



EIGHT YEAR REVIEW OF THE VICTORIAN CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Youthlaw Submission

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Tiffany Overall
Advocacy and Human Rights Officer
Youthlaw
19 King Street, Melbourne 3000
T: 03 9611 2422
E: tiffany@youthlaw.asn.au
W: www.youthlaw.asn.au

SUMMARY OF RECOMMENDATIONS

Recommendation 1 The Charter should include provisions for mandatory, regular auditing of public authorities, especially those providing special protection to the most vulnerable members of the community. These audits should be overseen by an independent body such as the Victorian Equal Opportunity and Human Rights Commission, OV or CCYP.

Recommendation 2 Expand and better resource independent Charter complaint handling bodies including VEOHRC, the Victorian Ombudsman, IBAC or a new independent body, and ensure their complaint handling processes are readily accessible for and understood by young people.

Recommendation 3 Transfer the role of assessing Charter compatibility to an independent body, such as VEOHRC. Alternatively enhance the role of the Scrutiny of Acts and Regulations Committee (SARC) to allow more public input, through notices of its work and timeframes, and enable the Committee to more actively engage with the issues raised by public submissions.

Recommendation 4 Community consultation to be conducted either prior to the bill being drafted or prior to being introduced to Parliament, wherever possible.

Recommendation 5 The Charter should be accompanied by a well resourced public education campaign that is accessible to all children and young people and their families.

Recommendation 6 The Charter should include provision for an independent cause of action and remedies, which are appropriate and accessible to all, particularly children and young people and those experiencing disadvantage.

Recommendation 7 The Charter should add economic, social and cultural rights, as detailed under the *International Covenant on Economic, Social and Cultural Rights*.

Recommendation 8 The Charter should expand its focus to include rights detailed under the Convention on the Rights of the Child (CRC), in particular a right to participation in line with Article. This would guarantee & enhance the participation of children and young people in public life.

Recommendation 9 Discontinue regulations that exempt certain public authorities (e.g. Adult Parole Board, Youth Residential Board and Youth Parole Board) from considering and complying with the Charter.

Recommendation 10 Charter reviews should continue to be conducted every 4 years.

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Part A – About this submission

1. About Youthlaw

Youthlaw is Victoria's state-wide community legal centre for young people under 25 years. Youthlaw is located at Frontyard Youth Services in central Melbourne. This is a group of co-located services including crisis housing support, Centrelink, legal and health services. Youthlaw provides free legal advice, education and advocacy. We assist young people who are facing substantial legal problems and experiencing disadvantage (including homelessness, mental illness, family breakdown, drug and alcohol abuse, family violence and social exclusion).

Since its establishment in 2001, Youthlaw has been working to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

In essence, human rights protection is central to the daily work of Youthlaw and the daily life of the young people we assist. Children and young people are vulnerable to the diminution of their rights, and are often less able to assert and protect their rights. Legislative protection and community education are crucial for practical realisation of their rights.

2. Scope of the submission

Youthlaw welcomes the opportunity to make this submission to the eight year review of Victoria's Human Rights *Charter of Human Rights and Responsibilities* (Vic) (Charter). This submission builds on the submission Youthlaw made to the review of the Charter in 2011 (attached).

Youthlaw uses the Charter in three areas of our work:

1. Representation: Youthlaw lawyers use Charter-based arguments in legal submissions made on behalf of young people in court.
2. Education: Youthlaw empowers young people to understand and assert their Charter and legal rights through community legal education.
3. Advocacy: Youthlaw advocates for a human rights and Charter framework in law reform and policy advocacy in regard to laws, policies and practices that systemically impact on young people.

This submission includes de-identified case studies drawing on Youthlaw's practical experience - where the Charter has contributed to better outcomes for the young people we support. We also include case studies of where – in our view – the Charter has not sufficiently protected the rights of young people.

In the submission we respond to some, but not all of the specific issues raised within the terms of reference of the review.

