YACVic's Response to the Inquiry into the Charter of Human Rights and Responsibilities Act 2006 (Vic)
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About YACVic and YDAS

Youth Affairs Council of Victoria

The Youth Affairs Council of Victoria (YACVic) is the peak body representing the youth sector in Victoria. YACVic provides a means through which the youth sector and young people voice their opinions and concerns in regards to policy issues affecting them. YACVic works with and makes representations to government and serves as an advocate for the interests of young people, workers with young people and organisations that provide direct services to young people. YACVic also promotes and supports the participation of young people in debate and policy development areas that most affect them. YACVic’s resources are primarily directed towards policy analysis and development, research and consultation and to meeting the information, networking, education and training needs of our constituency. YACVic is funded by the Victorian Government through the Office for Youth.

Youth Disability Advocacy Service

The Youth Disability Advocacy Service (YDAS) is a Victoria wide advocacy service of the Youth Affairs Council of Victoria, funded by the Victorian Government to provide individual and systemic advocacy for young people with disabilities between 12 and 25 years of age.

Introduction

In April 2004, the Youth Affairs Council of Victoria (YACVic) and Youthlaw: Young People’s Legal Rights Centre worked together to develop a guide for how to implement the United Nations Convention on the Rights of the Child (CROC) in Victoria. At the time, Youthlaw and YACVic believed it was important that Australia, a signatory to CROC, should look at practical ways to implement CROC. It was argued that issues


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around child protection, child sexual abuse, asylum seeker and refugee children and young people, juvenile justice, anti-terrorism laws as they relate to children and young people, housing and homelessness issues, and children and young people with disabilities would benefit from the articulation of human rights. It was also noted that ongoing monitoring with the CROC should occur.

In 2006, YACVic responded to the Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee 2006. We recommended that civil and political rights be included in the Charter. However, while we noted that a ‘Charter containing civil and political rights is a significant step along the journey towards the better protection of human rights in Victoria’, in our original submission YACVic argued for the inclusion of the rights of the child, specific rights of indigenous peoples and economic, social and cultural rights.

This submission builds on the recommendations we made in 2006 and draws on our experiences of seeing the Charter in use over the last four years. We also make recommendations for the Scrutiny of Acts and Regulations Committee in reviewing the Charter.

YACVic welcomes the opportunity to contribute to the review of the Charter of Human Rights and Responsibilities Act 2006. YACVic and YDAS believe that the Victorian Charter has helped to secure and protect human rights in Victoria, including the rights of Victorian children and young people. The Charter provides a safeguard for young people’s rights as the Charter must be kept in mind whenever law is either created or interpreted and public authorities are obliged to act in a way that is compatible with the Charter’s rights ((s1(b)). In addition, an articulation of the rights of all Victorians provides a degree of security against law or policies that are incompatible with the right’s of Victorians, as well as encourages discussion regarding the meaning of human rights and community education about human rights.
YACVic believes it is essential that human rights are explicitly provided for to enable vulnerable, disadvantaged, and marginalised young people in Victoria assert their rights, as well as allowing advocacy organisations, such as YACVic and YDAS, to assert the rights of children and young people on their behalf in advocacy work.

**Terms of Reference**

This submission addresses the following elements of the terms of reference for the review of the *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter):

1. Whether the Charter should include additional human rights under the Charter, including but not limited to, rights under the -
   (a) International Covenant on Economic, Social and Cultural Rights
   (b) Convention on the Rights of the Child
2. Whether the right to self-determination should be included in the Charter
3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights
5. What are the effects of the Charter Act on –
   (a) the development and drafting of statutory provisions
6. What if any, have been the overall benefits and costs of the Charter?
7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

This submission will address each of the terms of reference sequentially.
Our Submission

1. Whether the Victorian Charter should include additional human rights under the Charter, including but not limited to, rights under the -
(a) International Covenant on Economic, Social and Cultural Rights
(b) Convention on the Rights of the Child

1(a) International Covenant on Economic, Social and Cultural Rights

The Charter is largely based on civil and political rights, such as freedom of expression, private property, freedom from torture and cruel, inhuman or degrading treatment, and many of the criminal law rights. It does not refer to a number of children’s rights contained in the Convention on the Rights of the Child or include the right to health, the right to education and housing. However, from the advocacy work that YACVic has become aware of the Victorian Charter has been used primarily to address these rights, rather than civil and political rights. It is important, therefore, that these rights should be recognised in the Charter.

