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Introduction

The Association of Employees with Disability (AED) welcomes the opportunity to make a written submission into the review of the Victorian Charter of Human Rights and Responsibilities Act 2006. This submission aims to provide our response as an organisation, to some of the questions in the Terms of Reference that are directly relevant in our work with people with disabilities. In particular, we will focus our response into the effectiveness of the Victorian Charter in the area of education and training. This is because education is one of the key areas of our work, despite what the name of our organisation may suggest. Secondly, our experience in this area has largely been for children with disabilities in the public school system where the Charter would apply.

AED Legal Centre

AED Legal Centre was established by the Association of Employees with Disability (AED) in 2008 as a specialist Community Legal Centre. We are a disability organisation located in the Melbourne CBD that works towards assisting people with disabilities through legal advocacy in the areas of employment, education and training.

The main objective of AED is to protect and advance the rights of people with a disability who experience difficulties and/or discrimination in employment or education because of their disability. AED works in partnership with service users, other disability and community agencies, trade unions, educational institutions, employers and government to:

- protect and advance the human, civil and legal rights of persons with a disability;
- empower employees with a disability who experience workplace discrimination or disadvantage;
- advocate for the inclusion and participation of persons with a disability in employment, education and training; and
- increase community awareness and promote better community attitudes towards persons with a disability.

The organisation is funded by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) under the National Disability Advocacy Program (NDAP).

We have always had a strong human rights focus in our work. Through individual legal advocacy we seek to achieve positive client outcomes, often using State and Federal anti-discrimination legislation. Through systemic advocacy, we have been able to address some of the negative community attitudes and structural barriers that people with a disability face in the areas of employment and education.

Over time, we have gained significant experience in advocating on behalf of people with disability where their right to be free from discrimination has been breached. It is within this background and context that our submission about the Victorian Charter is made.
Education

The right to education is recognised as a fundamental human right. Being a gateway to employment, the level and quality of a person’s education has the potential to have a long term impact on their quality of life as well as provide them with the opportunity to participate in the community as full social citizens.

Children with a disability – what about their education?

Children with a disability have a right to a quality education, in the same way that any other able bodied child in the community has. It is essential that education is made accessible for children with disabilities.

Our views about the current situation of the accessibility of quality education for children with disabilities are stated succinctly in the findings of the Victorian Equal Opportunity and Human Rights Commission. This was a result of a forum held in July 2010 to discuss human rights issues facing Victorians with disabilities:

“A critical shortage of adequately trained teaching staff and lack of vital supports, aids and equipment in school due to insufficient funding mean that the education system is often failing students with a disability.”


Responses to the Terms of Reference

Question 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; and
(c) Convention on the Elimination of All Forms of Discrimination against Women?

The Victorian Charter should be expanded to include the rights under the Convention on the Rights of Persons with Disabilities (CRPD), as Australia is a signatory and has ratified this Convention in 2008. For the purposes of this submission, the two additional human rights from the CRPD that should be included in the Victorian Charter are:

Children with Disabilities (Article 7)
This is mainly about ensuring the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
Right to Education (Article 24)
The main components of the right to education is about ensuring that children with a disability have the opportunity to access a quality education on an equal footing as able bodied children, making reasonable accommodations to facilitate the learning of children with a disability and providing these children with the supports that they need.

Question 5 (c)

What have been the effects of the Charter Act on the provision of services, and the performance of other functions, by public authorities?

The Charter Act has had little impact in the State’s provision of education with respect to children with disabilities. It is recognized that this is because the Charter Act as it currently stands, confers legal protection for a limited number of fundamental rights. In particular, it does not specifically protect either the right to education or the right of children with disabilities.

If the right to education is taken as a fundamental human right and this is a right that should apply to all children in a non-discriminatory manner, then the following illustrates why the Charter’s coverage needs to be extended to protect the right to education for children with disabilities.

In our experience, children with a disability often face a range of barriers in the area of education. Parents wanting to ensure that their child with a disability receives a good education can find this a constant struggle. This could be due to the lack of appropriate supports or because the teachers in the school simply do not know how to deal with children with specific disabilities. There are also times when adequate measures are not taken to protect children with disability from bullying in schools.

Consequently, it is not unusual for parents to move their child from school to school in search for a more appropriate learning environment for their child, which can also end up disrupting the stability that many children with disability need.

Principals would often suggest to the parents to send their child to a “Special School” where they can socialize and learn with other children with disabilities. This option may not always be in the best interests of the child, both in terms of learning from an academic curriculum or socialization with able bodied children.