It is our view that the review of the Charter presents an opportunity for Government to strengthen human rights protections in Victoria by:

- further clarifying and simplifying the Charter;
- further promoting the Charter;
- including social, economic, cultural and child specific rights; and
- expanding actions and remedies under the Charter.

Such changes would encourage advocates to use the Charter in practice and make it more meaningful for individuals and communities to protect their essential rights.

TOR 1 (a) Submissions from the 2011 Scrutiny of Acts and Regulations Committee (SARC) review and the Committee’s report

See Youthlaw’s 2011 submission attached.

TOR 1 (b) VEOHRC, Victorian Ombudsman (Ombudsman) & human rights complaints

General functions of VEOHRC and the Ombudsman

VEOHRC and the Ombudsman perform important oversight, monitoring, audit, review and complaint handling functions. These functions are most critically targeted at protecting the most vulnerable and susceptible members of our community, especially children and young people in detention and in the care and protection system.

Below is a case-study that highlights the importance of this work in ensuring that public authorities are Charter compliant in regard to their policies and practices.

Case study: Children being transferred to adult prisons

Youthlaw supported *No young people in adult prisons*:¹ a coalition of community members, advocates, and self-advocates concerned about the treatment of young people in Victorian prisons. The coalition was formed late in 2012, after a series of transfers of young people from youth detention into adult prison.

The Ombudsman undertook an investigation² of children transferred to or detained in adult custody, which revealed that there were 24 instances of children received into adult custody between 2007 and 2013.³ Some of the children were held in disturbing conditions including f solitary confinement for 23 hours each day with only one hour of exercise in a yard while in handcuffs.

One of the key recommendations by the Ombudsman was that the Minister for Community Services considers amending the *Children, Youth and Families Act 2005* to remove the option to transfer children to the adult prison system once additional accommodation became available at the Malmsbury Youth Justice Centre.

In response to this Ombudsman’s recommendation, there were a number of positive responses by government departments:

- The Department of Human Services (DHS) advised that it had redoubled its efforts to ensure that transfers to adult prisons would be a last resort. DHS also stated that it had strengthened its approaches to managing young people in youth justice centres with the aim of minimising the need for such transfers to occur.
- Corrections Victoria agreed to implement a process of verification of birth dates in certain circumstances.
- The Department of Justice advised that the Minister would give consideration to the recommendation for independent prison oversight.⁴

In a separate investigation of Corrections Victoria and Youth Justice, VEOHRC assessed the practice of transferring children to adult prisons and the use of solitary confinement under *Section 41(c)* of the *Charter* and its compatibility with human rights. VEOHRC’s reviews resulted in revision of policy guidelines “*Transfer from youth justice centre to prison*” (s467 *Children, Youth and Families Act 2005* (CYFA)). VEOHRC also made recommendations to improve respect for children’s human rights in this area, including that Corrections Victoria amend its policy to require that prisoners under 18 years old not be placed in solitary confinement.

¹ No Prison 4 Kids website <www.noprison4kids.org.au sited 16/12/2014>.

² Victorian Ombudsman, [Investigation into Children Transferred from Youth Justice System to the Adult Prison System](#), 2013.

³ Ibid.

⁴ VEOHRC Charter report 2013, p.20.

This is one positive case study of how current monitoring, review and investigation functions can have a positive impact on young people. However, Youthlaw considers that these functions need to be mandated and better resourced. This would lead to more monitoring of the experiences of vulnerable children and young people who are in greatest need of special protection, such as in residential care, secure welfare and youth justice.

For example, for many years the Commission for Children and Young People (CCYP) has expressed concern about the safety and wellbeing of children who reside in residential care in Victoria. As noted in CCYP's 2013-14 annual report, it receives and reviews Category One critical incident reports about children in out-of-home care. The largest proportion of the critical incidents reported involved children and young people who reside in residential care, even though residential care is the smallest proportion of care.

Recommendation 1 – The Charter should include provisions for mandatory, regular auditing of public authorities, especially those providing special protection to the most vulnerable members of the community. These audits should be overseen by an independent body such as VEOHRC, the Ombudsman or the Commission for Children and Young People.