In particular, YACVic submits that there should be inclusion of rights modelled on Articles 11, 12, and 13 of the International Covenant on Economic, Social and Cultural Rights in the Victorian Charter:

- **Article 11(1):** The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.
- **Article 12(1):** The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
- **Article 13(1):** The States Parties to the present Covenant recognise the right of everyone to education.

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2 Examples of advocacy work includes around the use of the Mental Health Act 1986 and the appropriateness of current forms of schooling for students with special needs.

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YACVic believes that for the Charter to be truly relevant to young people, these rights must be included. It is the economic and social rights which indirectly protect and promote young people’s right to participate in society by guaranteeing the conditions of living necessary for their participation, such as adequate health, housing and education.

The scenario outlined below illustrates the negative impact that low income can have on the life chances of a young person, as it reduces the potential of that young person to succeed throughout their life. The scenario is based on the expected outcomes for a young disadvantaged person living in the Latrobe Valley.

- **Disadvantage economically impacts the life chances of children and young people and shapes their ability to generate income later in life. Before reaching their second birthday, a child from a disadvantaged family is already more likely to show a lower level of educational attainment than a child from a more affluent family.**

- **This young person from the Latrobe Valley in year 9 has 3.2 % reduced chance of achieving the minimum standard in writing (2010). It is therefore likely that this young person will not complete year 12 as young people in Latrobe have a 5.4% reduced chance of completing year 12 or equivalent. Finally, this same young person is more likely to leave school at 16 with fewer qualifications and therefore their chance of a successful future career is hampered.**

Given the negative consequences on children and young people of financial disadvantage and dependency on others, the recognition of social and economic rights is important for a young person’s potential, especially the right to a meaningful education, which prepares young people for adult life.

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1(b) Convention on the Rights of the Child

YACVic strongly supports Section 17 of the Charter, which states that ‘families are the fundamental group unit of society and are entitled to be protected by society and the State’ and that ‘every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child’. However, we submit that a number of additional human rights under the Convention on the Rights of the Child should be included in the Victorian Charter, especially those relating to the participation rights of children and young people (Article 12), the health of children and young people (Article 24), children and young people’s rights to an adequate standard of living (Article 27), and the right to education (Article 28). We set out our arguments for this below:

The right of children and young people to participate in matters affecting them

- **Article 12(1):** States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child;

- **Article 12(2):** For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

YACVic has emphasised the importance of youth participation and the need for the voices of children and young people to be heard in relation to decision making affecting them in a number of our reports and submissions. As the Office for Youth and YACVic noted in our joint publication *Consulting Young People about their Ideas and Opinions*,

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5 *Charter of Human Rights and Responsibilities Act 2006 (Vic), s 17(1) and (2).
for any democratic society, it is important that all members have the opportunities to participate in the decision-making processes that affect them and their communities.\(^7\) When young people are able to meaningfully participate in governmental, community, and school processes, young people "make invaluable contributions to communities and are empowered themselves when they participate"\(^8\). It is highly positive that policies, such as Australia's National Framework for Protecting Australia's Children 2009-2020, recognise the importance of the participation of children and young people\(^9\). The National Framework notes that "upholding children's right to participate in decisions that affect them is a key signal of valuing and supporting children" and is "particularly relevant in judicial proceedings in care and protection, juvenile justice and family court matters, and in child protection and out-of-home care services"\(^10\).

An example, which illustrates the importance of the inclusion in the Victorian Charter of a right of children and young people to participate in accordance with their age and maturity in processes which affect them, is the experiences of children and young people in out of home care. In research conducted by Sharon Bessell with 28 Australian young people who had experienced out-of-home care, conducted between 2007 and 2008, 'none of the young people participating in [the] study felt they had sufficient or consistent opportunity to express their views on matters affecting them while in care\(^11\). Of those surveyed, the young people noted that they 'felt valued...when someone listened, took their concerns seriously and provided real options'\(^12\), yet felt 'intensely powerless, voiceless and afraid' when they felt unable to participate in decision making.

