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THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES What it means for young people

Introducing Victoria's Charter of Human Rights and Responsibilities

The Charter of Human Rights and Responsibilities Act 2006 (Vic) (the '*Charter*') became part of Victorian law on the 25th July 2006 and exemplifies the government's commitment to human rights in policy development and the operation of laws. Prior to the introduction of the *Charter*, our human rights were scattered across a variety of legislation and received little protection. Development of the *Charter* included extensive consultation with a wide range of individuals and groups who overwhelmingly supported its introduction.¹ The purpose of the *Charter* is to establish a framework for the protection and promotion of human rights for all members of the community, including marginalised and vulnerable groups such as children and young people.

When will it come into operation?

The *Charter* will come into operation on the 1 January 2007. Certain provisions relating to the interpretation of laws² and obligations on public authorities³ will not commence until 1 January 2008, allowing time for any necessary changes in practices and procedures.

What human rights are in the *Charter*?

The *Charter* is founded on principles that human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom.⁴ The *Charter* also states that rights come with responsibilities and must be exercised in a way that respects the human rights of others.⁵ Section 7 of the *Charter* recognizes that rights are not absolute and must be exercised within reasonable limits. The Explanatory Memorandum provides that this 'reflects Parliament's intention that human rights are, in general, not absolute

¹ Rights, Responsibilities and Respect - The report of the Human Rights Consultation Committee (HRCC Report).

² Division 3 of Part 3.

³ Division 4 of Part 3.

⁴ Charter Preamble.

⁵ Charter Preamble.

rights, but must be balanced against each other and against other competing public interests'.⁶ The *Charter* is based on fundamental human rights protected in international human rights law, with the majority modelled on the International Covenant on Civil and Political Rights (*ICCPR*).⁷ The *Charter* covers selected human rights of a civil and political nature. It includes the right to life, protection from cruel and degrading treatment, freedom of association, the right to take part in public life and rights concerning equality before the law and treatment in the criminal justice process, as well as others.⁸ Each of these rights are defined in Part 2 of the *Charter*. The *Charter* does not include important economic, social and cultural rights such as education, health and housing. However a growing number of cases from other jurisdictions demonstrate the willingness of some courts to "read in" economic, social and cultural rights even though they have not been included in the charter/bills of that respective jurisdiction.

The *Charter* and Children's rights

The *Charter* states that all human rights apply to all persons⁹ and thus should be capable of being fully applied to children. In addition to the full range of rights enjoyed by all it also recognises that children and young people have special needs for protection. The *Charter* includes provisions protecting children and families¹⁰, and children in the juvenile justice¹¹ and criminal trial system¹². References to 'child' in the *Charter* means a person less than 18 years of age.¹³

⁶ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p 8.

⁷ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) p1.

⁸ Cauchi, S. *Victoria gets a Charter of human rights* 14 September 2006.

⁹ Charter s1.

¹⁰ Charter s 17.

¹¹ Charter s 23.

¹² Charter sections 24 & 25.

¹³ Charter s 3.

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The *Charter* does not specifically refer to other children's rights including the right to health, the right to social security, the right to an adequate standard of living, the right to education, and the right to rest and leisure, as set out in the *Convention on the Rights of the Child (CROC)*¹⁴ which is ratified, but not incorporated into Australian law. However it will be open to the courts to interpret the limited child specific provisions in the *Charter* in light of the provisions and principles of *CROC*.

'Best interests of the child' principle

The *Charter* is different from its counterparts in the ACT¹⁵, New Zealand¹⁶ and the United Kingdom¹⁷ as it incorporates the 'best interest of the child' principle, in determining a child's need for protection¹⁸ and possible publication of courts and tribunal decisions¹⁹. This may simply reflect the adoption of the principle in key pieces of national and state children's legislation namely the *Family Law Act 1975* (Cth) and the *Children, Youth and Families Act 2005* (Vic). It may also be an acknowledgment of the importance of the best interests of the child to our understanding of children's rights, and as a guiding principle of *CROC*.²⁰

Determination of the best interests of the child may introduce to the *Charter* the application of a broader range of *CROC* principles and articles, as the *Charter* does not specifically state how the principle should be applied. Best interests requires considering the child's perspective and is usually determined on a case-by-case basis, requiring a rigorous effort to ensure that best interest, not simply adult's perceptions, are considered.

The Charter and promotion of children's rights

The primary aim of the *Charter* is to establish a 'dialogue model' for the protection and promotion of human rights. This model essentially seeks to ensure that human rights are taken into account when developing and interpreting Victorian law, policies and programs. The 'dialogue' is between the various arms of government, namely, the legislature (parliament), the executive (which includes 'public authorities') and the courts. The idea being that it is better to prevent human

rights problems arising rather than focusing on fixing problems in the courts.

Parliament

Bills coming before Parliament must be 'human rights proofed'. The focus of the *Charter* is on preventing the enactment of legislation that does not comply with human rights being enacted in the first place. Prior to introduction to parliament, bills must be assessed for the purpose of consistency with human rights contained in the *Charter*, and a Statement of Compatibility tabled with the bill when it is introduced to parliament. The Scrutiny of Acts and Regulations Committee must consider all legislation introduced to Parliament for the purpose of reporting as to whether the legislation is incompatible with human rights.