Human Rights complaints

Currently VEOHRC and the Ombudsman receive and process a significant number of human rights or Charter based complaints.

Arguably the VEOHRC complaints process acts as an alternative to VCAT as not everyone has the capacity to take complaints to VCAT or do not have recourse to VCAT under the current legislation.⁵ The emphasis throughout the complaints process is on early resolution rather than paper-based exchange. They generally have high engagement by respondents to early dispute resolution, and an authority's responsibility under the Charter is sometimes included in the dispute resolution terms. This often leads to a systemic outcome, such as changes to policy.

Independent investigation of complaints against police

There is however a lack of independent investigation of complaints of police misconduct that involve alleged breaches of Charter rights in Victoria.

The Independent Broad-based Anti-corruption Commission (IBAC) has reported that it receives a number of complaints and notifications about people's dealings with police officers and protective services officers (PSOs) while in custody, under arrest or in the care of officers. While IBAC has the statutory function to investigate police misconduct, *in practice* they often do not investigate complaints against police, but rather refer them back to Victoria Police to conduct an internal investigation.

This practice is counter to established principles of international human rights law. In 2014, in *Horvath v Australia*⁶, the United Nations Human Rights Committee (UNHRC) found that the International Covenant on Civil and Political Rights requires State parties to investigate allegations of violations by police members promptly, thoroughly and effectively through an independent and impartial body. IBAC is currently undertaking a review of the Horvath case.

In *Bare v Small*,⁷ the Supreme Court of Appeal is currently considering whether the right not to be treated in a cruel, inhuman or degrading way under section 10(b) of the Charter includes an implied procedural right to an effective and independent investigation of complaints in Victoria (see discussion below at p. 12-13).

⁵ This is particularly evident after the Court of Appeal ruled in *Director of Housing v Sudi* [2011] VSCA 266 (6 September 2011) that VCAT did not have jurisdiction to adjudicate on human rights issues under the Charter in relation to a public housing decision.

⁶ http://www.communitylaw.org.au/flemingtonkensington/cb_pages/files/UN%20decision%202014.pdf

⁷ [2013] VSC 129. At the time of writing, the Court's decision is reserved.

Accessible complaint processes

Another issue is ensuring the complaint process is easily accessible for young people and that they are supported to engage with it. CCYP engages independent volunteers to visit young people in youth justice facilities. Via this program CCYP hears concerns of young people and, in some cases these concerns raise fundamental questions of human rights. One concern raised by young people to visitors is about receiving information about legal processes and complaint processes in a form that young people can easily understand.

A further area of concern for Youthlaw is the treatment of young people in residential care and secure welfare facilities and the lack of any processes or independent visitors to assist young people to understand their right to complain and assist them to lodge complaints

Recommendation 2 Youthlaw supports the expansion and further resourcing of independent Charter complaint handling bodies: VEOHRC, the Ombudsman, CCYP, IBAC or a new independent body, and recommends processes that are readily accessible and assist young people to understand their rights and lodge complaints.

TOR 1 (c) Role of Scrutiny of Acts and Regulations Committee (SARC)

Youthlaw supports “*Charter rights compatibility*” scrutiny of new bills introduced to Parliament. Unfortunately, Youthlaw questions the effectiveness of SARC to have impact, and the public service capacity and motivation to engage with SARC to actively achieve Charter right compatibility.

In 2013, SARC identified 14 Bills (out of 91) with provisions that were incompatible with human rights in the Charter. Where SARC identifies a potential incompatibility and with human rights, its usual practice is to put questions to the Minister or refer issues to Parliament for consideration. However there were no changes made to any of these Bills as a result of questions raised by SARC.⁸

In 2014, SARC identified 16 Bills that it considered were incompatible with Charter rights (out of 101 bills introduced) with house amendments made to 3 Bills as a result of questions raised by SARC about human rights issues.