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\(^7\) Office for Youth and YACVic, Consulting Young People about their Ideas and Opinions: a Handbook for Organisations Working with Young People, 2004, 1-68, 1.


such as the family they would be placed with or who their worker would be. The researcher noted that such feelings caused substantial anxiety among the young people and even led ‘a significant minority’ to believing ‘the only ‘choice’ they had was to run away or find a means of exiting the system’. In YACVic’s *Response to the Protecting Victoria’s Vulnerable Children Inquiry*, we emphasised the importance of children and young people participating in the Inquiry as well as having the ability to participate meaningfully ‘throughout all stages of the service systems protecting vulnerable children and young people in Victoria’. We submit that it would be highly desirable that the right to participation for children and young people be included in the Victorian Charter, in line with Article 12 of CROC.

Other Economic and Social Rights, contained in CROC, which should be incorporated into the Victorian Charter

- **Article 24 (1):** “States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

- **Article 27:** (1) States Parties recognize the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.

*Article 27(2)* The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child’s development.

*Article 27(3)* States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

- **Article 28(1)** States Parties recognize the right of the child to education...”

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As we noted above, these economic and social rights are of essential importance to the physical and mental wellbeing of children and young people in Victoria, particularly for those who are the most vulnerable and marginalised in the Victorian community.

YACVic understands that there may be reluctance by the Victorian Government to include such social and economic rights in the Charter, due to the perceived expense of giving effect to such rights. However, Dr John Tobin a legal scholar has considered these types of assumptions commonly made by States when considering the inclusion of social, economic, or cultural rights in human rights instruments, such as the Victorian Charter and negates this as concern. He states that Victorian Government is already putting substantial resources toward education, health care, and the provision of other services to ensure that Victorian children and young people are able to receive high quality education, health care, and a good quality life. In addition, Tobin emphasises that International Covenant on Economic, Social and Cultural Rights takes into account the ‘resources available to a State’ and ‘recognises that States will rarely have the resources available to secure the full enjoyment of the various economic, social or cultural rights ‘immediately’. YACVic submits that in light of the importance of the social and economic rights discussed above, it would be of great benefit if these additional rights were included in the Victorian Charter.

2. Whether the right to self-determination should be included in the Charter?

The right of self-determination of people is a fundamental principle in international law. This right is understood as the right to participate in the democratic process of governance and to control and influence one’s future. This is an especially important

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right for Indigenous young people and those young people who have disabilities. Two examples illustrating why self-determination is important to include are outlined below:

**Indigenous young people**

YACVic has auspiced the Victorian Indigenous Youth Advisory Council (VIYAC) since 2004. The role of this state-wide network of volunteer Indigenous young people between 12 and 25 years is to provide a voice to government and community on issues of importance to them.

YACVic believes strongly that the best way to engage young people is in discussion about the issues that affect them to give them some control. In relation to Indigenous young people, this is even more important as the history of colonisation, dispossession and the Stolen Generation has led to systemic trust issues. Therefore, we believe it is imperative that the right to self-determination of Indigenous peoples be included in the Charter in order to provide redress and assist in the re-engagement of Indigenous communities. The structure and decision making of VIYAC is based on self determination model and support and guidance is offered by YACVic when needed.

**Young people with a disability**

Historically many people with disabilities have not always been able to exercise choice, decision making and to actively participate in the decisions that impact upon them. Instead these decisions were made by carers and service providers on behalf of people with disabilities. It is particularly important that those with communication disabilities have these self determination rights enacted. The current situation is that many people with disabilities, especially those with communication disabilities, are often not consulted on issues that affect them. If this human right were included in the Charter and public authorities were audited then this would be less likely to occur.
3. Whether there should be mandatory regular auditing of public authorities to assess compliance with human rights?