Arguably the pre-enactment dialogue will have an effect on the final form of some legislation in ways that enhances children's rights. In late 2005, the federal government introduced a package that contained among other measures, a legislative regime for preventative detention and control orders²¹, which were eventually enacted with complementary State and Territory laws. The ACT *Human Rights Act* led the Territory to develop an anti-terrorism regime that offers far greater protection for the rights of young people than its state and federal counterparts.²² Unlike the federal laws which apply preventative detention orders to young people aged 16-18 years, ACT assessed this as a fundamental breach of obligations under international conventions, and enacted that children under 18 years could not be subject to preventative detention orders.²³

Courts

The *Charter* empowers courts and tribunals to interpret all Victorian laws consistently with *Charter* rights unless this would be contrary to the objects of the legislation.²⁴ The purpose of this provision is to ensure that courts and tribunals interpret and apply legislation to give effect to human rights. The courts cannot strike down or change the law, only parliament can do this. A court can refer a question of law or interpretation to Supreme Court. It has the power to declare that a law cannot be interpreted and applied consistently with human rights and to issue a

¹⁴ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

¹⁵ Australian Capital Territories Human Rights Act 2004.

¹⁶ New Zealand Bill of Rights Act 1990.

¹⁷ United Kingdom Human Rights Act 1998.

¹⁸ section 17.

¹⁹ section 24.

²⁰ Apart from Article 3, 'best interests' is also included in six other *CROC* articles: separation from parents, 9(3); parental responsibilities, 18(1); deprivation of family environment, 20(1); adoption, 21(a); restriction of liberty, 37(c); and court hearings involving juveniles, 40(2)(b)(iii).

²¹ The police may seek a preventative detention order if they have reasonable grounds to suspect a person will engage in a terrorist act, is connected with preparation for a terrorist act, or is planning a terrorist act to take place within next 14 days. The police do not have to tell the person the grounds for their detention.

²² Terrorism (Extraordinary Temporary Powers) Act 2005.

²³ Byrnes, A & McKinnon, G, *The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: a triumph for federalism or a federal triumph?* Working Paper No. 1, p8-10.

²⁴ Charter s32(1).

Declaration of Inconsistent Interpretation, which the government must respond to within six months.

In fulfilling this interpretative role, the *Charter* encourages (but does not mandate) courts to consider international law and judgments of domestic and foreign courts and tribunals, especially from jurisdictions that have incorporated international human rights into their domestic laws such as the ACT, Canada, New Zealand, South Africa and the United Kingdom.

Public Authorities

The *Charter* imposes a substantive obligation on public authorities to act compatibly with human rights and a procedural obligation to properly consider relevant human rights in decision-making processes.²⁵ Not doing so will be considered unlawful, unless the public authority 'could not reasonably have acted differently'.²⁶ 'Public authority' is defined broadly to include government agencies and departments, statutory authorities, the Victoria Police, and local councils, and extends to bind private entities and community sector organisations where they are performing functions of a public nature on behalf of the State.²⁷

The *Charter* should be used as a model of good practice by those planning and devising services for children and young people, particularly local government authorities.

The *Charter* compels government departments and public authorities such as Victoria Police to have regard for the human rights of marginalised community groups especially young people in their day-to-day operations and dealings. Luke Cornelius, Assistant Commissioner of Victoria Police states that:

'...in an age when counter-terrorism laws were necessary to protect the community, a bill of rights would provide transparency on the balance between authorities' responsibilities and human rights'.²⁸

Based on his comments, the *Charter* may provide safeguards to ensure these powers are not used inappropriately to particularly target groups of young people.

Monitoring and reviewing the *Charter*

The role of the Victorian Equal Opportunity and Human Rights Commission

The Victorian Equal Opportunity and Human Rights Commission (*VEOHRC*) has responsibility to act as an independent monitor of the operation of the *Charter* and report on implementation, operation and the impact of

²⁵ Charter s 38(1) which will take effect from 1 January 2008.

²⁶ Section 38(2) of the Charter.

²⁷ Charter s 4(c).

²⁸ Milovanovic, S. *Top policeman backs rights bill*, The Age, 20 April 2006.

human rights laws.²⁹ Its functions are set out in section 41 and include providing education about human rights and the *Charter*.³⁰

It will be critical to ensure that young people, the wider public as well as the public sector are well informed about the benefits the *Charter* can provide young people.

Review of the *Charter*

Section 44 of the *Charter* obliges the Attorney-General to conduct a review of the *Charter* after four years of operation. This involves considering whether additional human rights should be incorporated, including but not limited to, rights under the *International Convention on Economic, Social and Cultural Rights*³¹ and *CROC*.³²

A specific treaty for children is necessary in order to interpret and implement children's rights in a manner that takes into account their specific experiences and needs.

In summary the *Charter* requires that government, parliaments, courts, and public authorities place human rights on their respective agendas, thereby holding them to established international standards of protecting children's rights. Indirectly it places children on local political agendas and calls upon local authorities to play an active role in the protection of children's rights.

Further information

For more information about the Victorian Charter of Human Rights and Responsibilities, or to download a copy of the *Charter*, visit the **Department of Justice** website: www.justice.vic.gov.au/humanrights

For more legal information sheets for workers or for young people visit the legal information section of the **Youthlaw** website: www.youthlaw.asn.au/legalinfo/

Equal Opportunity Commission

(to be renamed the **Victorian Equal Opportunity and Human Rights Commission** from 1 January 2007)

Enquiries: 9281 7100

Website: www.eoc.vic.gov.au

Acknowledgement

Information contributed by Human Rights and Advocacy Officer, Tiffany Overall, Research essay: Children's rights in international and domestic law.

²⁹ Human Rights Law Resource Centre, 'Victoria Enacts Charter of Human Rights and Responsibilities', [2006] *HRLRC Bulletin*, July 2006, p2 -3.

³⁰ Charter s41(d).

³¹ Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

³² Charter s44(a)(i) & (ii).