Youthlaw only made one submission in 2013 and none in 2014. In fact, organisations only made a total of 21 submissions to SARC on six separate Bills introduced in 2013⁹, and 15 submissions on 6 Bills in 2014. There were no submissions to SARC in 2012 and two in 2011.

Case study: Justice Legislation (Cancellation of Parole & Other Matters) Amendment Bill 2013

In February 2013, Youthlaw made a submission to SARC expressing our concerns regarding amendments proposed in clauses 10 and 11 of Part 3 of the *Justice Legislation (Cancellation of Parole and Other Matters) Amendment Bill 2013* that effectively limited the Charter rights of children, and in particular their right to legal representation regardless of their age.

The Bill included amendments to the Children Youth and Families Act that increased the age at which a child is eligible to be legal represented in the family division of the Children’s Court to 10 years. Under the changes, legal representation for children under 10 would be limited to ‘exceptional circumstances’ and in these cases provided only on a ‘best interests’ rather than ‘direct instruction’ basis. This followed a change to Victoria Legal Aid guidelines that capped legal aid funding for children under the age of 10 in Children’s Court proceedings.

The Bill was passed with no amendments made.

⁸ VEOHRC Charter report 2013, p.59.

⁹ Ibid p86.

Case study: *The Summary Offences and Sentencing Amendment Bill 2013*

This Bill expanded the grounds on which police officers and protective service officers may direct a person to move on from a public place.

The Bill was the subject of significant public debate, which voiced concerns about the erosion of fundamental rights of freedom of assembly and freedom of speech.¹⁰ Ten organisations made submissions to SARC, raising concerns about the implications of the Bill on the right to peaceful protest.¹¹ This represents approximately half of all submissions received by SARC on any bills in 2013.

Nonetheless SARC assessed the Bill to be compatible with human rights. The Committee noted that when existing move-on powers were introduced in 2009, the Committee (as then constituted) considered the Charter compatibility of that Bill. At that time, the Committee referred to Parliament questions for consideration as to whether or not the move-on provisions on grounds of 'likely breach of the peace' were sufficiently clear to be a reasonable limit on rights and whether there were any less restrictive means.¹²

Youthlaw and other organisations have raised general concerns about SARC including that:

- SARC generally reports on a bill within two weeks of it being introduced into Parliament. Community organisations often do not have the time or resources to prepare a submission to SARC on issues of genuine concern within such a limited time frame.
- For meaningful community consultation and input, the SARC process needs to be more transparent and set out clear timelines and processes for engagement.
- It is difficult to find out information about proposed Bills, without actively monitoring Parliament, which many community organisations don't have capacity to do.
- SARC does not actively consider submissions in its Alert Digests, despite the fact that drafting submissions takes considerable time and effort.
- Community organisations often find it more effective to raise the human rights impacts of Bills by engaging in media advocacy and public campaigning than providing submissions to SARC.
- Non-legal community organisations often struggle to engage with technical legal drafting of Charter issues raised by Bills.

Youthlaw believes there are a range of strategies that could be adopted to allow for appropriate community consultation and help make the process more accessible and responsive to community concerns about Charter incompatibility.

a) Government request legislative drafting advice from SAC

In 2011, the Government requested advice from the Sentencing Advisory Council's (SAC) on the introduction of statutory minimum sentences for gross violence offences. Youthlaw made a submission to SAC on minimum mandatory sentencing endorsed by the Federation of Community Legal Centres (FCLC) and the broader youth sector, which outlined the Charter

¹⁰ See for example, Asher Wolf, 'Victoria's new anti-protest bill is a threat to our freedom of assembly', *The Guardian* (online), 29 January 2014 <<http://www.theguardian.com/commentisfree/2014/jan/29/victorias-new-anti-protest-bill-is-a-threat-to-our-freedom-of-assembly>>; Jane Lee, 'New law to expand police powers to "move on" protesters', *The Age* (online), 12 December 2013 <<http://www.theage.com.au/victoria/new-law-to-expand-police-powers-to-move-on-protesters-20131212-2z8ip.html#ixzz2x1IPPrEZ>>.