YACVic supports Youthlaw's submission to the Scrutiny of Acts and Regulations Committee recommendation which states:

Recommendation 4 – That the Charter include provisions for mandatory regular auditing of public authorities, to be overseen by an independent body such as the Victorian Equal Opportunity and Human Rights Commission, with assistance from the Office of the Child Safety Commissioner or a Victorian Commissioner for Children and Young People on issues relating to children and young people.
(Youthlaw's submission to the Scrutiny of Acts and Regulations Committee recommendation number 4, Page 3)

YACVic supports this recommendation as without auditing there is no guarantee that the organisations and agencies are complying with the rights contained in the Charter.

5. What have been the effects of the Charter Act on –
(a) The development and drafting of statutory provisions

YACVic submits that it is of substantial benefit that all new Bills must be accompanied by statements of compatibility, which contain consideration as to whether the Bills are compatible with the human rights contained in the Charter and the 'nature and extent of [any] incompatibility'.

Though a Bill may become law despite being incompatible with one or more of the human rights contained in the Charter, this process of consideration of the human rights contained in the Charter during the drafting process of all statutory provisions in Victoria is important in ensuring a greater regard to human rights than may otherwise occur and 'is enhancing transparency and accountability in government'.

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6. What, if any, have been the overall benefits and costs of the Charter?

As the Charter has only recently been implemented the quantitative costs are difficult to calculate. Furthermore, it is more difficult for the social return on investment to be calculated by small organisations such as YACVic. However, the anecdotal evidence of the benefits has been tangible. Three case studies below from the Youth Disability Advisory Service illustrate how the Charter has clearly benefitted young people with a disability:

Case Study 1

YDAS worked with a 25 year old male with an intellectual disability and Autism, who was from a Muslim background, and had guardianship appointed. The application for guardianship was made by the Department of Human Services’ (DHS) and was done on the grounds that the young person was absconding from home, and was causing damage to other people’s property. The young person had a complex disability, and when DHS made the application, there was little regard for his parent’s decision making, and there was a lack of consideration that English was not the family’s first language, or for the young person’s cultural background. This resulted in the guardianship being imposed, and the young person being removed from his parent’s home. The young person had no access to Halal food that was prepared in line with his religious requirements. In addition, there were no workers from a similar cultural background, and no guardian appointed that could speak the primary language of the young person, and therefore no one that could work and communicate with the young person in their primary spoken language.

YDAS assisted in advocating for the young person by attending VCAT hearings, and highlighted in these hearings that under the Victorian Charter of Human Rights, the young person’s Cultural rights (section 19) were not supported. YDAS submitted that the young person could not enjoy their culture, practice their religion, or use their language. YDAS advocated the young person’s parents were the most appropriate
Guardian. This outcome was achieved, and the young person’s health and well being improved.

This case demonstrates how the Victorian Charter of Human Rights can help to strengthen and protect people’s cultural, religious, and language requirements. By having this right included in the Charter, it can help statutory bodies in Victoria to meet these obligations, and it also provides a tool to review processes that result in the loss of such rights.

Case Study 2

YDAS worked with a 19 year old woman with a physical disability, who was homeless and residing in an aged care facility. She was requesting services and supports from the DHS to assist her in applying and registering for suitable long term supported accommodation. The young person’s application for services and supports was rejected on the basis that DHS believed the young person did not have a disability as defined by the Act.

YDAS assisted in advocating for the young person, by writing to and speaking with DHS and by asking that the decision be reviewed for rejecting the young person’s request. YDAS submitted that the young person did have a disability as defined under the Act. YDAS also highlighted that if DHS failed to give the young person the opportunity to access care or supports, this may be seen to be cruel, inhuman, or degrading (section 10), under the Victorian Charter of Human Rights.

DHS reviewed the decision, and responded to the young person’s request for services and supports. The young person was given opportunities to seek supports with assistance with DHS.

This case demonstrates how the Victorian Charter of Human Rights can help to strengthen and protect people’s rights to self identify, and to be able to access care and supports. By having this right included in the charter it can help statutory bodies in
Victoria to meet these obligations, and it also provides people with a tool to review processes that result in the loss of such rights.

**Case Study 3**

YDAS worked with a 14 year old male with a learning disability, who was attending a high school, and was threatened with expulsion due to behavioural issues. The case was referred to YDAS by Youth Justice, who felt the young person needed supports in school to give the young person opportunities, and that the young person had not been tested for having a disability, despite the family asking the school to do this.

