Submission

Charter of Human Rights and Responsibilities Act 2006 (Vic)
Four-year Review

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1 National Children's and Youth Law Centre

1.1 The National Children's and Youth Law Centre ("NCYLC") is the only Australian national community legal centre for children and young people. NCYLC promotes the rights and interests of Australian children and young people through advocacy, information and education. Since its inception in 1993, NCYLC has made over 180 public submissions on law and policy affecting children and young people and handled over 150,000 inquiries. NCYLC seeks to increase access by children and young people to legal assistance and to improve the legal status of children and young people in Australia.

1.2 NCYLC provides information and advice to children and young people through the following services:

a) Lawstuff (www.lawstuff.org.au) – a website that provides general legal information and referral options on a wide range of issues relevant to children and young people;

b) LawMail (www.lawstuff.org.au/lawstuff/lawmail) – a confidential legal advice and information service that allows children under the age of 18 years from all over Australia to seek legal advice, referrals and information via email; and


2 Overview

2.1 NCYLC welcomes the opportunity to participate in the four-year review of the Victorian Charter of Human Rights and Responsibilities Act 2006 ("Charter").

2.2 In providing our comments, we take a child rights-based approach, reflecting the understanding that children and young people are the holders of human rights. This includes not only basic survival and development rights and child-specific rights associated with protection from harm, but also rights of participation including the right to be consulted and heard on issues affecting them.¹

¹ CROC, Articles 6 and 12. This Convention has been almost universally ratified. The Australian Law Reform Commission notes: "Given the diversity of its States Parties and breadth of coverage, CROC is
3 Executive Summary

3.1 NCYLC makes the following recommendations:

a) that the Charter be amended to include all articles of CROC relevant to the preservation of the home and family environment, including those which guarantee social security, minimum standards of living and state assistance for those children and young people who have been deprived of their family environment;

b) that the Charter be amended to include Articles 37 and 40 of CROC guaranteeing that imprisonment of children and young people shall be a measure of last resort, for the shortest period of time possible and never for a period of life without the possibility of release;

c) that the Charter be amended to include Article 12 of CROC guaranteeing to children and young people capable of forming views on matters concerning them that those views will be heard and considered;

d) that the Charter be amended to include Articles 28 and 29 of CROC ensuring Victorian children and young people a right to education on an equal opportunity basis and in a way that supports the development of their unique talents to the best of their ability;

e) that the Charter be amended to incorporate Article 3.1 of CROC requiring the best interests of the child to be the primary consideration in all actions concerning them;

f) that the Charter be amended to provide an alternative mechanism to redress breaches of children’s rights in Victoria. Such a mechanism should be developed in consultation with children and young people and encourage their participation in the dispute resolution process; and

g) that the Charter be amended to include the full text of CROC in a separate chapter specifically for children and young people under 18, thereby ensuring compliance with Australia’s international obligations.
4 Child Rights-Based Approach

4.1NCYLC believes that human rights standards provide a clear normative framework within which to assess laws and policies made with respect to children and young people. CROC provides a universally accepted rights-based framework specific to the treatment of children. CROC has been adopted and ratified by Australia and is presently the most widely ratified international instrument. A rights-based approach is founded on the understanding that the rights contained in CROC are interdependent and indivisible.

4.2 In the review of the Charter, the rights enshrined in CROC and its Optional Protocol on the involvement of children in armed conflict and Optional Protocol on the sale of children, child prostitution and child pornography ("Optional Protocols"), should be included. Of those rights, NCYLC considers two to be of central importance:

a) Article 3: the best interests of the child or young person are the primary consideration in all decision-making that concerns them, including the development of law and policy; and

b) Article 12: children and young people who are capable of forming their own views, having regard to their age and maturity, have the right to express those views in all matters affecting them. These views should be recognised by allowing children and young people to participate in the decision-making processes that affect them.