¹¹ Submissions were received from Flemington and Kensington Community Legal Centre, Human Rights Law Centre, Victorian Equal Opportunity and Human Rights Commission, Fitzroy Legal Service Inc., Law Institute of Victoria, Victorian Trades Hall Council, Homeless Law, Madge Australia Inc., Federation of Community Legal Centres (Victoria) Inc., and Victorian Council of Social Service. Submissions are available on the SARC website at <<http://www.parliament.vic.gov.au/sarc/article/916>>.

¹² See Scrutiny of Acts and Regulations Committee, *Alert Digest* No.14 of 2009, reporting on the Summary Offences and Control of Weapons Amendment Bill 2009.

incompatibility of the proposal in relation to under 18 year olds (especially sections 23(3) and 25(3)).¹³

SAC submitted a report in November 2011 to the Victorian government in regard to statutory minimum sentences. The government response was to decide to defer the introduction of statutory minimum sentences for young people aged 16 and 17 years old.

b) Incorporating recommendations of a Parliamentary Law Reform Committee

In 2013, the Victorian government introduction of the *Crimes Amendment (Sexual Offences and Other Matters) Bill 2014* heeded recommendations from the Parliamentary Law Reform Committee Inquiry into Sexting¹⁴ to reduce the risk of young people involved in the practice of 'sexting' being charged and convicted of child pornography offences for sending sexual images of themselves on their mobile phones.

Consequently the Bill created exceptions to prevent non-exploitative, consensual sexting between teenagers aged less than 18 years from being a criminal offence. This decreased the risk of children being subjected to the stigma of a criminal conviction and possible registration as sex offenders, which may have breached their right to protection of their best interests under section 17(2) of the Charter.

c) Having time to review an exposure draft of bills

The Criminal Investigation Powers Bill Exposure Draft (2014) is a critical piece of legislation that will impact significantly on how children and young people are treated both by police and the criminal justice system.

The previous Victorian Government stated that the Exposure Draft Bill would enable police officers to investigate crime more effectively, while providing appropriate safeguards around the use of these powers.

The major consideration for Youthlaw is whether the Bill adequately and appropriately safeguards the rights of children and young people in criminal investigations. In our view the current Exposure Draft Bill impinges unnecessarily on the rights of children and young people and fails to introduce strengthened safeguards that have been previously recommended by the Victorian Law Reform Commission and other experts.

Given the importance and impact of this legislation, Youthlaw has encouraged the current Victorian Government to reconsider the Bill, and open it up to broader community consultation and comment.

It is our view that this Exposure Draft Bill is not compatible with a child rights framework. It does not provide adequate protection for children in contact with police and these special protections have been compromised in the interest of police efficiency and administrative ease.

Recommendation 3 – Transfer the task of assessing Charter compatibility to an independent body such as VEOHRC. Alternatively enhance the role of SARC to allow more public input, through notification of its work and timeframes, and enable SARC to more actively engage with the issues raised by public submissions.

Recommendation 4 – Community consultation should be conducted either prior to bills being drafted or prior to being introduced to Parliament, wherever possible.

¹³ http://youthlaw.asn.au/wp-content/uploads/2012/05/Youthlaw-submission-Stat-Min-_final_.pdf

¹⁴ http://www.parliament.vic.gov.au/file_uploads/LRC_Sexting_Final_Report_0c0rvqP5.pdf

TOR 1 (d) Development of a human rights culture

Changing human rights culture of public authorities

Youthlaw uses the Charter in its advocacy with public authorities, especially Victoria Police, Corrections Victoria and Youth Justice. The Charter is an important instrument in ensuring Government departments and agencies are cognate of the rights protected by the Charter and their responsibility to comply with these.

We find the Charter provides a framework to remind public authorities that respect for human rights is central to the way they operate, and that human rights must be given proper consideration at the “front end” of their decision making.