YDAS assisted in advocating for the young person, by writing and speaking with the school and the Department of Education and Early Childhood Development’s (DEECD) staff. YDAS highlighted in its letter to the school and the DEECD that the school had duties under the Victorian Charter of Human Rights and Responsibilities Act 2006 to protect the right of persons not to be treated in a cruel, inhuman or degrading way (section 10), which could result from inadequate care and supports. The young person was given the opportunity to be tested, and the results showed that the young person needed additional supports, which were then provided. These supports also resulted in the behavioural issues reducing, and both the young person and the school being happy for the enrolment to continue.

This case demonstrates how the Victorian Charter of Human Rights can help to strengthen and protect people’s rights to be able to access care and supports. By having this right included in the charter, it can help statutory bodies in Victoria to meet these obligations, and it also provides people with a tool to review processes that result in the loss of such rights.

**Code of Ethical Practice – A First Step for the Victorian Youth Sector**

Another example of the way the Victorian Charter has been positively used was in YACVic’s development of the Code of Ethical Practice - A First Step for the Victorian
Youth Sector. The Code was developed by YACVic as an agreed framework and set of values for professional practice to provide a frame of reference in which to develop ethical and safe practice with young people. The Code is based on a human rights framework and draws on the Victorian Charter. The Code states that 'the Victorian Charter of Human Rights and Responsibilities...outlines human rights that all Victorians can expect to enjoy' and emphasises that 'youth workers need to have an understanding of these rights and actively work to promote them'.

In addition, a number of organisations have used the introduction of the Charter as an opportunity to shift their practice from a welfare-based approach to a rights-based approach.

Local Government Youth Strategic Planning

Hobson's Bay City Council used the Victorian Charter to evaluate the Youth Strategic Plan 2009 – 2013 and found that it was a powerful tool for reflective practice within a social policy context. The use of the Charter allowed social policy issues to be framed in a strengths-based context and lead to sustained support and advocacy for the work with young people.

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria?

For YACVic, the obvious area for reform is for the Victorian Charter to be extended to non-statutory bodies. Currently the Charter only applies to public authorities and therefore the protection of human rights under the Charter is not universal. This is


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particularly concerning given that non-government schools are providing a public service, but are not doing so on behalf of the State and therefore are not required to adhere to the Victorian Charter. Education is one of the key rights that young people feel is important to them. Therefore, it does not make sense for the Charter not to cover this sector. Further, there is no reason why the Charter should not cover all non statutory authorities.

In addition, as has been discussed above, YACVic supports the inclusion of a number of additional rights in the Victorian Charter, such as the right of participation for children and young people, the right to education, the right to health, and the right to an adequate standard of living.

A list of the recommendations for reform and improvement

**Recommendation 1:** That the Victorian Charter include economic, social and cultural rights modelled on Articles 11, 12, and 13 of the International Covenant on Economic, Social and Cultural Rights and Articles 12(1-2), 24(1), 27(1-3) and 28 of the Convention on the Rights of the Child discussed above, particularly the rights of children and young people to education, participation and good quality health care, as these rights are essential in the lives of all Victorian children and young people and should be taken into account in all laws and policies that are created or interpreted in Victoria.

**Recommendation 2:** That the right to self determination, particularly for Indigenous and people who have disabilities in Victoria, should be included in the Charter.

**Recommendation 3:** That the Charter include provisions for mandatory regular auditing of public authorities, to be overseen by an independent body such as the Victorian Equal Opportunity and Human Rights Commission, with assistance from the Office of the Child Safety Commissioner or a Victorian Commissioner for Children and Young People on issues relating to children and young people. (Youthlaw's submission to the Scrutiny of Acts and Regulations Committee recommendation number 4, page 3)
**Recommendation 4:** That the review of the Charter consider the tangible benefits, which are evident from the use of the Charter by the Youth Disability Advocacy Service in the three case studies discussed above, and Youth Affairs Council of Victoria’s use of the Charter in developing the *Code of Ethical Practice – A First step for the Victorian Youth Sector*.

**Recommendation 5:** That the Charter is extended to non-statutory authorities, as it will ensure that all important organisations and services act in accordance with the human rights outlined in the Charter.