4.3 Assessing proposed policies and laws that affect children from a rights-based perspective is not a novel idea. Indeed, involving human rights considerations in legislative and policy evaluation processes is increasingly common. In 1997, former UN Secretary General Kofi Annan delivered a directive calling for governments to uphold human rights regardless of the political, economic, social or cultural systems in which they operated and notwithstanding their economic and social situation.

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3 On 17 December 1990.
5 See e.g. J Tobin, above n 2.
4.4 As the first Australian state to adopt a charter of human rights and responsibilities, Victoria has shown leadership in this area and has played an important role in assisting Australia to meet its obligations under CROC. The NCYLC hopes that the Victorian Government will take the opportunity afforded by the Charter’s four year review to strengthen the protection of rights for children and young people in Victoria.

5 What Victorian Children & Young People Tell Us

5.1 Through the NCYLC’s LawMail service (see para 1.2), we have observed that children are concerned about the issues surrounding their home and family, breaches of privacy and rights in the workplace and participation rights. The following are examples of queries received by the NCYLC from Victorian children and young people. Some identifying details has been removed:

“\textit{I want to change the contact times I have with my dad but he does not want me to. My mum can’t afford to go back to court but cannot claim legal aid, the last court order was made in XXX and I have to go to my dads every XXX night and sleepover, every 2nd weekend and half school holidays. He lives a long way from my friends and I hate going to his place. What can I do?}”

14 years old – Male

“\textit{I’m wondering if there is a list of Rights for children in Foster Care (in Victoria). I feel like I am being treated unfairly in my current Foster Placement... I really want to do well in school, maintain a healthy social life and continue to see my regular counsellor as I don’t want to become a person dependent on Centrelink payments for income. What are my rights in this situation? Who else can I ask for advice? I feel as if I have pressed the matter as far as I can with the Department (to no avail). Also, my privacy isn’t respected in the current placement I am in. My bedroom door doesn’t close, and I am not allowed to make phone calls to my friends without my carer listening (I understand that part of my rights is being allowed the use of a phone privately to make calls to friends and family and other services - such as my counsellor or Kids Help Line.) Your advice is appreciated}”

16 years old – Female

“\textit{Hi I am a casual employee at my local supermarket. Usually I am offered a shift at a specified time. However, if the shift gets cancelled or changed without anyone telling me before I arrive, do I have the right to be paid a minimum of three hours?}”

16 year old – Male

“\textit{i am X years old and I am the victim of XXX, this happened like XXX years ago and I have been given a subpoena and I have to go to court in XXX. I do not in any way want to go to court, I know it will help put bad people in jail, I know the law dictates that I must go to court but it is not an option for me. I really need some advice, do I have to go? What are the consequences if, or}
when i don't?... because i wont, no matter what, even if it takes me leaving home for a matter of weeks. I have no problem doing so. Please help me somehow..."

X years old – Female

"Am I allowed to refuse an operation. If my parents want me to have it. If so what laws protect me? Please Help!"

15 years old – Female

"I'm currently being held in the custody of the Child Protection unit, as a I ran away from home to XXX because my parents were violating me and abusing me.. Do i have any rights to legal representation? I'm 12 and a half years old. Thanks" 

12 years old – Male

"I would like to know what my rights are in regards to requesting non-traditional religious holidays off work. I do not celebrate Christian holidays; rather I celebrate alternative 'holy days'. How can I go about requesting these days off in a legal fashion?"

16 years old – Male

6 CROC and the Charter

6.1 Full recognition of human rights is founded on the principle that all rights are indivisible and interdependent. As such, NCYLC seeks to implement Australia’s international obligations to promote, protect and realise the rights of children and young people as set out in inter alia the following international instruments:

a) CROC and its two Optional Protocols;

b) The International Covenant on Economic, Social and Cultural Rights;

c) The International Covenant on Civil and Political Rights;

d) The Convention on the Elimination of All Forms of Discrimination Against Women; and


6.2 A key step in the full recognition of the rights of children and young people in Victoria would be the express inclusion of all rights afforded by CROC in the Charter. Although section 5 of the Charter suggests that any rights excluded from the Charter should not
be taken to be abrogated or limited, the principle of indivisibility and interdependency as well as the Articles of CROC itself require this.