We are aware of some examples of VEOHRC supporting public authorities to comply with the Charter by providing information and by developing ‘train the trainer’ sessions so that public authorities can support their staff. Victoria Police, Youth Justice and Corrections Victoria have worked with VEOHRC to develop human rights training to better educate senior staff on their obligations under the Charter and to consider human rights when developing policies and making decisions.

Case study: Victoria Police investing in human rights

In late 2013, Victoria Police released its *Equality is not the same* report, which contains a three year action plan to develop, implement and evaluate improvements to frontline policing.

The report signalled a need for a significant investment in cultural change by Victoria Police – aimed at better protecting human rights – and supporting staff to be more Charter and human rights compliant. The development of the report was triggered by the settlement of the *Haile-Michael* case, which alleged racial profiling within Victoria Police.

In developing the report, Victoria Police undertook extensive community consultation to better understand community concerns about policing. The Smart Justice for Young People’s 2013 submission (part of the community consultation) referenced both the Charter and international human rights to highlight their concerns about some police practices.¹⁵

The submission highlighted the impact of:

- search and seizure powers and policing practices on young people;
- inconsistent use of their discretion in relation to cautioning;
- diversion; and
- bail conditions.

The three-year action plan developed by Victoria Police has a focus on the development of a range of education, policy and practice platforms during the first year with implementation and review occurring in years two and three.

The key activities include:

- Review of Victoria Police policies to ensure that they do not lead to racial profiling (including having its Field Contact Policy reviewed by VEOHRC, which resulted in amendments and additional policies to provide clear guidance for officers when interacting with the public, in line with VEOHRC’s recommendations).
- Reform of communication and feedback mechanisms for complaints processed by Victoria Police;
- Development and implementation of ‘unconscious bias’ training packages as a component of human rights refresher training for police officers and staff and development of a cultural, community and diversity education strategy.

¹⁵ <http://youthlaw.asn.au/wp-content/uploads/2012/05/SJFYP-submission-to-Victoria-Police-Inquiry-final-01-08-2013.pdf>

While signifying a positive cultural shift, the ultimate success of the plan will be the demonstration of it being put into daily practice and addressing original community concerns about discriminatory policing and racial profiling that led to this significant piece of work.

Youthlaw continues to receive complaints from young people about some interactions with police and PSOs, including circumstances where police or PSOs have made unnecessary requests for personal details (a potential breach of a young person's right to privacy) or where excessive force has been used in the course of an arrest (which could constitute cruel or degrading treatment).

The findings of a recent report by the Federation of Community Legal Centres (FCLC), indicates significant ongoing concerns about PSOs exceeding their powers.

The report *Tracking Protective Services Officers: Insights from the first three years*¹⁶ details the results of 3 year community legal project 'Your Rights On Track', undertaken by the Federation from 2012–15.

The report provides numerous examples of inappropriate actions by PSOs including asking for personal and intrusive information without reasonable grounds to do so such as a person's full name, address and date of birth and asking a student whether she was known to Child Protection.

Youthlaw is also concerned that police informants are inconsistent in their exercise of discretion to issue a caution and their consent for a referral to a youth diversion program despite clear grounds for doing so.

Access to diversion is consistent with rights set out in the Charter,¹⁷ in particular section 25(3) which provides that "[a] child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation."¹⁸

Furthermore police officers often arrest young people with the offence of breach of bail under the *Bail Act* introduced in late 2013, for what are technical breaches of bail, rather than giving them a charge and summons in relation to their failures to comply with bail.

Creating a human rights culture among young people

The Charter provides a framework within which disadvantaged young people can:

- seek to have their voices heard;
- challenge unfair and unjust decisions and actions; and
- advocate for fairer outcomes.

The link between human rights education and the promotion of a culture of respect for and the protection of human rights is well acknowledged.¹⁹ When armed with knowledge of the Charter, children and young people become familiar with their legal rights, feel more confident that they have a voice to challenge unfair and unjust decisions, and gain a sense of empowerment through this knowledge and process.

Human rights need to be made practical and meaningful for young people in their daily lives. Young people often equate human rights with being treated fairly in their interactions with public authorities, without being concerned about the nuances of the Charter.