We are aware that the Department of Education and Early Childhood Development (DEECD) runs a Program for Students with Disabilities that provides 6 levels of funding for students with a disability according to an assessment process. However, parents are often at odds with the DEECD in relation to the supports that the Department makes available for their children. This is often as a result of insufficient funding for supports, aids and equipment in school or rigid funding guidelines that exclude some children with disabilities. As a result, the opportunity for some children with disability to participate meaningfully in educational activities is compromised.
Question 5 (d)

What have been the effects of the Charter Act on litigation and the roles and functioning of courts and tribunals?

In our Practice, we rely on anti-discrimination laws such as the Victorian Equal Opportunity Act 1995 and the federal Disability Discrimination Act 1992 to promote the rights of people with disability. Whilst equal opportunity legislation generally assists our clients in achieving desired outcomes, the courts and tribunals make decisions on whether the alleged action is unlawful. This means that in some cases, the framing of this question leads to an entirely different result rather than asking whether the alleged action has breached the rights of a person with disability. It is in these areas of uncertainty that the Charter can play a valuable role in advocacy.

However, our experience has been that the Charter Act is a rather limited tool for conducting legal advocacy. One key reason for the limited efficacy of the Charter has been that very few cases before Victorian courts and tribunals have made reference to the Charter. Hence there is relatively little case law that discusses the Charter, which makes it difficult to gauge how courts and tribunals will consider Charter based arguments. This difficulty appears to be compounded by the fact that the Charter rights do not stand alone and it is not possible to directly file a case on behalf of a client for breach of Charter rights.

More importantly, we have had little use of the Charter Act in our work because it does not expressly provide protection for the rights of people with disabilities.

Question 6

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

For the reasons we have already explained, the Charter has had minimal impact on our work for people with disabilities. Despite our response about the Charter, the aim of this submission is not to discredit the value of having the Victorian Charter. We recognise that the Charter may have brought about significant improvements in other key human rights issues affecting Victorians.

Question 7

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

The Charter has an important role to play so that the rights of people with a disability are recognised, respected and protected. We believe that there are some recommendations that should be made to the Charter to ensure that human rights are better protected in Victoria:

1. Strengthen the “Dialogue model” of the Charter

The dialogue model of the Charter depends on mutual participation and constructive discussion between all parties involved in a dispute. In the absence of any mechanism for
enforcing the Charter, this model can become difficult to use at the “coal face” of a public school (or the front desk of a public authority, for that matter).

2. Introduce the concept of “reasonable adjustment” in the Charter

Australian anti-discrimination laws recognise that justice is not necessarily achieved by treating everyone the same way. It is within this context that the concept of a “reasonable adjustment” has been introduced in legislation, so that a level playing field is made available to people in a protected group such as race, gender and disability.

The Charter should introduce the concept of a “reasonable adjustment” as a mechanism for public authorities to consider when applying the Charter. This is to ensure that people with disability are substantially afforded the rights on an equal basis as other Victorians.

3. Recognise the right of education as a fundamental right in the Charter that applies to all children in Victoria

The Charter can play an effective role in ensuring that children with disabilities are provided with equal opportunity to access education at a level that is comparable to that of able bodied children in the mainstream public education system. As far as possible, the access to education for children with disabilities should not be limited because of the lack of resources or rigid funding guidelines.

4. Use the Convention on the Rights of Persons with Disabilities (CRPD) in updating the Charter

Australia ratified the CRPD in 2008. A move to update the Charter consistent with the rights protected by the CRPD would be significant because Victoria would be a leader in facilitating the active and equal participation of all people with disability in Australia.

In addition, the Charter should also consider including the human rights covered by the other international conventions to which Australia is a signatory.

5. Introduce a mechanism for Victorians to complain about infringements of human rights protected by the Charter

Victorians should have access to complaints mechanism for infringements of human rights under the Charter. There are a number of situations when this could be useful: for example, in situations where there is no existing cause of action (e.g. disability discrimination legislation), or the prospect of succeeding on such a claim in the courts is slim, or the affected person would rather not pursue a remedy through the legal system. This complaints mechanism could still take the form of a dialogue model, which allows people with disabilities and/or their advocates to raise their concerns directly for alleged infringements into their Charter protected rights.

Finally, we thank you for the opportunity to make this submission and look forward to hearing on the outcome of the review process to the Victorian Charter of Human Rights.
If there are any further questions that you have in the meantime, please do not hesitate to contact us on (03) 9639 4333.