6.3 The Charter contains twenty basic rights that promote and protect values of freedom, respect, equality and dignity. Notably, provisions of the Charter implicitly uphold various rights of the child in protecting the rights of a "person," which includes people under the age of 18. The Charter's promotion and protection of basic rights to non-discrimination, life, protection from torture, privacy and freedom of expression, thought and association parallel many of the rights afforded to children and young people under CROC.

6.4 However, with the exception of a few limited provisions, the Charter fails to provide any express recognition of the rights afforded to children and young people under CROC. Where the Charter does provide expressly for children and young people, the provisions are less comprehensive than their CROC equivalents. Most significantly, a number of child-specific rights contained in CROC are excluded from the Charter entirely.

7 Recommendations

7.1 Home & Family

The Charter's section 17 provides broadly for the protection of the family unit and of children by reason of their special vulnerability. Over the short time the Charter has been in operation this provision has formed the basis of many positive outcomes for Victorian children, particularly in protecting them from homelessness. It would be strengthened however by more specific wording. Inclusion of the text of CROC Articles 6 (the right to survival and development) and 9 (the right to know and maintain a relationship with both parents), for example, would clarify and strengthen the Charter's protection of families and children.

Recommendation: that the Charter be amended to include all articles of CROC relevant to the preservation of the home and family environment, including those

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8 Charter of Human Rights and Responsibilities Act 2006 (Vic), s5.
9 CROC, Article 42.
10 See for example Charter of Human Rights and Responsibilities Act 2006 (Vic) s8 & CROC Article 2; s 9 & CROC Article 6; s10 & CROC Article 10; s13 & CROC Article 16; s14-16 & CROC Articles 13-15.
12 Charter of Human Rights and Responsibilities Act 2006 (Vic), s17.
14 Relevant Articles of CROC include 20, 24, 25, 26 & 27.
which guarantee social security, minimum standards of living and state assistance for those children and young people who have been deprived of their family environment.

7.2 Youth Justice

The Charter's provisions relating to the arrest and detention of children and young people should also incorporate the relevant Articles of CROC in full. The Charter's section 23 requires that children and young people be detained separately from adults, be brought to trial as quickly as possible and be treated in a manner appropriate to their age. Article 37 of CROC, however, also highlights the importance of treating imprisonment as a measure of last resort for children and young people under 18 and emphasises that any term of imprisonment should be for the shortest period of time possible. The Charter should reflect this, as well as the requirement that no child be sentenced to a term of life imprisonment without the chance of release.

Recommendation: that the Charter be amended to include Articles 37 and 40 of CROC guaranteeing that imprisonment of children and young people shall be a measure of last resort, for the shortest period of time possible and never for a period of life without the possibility of release.

7.3 Participation Rights

Although section 18 of the Charter prescribes the right of every person to participate in public life, participation rights of children and young people remain limited. Through their LawMails toNCYLC, children consistently express a desire to have their views heard and taken into account and Article 12 of CROC affords them this right, whilst recognising the need to consider their evolving capacity having regard to their age and level of maturity. The Gillick competency test settled by the Australian High Court in Marion's case recognises a child's autonomy and empowers children to make their own health care decisions. The principles upon which the Gillick test is founded should be applied more broadly across all areas of decision-making that affect children and should not be limited to health. Despite this, young people under the age of 18 do

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15 CROC Articles 37 & 40
16 CROC, Article 37 b).
17 CROC, Article 37a).
18 Department of Health and Community Services (NT) v JWB (Marion’s case) (1992) 175 CLR 218 at 237-238 (Mason CJ, Dawson, Toohey, and Gaudron JJ).
not have the right to vote\textsuperscript{19} and their views are rarely otherwise heard or considered, either in the political process or in relation to more personal matters, such as those relating to family or school affairs.\textsuperscript{20}

**Recommendation:** that the Charter be amended to include Article 12 of CROC guaranteeing to children and young people, capable of forming views on matters concerning them, that those views will be heard and considered.