¹⁶ <https://communitylawblog.wordpress.com/2015/05/01/report-recommends-action-to-address-psos-exceeding-powers-and-using-excessive-force/>

¹⁷ It is also consistent with rights enunciated in international instruments. See for example, Article 40.3 of the United Nations Convention of the Rights of the Child and rule 11 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

¹⁸ Section 32 of the Charter requires statutes to be interpreted, where possible, consistently with human rights (see also section 38(1)). Regardless of the proper approach to the interplay between sections 32 and 7(2) of the Charter, the Charter sets out a number of rights which pursuant to the general canon of statutory

¹⁹ See, for example, UN Human Rights Commission Resolution 2004/71.

VEOHRC's education unit runs a variety of human rights workshops that inform a wide range of Victorians about the Charter. This has been complimented by ad hoc and under-resourced, educative programs run by community organisations, including community legal centres.²⁰ For example, Youthlaw developed a mobile phone application Street Smart Victoria²¹ that provides information about rights on the street, making information about human rights more accessible to young people.

The Charter itself needs to be made more accessible and easy for young people to understand and use, with a broader education campaign for the community and public authorities.

A practical way to educate young people could be through a Charter of Rights to be handed to all young people by Authorities (police, PSO's, Authorised officers etc.) interacting with them and to be visibly placed at train stations and other transport infrastructure similar to the Charter of Rights for Young people in out of home care.

Recommendation 5 - The Charter should be accompanied by a well-resourced public education campaign that is accessible to all children and young people and their families

Part C – Term of Reference 2: Amendments to improve the operation of the Charter

TOR 2 (b) Clarifying provisions relating to legal proceedings and remedies

A very real and positive impact can be achieved through strategic litigation that emphasises the importance of human rights considerations. This has positive practical implications for many disadvantaged clients.

Case-study: *Benefits of Charter litigation*

In the decision of *Taha v Broadmeadows Court & Ors: Brookes v Magistrates' Court of Victoria & Anor*,²² the Court of Appeal found that an interpretation of the *Infringements Act 2006* that least restricted an individual's human rights required a magistrate to inquire about and consider that individual's circumstances to address whether a less severe order was appropriate before imprisoning the person for defaulting on payment of fines.

Relying on *Taha*, Youthlaw was able to help a young single mother of two children who was at risk of homelessness with recalling a warrant for imprisonment and for the matter to be re-listed before a magistrate. The young mother was facing imprisonment for defaulting on payment of outstanding fines for infringement offences. Youthlaw relied on the Charter throughout the process, especially section 21 of the Charter (which extends to the right not to be arbitrarily deprived of liberty),²³ where we made a request to have the matter re-heard. Youthlaw also argued the need to limit the infringement on rights and that the initial decision was wrong. As a result of *Taha*, Youthlaw was better placed to guide the magistrate through the human rights issues to be considered.

In our view Charter cases need to be able to be brought and argued at VCAT or the Magistrates' Court. VCAT should have jurisdiction to hear Charter rights arguments.

²⁰ For example, Youthlaw has been running the REAL Rights project for young people, the Eastern Community Legal service has developed a play, *Fred's Fair Play*, and *Human Rights are Aussie Rules*²⁰, West Heidelberg Legal Service offer Charter training for its local community, Berry Street Victoria, CREATE Foundation and Victorian Aboriginal Child Care Agency's *Embedding the Charter Project* is designed to make the Charter more understandable and accessible for children in Out of Home Care

²¹ <http://streetsmartvic.com.au/>

²² *Victoria Police Toll Enforcement v Taha; State of Victoria v Brookes* [2013] VSCA 37.

²³ *Taha* [2013] VSCA 37, [198] (Tate JA). Arbitrariness, as defined by the Chief Justice's in *WBM v Chief Commissioner of Police* (and relied on by Tate J in *Taha*), is concerned with 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.