### 7.4 Education

CROC affords children and young people a right to education under Articles 28 and 29. These articles include *inter alia* a responsibility to ensure that higher education is made available on the basis of capacity\textsuperscript{21} and that a range of general and vocational education is made available.\textsuperscript{22} In Australia, responsibility for the provision of education services to children and young people lies with state governments. As such, it is the responsibility of the Victorian Government to ensure that Victorian children and young people are afforded access to education in a way that best supports the development of their unique talents. However the Charter currently makes no reference to education rights and even excludes non-government schools from Charter compliance.\textsuperscript{23}

**Recommendation:** that the Charter be amended to include Articles 28 and 29 of CROC, ensuring Victorian children and young people a right to education on an equal opportunity basis and in a way that supports the development of their unique talents to the best of their ability.

### 7.5 Best Interests Principle

Article 3 of CROC prescribes an overarching "best interests" principle, namely that the best interests of the child be the primary consideration in all decisions made on their behalf, both in relation to policy and law. This does not mean children's rights and interests necessarily take precedence over all other considerations, but simply that they form an essential element in any decision-making process in which the interests


\textsuperscript{21} CROC, Article 28.1(c).

\textsuperscript{22} CROC, Article 28.1(b).

\textsuperscript{23} *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, ss 1 & 4(1)(c).
of children and young people are implicated. The term “best interests” in relation to children appears in the Charter\textsuperscript{24} but is not expressed as a free-standing principle of general application as it is under CROC.

**Recommendation:** that the Charter be amended to incorporate Article 3.1 of CROC requiring the best interests of the child to be the primary consideration in all actions concerning them.

### 7.6 Remedies

Full recognition of child-specific rights requires appropriate child-specific mechanisms to address breaches of those rights. In the case of children and young people this generally means inclusive and largely informal procedures. Under the Charter as it stands, the remedies available to children and young people for breaches of their rights are too formal and do not allow them to participate constructively. While the ability of the courts to review legislation and procedures is an important aspect of monitoring rights compliance, existing mechanisms may be enhanced by alternative dispute resolution mechanisms tailored to the specific needs, maturity and circumstances of an individual child. This would involve ensuring that breaches of the Charter can form an independent cause of action.

**Recommendation:** that the Charter be amended to provide an alternative mechanism to redress breaches of children’s rights in Victoria. Such a mechanism should be developed in consultation with children and young people and encourage their participation in the dispute resolution process.

### 7.7 Implementation

The fact that CROC is the most widely ratified human rights treaty demonstrates the international community’s commitment to recognising children and young people as rights-bearing subjects. More than that, they are viewed as deserving of specific rights and protections not afforded to adults. Significantly, CROC encompasses the full range of human rights contemplated by other international instruments including the International Covenant on Economic, Social and Cultural Rights. CROC prescribes child-specific civil, cultural, economic, political and social rights, which should be enjoyed by all Victorian children and young people.

\textsuperscript{24} Charter of Human Rights and Responsibilities Act 2006 (Vic), s17(2)
Recommendation: that the Charter be amended to include the full text of CROC in a separate chapter specifically for children and young people under 18, thereby ensuring compliance with Australia's international obligations.

8 Conclusion

8.1 The NCYLC commends the Victorian Government for its leadership in legislating to protect the human rights of children and young people. However the four-year review of the Charter provides an opportunity to clarify and enhance the recognition and protection of those rights. By including in the Charter all of the substantive rights guaranteed by CROC and improving or supplementing mechanisms for addressing rights breaches, Victoria can provide a model of practical and effective rights recognition to be replicated in other states and territories, as well as at a federal level.