Requiring vulnerable and impecunious young people to raise charter arguments in the Supreme Court is highly restrictive due to the lengthiness of proceedings, the complexity of such applications, the legal expertise required, and the professional and personal costs associated. Despite a landmark decision in the Supreme Court last year to approve a protective cost order to restrict costs (in the particular case, \$5,000), public interest litigation is still far out of reach of the ordinary person. It effectively removes access to justice for breaches of Charter rights and creates a system where only wealthy people can afford to protect their human rights through the legal system.

A significant number of young people who approach Youthlaw report incidents of police abuse of powers, assaults by police and harassment. In our experience over 12 years, young people rarely complain about police mistreatment once they are informed of the process for the complaint to be handled. Understandably they are reluctant to complain directly at their local station or to Victoria Police Professional Standards Command because of fear of repercussion from police they have been mistreated by, and a lack of confidence in police investigating police. Young people are also put off by hearing of their friends and others dissatisfaction with the police internal complaint process. In cases where young people have attempted to contact the Office of Police Integrity (OPI) or IBAC, in order to avoid lodging a complaint directly with Victoria Police, the OPI or IBAC has frequently refused to take on the complaint.

Case-study: *Bare v Small*²⁴ and barriers to Charter litigation

Nassir Bare alleged police brutality in February 2009 when he was 17 years old. With assistance from Youthlaw, Nassir lodged a complaint with the Director of OPI, and he specifically requested that the complaint not be then referred to the then Ethical Standards Department (ESD) of Victoria Police. However the OPI referred the complaint to Victoria Police for internal investigation rather than conducting an independent review.

With the assistance of pro bono counsel and legal assistance, in 2010 Nassir sought judicial review of the OPI's decision in the Supreme Court. He argued that Victoria Police breached his right under section 10(b) to protection from treatment in a cruel, inhuman and degrading way by Victoria Police and that this right includes an implied procedural right to an effective and independent investigation of a complaint involving allegations of a breach of section 10(b) of the Charter. Nassir also argued that the OPI had breached its obligations under section 38 of the Charter because its decision to refer the complaint was incompatible with section 10(b) and they failed to properly consider it.

Justice Williams of the Supreme Court ruled in March 2013 that section 10(b) of the Charter does not contain an implied ancillary 'procedural' right to an effective investigation of allegations of cruel, inhuman or degrading treatment. She also held that a decision contrary to section 38 of the Charter does not amount to jurisdictional error and therefore the decision could not be reviewed on the ground of Charter unlawfulness because of a privative clause in the *Police Integrity Act*.

In August 2013, the Victorian Court of Appeal made a landmark decision to grant a protective cost order to Nassir which limited his costs to a maximum of \$5,000. Without this order he would have had to discontinue his appeal because if he lost it he would have to have paid full court costs to the tune of more than \$100,000.

The appeal was heard in May 2014. The Court of Appeal's decision is reserved (as of June 2015).

Independent cause of action and remedies

Youthlaw has observed that the Charter would be more accessible if it included an independent cause of action and clear remedies for individuals seeking to pursue a breach of their rights.

²⁴ *Bare v Small* [2013] VSC 129.

Ultimately, human rights in the Charter need to be enforceable within the courts in order for children and young people to have their rights fully protected. A legally enforceable Charter was recommended in the *Seen and Heard* report.²⁵

A full range of effective, just and appropriate judicial and non-judicial remedies should be available for breaches of all Charter rights. A breach of rights without any other proceedings instituted should allow the individual child or young person to bring a *new* cause of action.

Any mechanisms of enforcement in relation to breaches of human rights need to be accessible and appropriate to, and have a timely outcome for, children and young people and need to ensure that children and young people can fully participate in enforcement processes and proceedings. Young people do not easily make complaints or seek redress because these are processes that take time and young people may not have adequate information or legal assistance to undertake such proceedings.

Recommendation 6 – The Charter should include provision for an independent cause of action and remedies, which are appropriate and accessible to all, particularly children and young people and those experiencing disadvantage.

TOR 2 (i): other desirable amendments

Addition of economic, cultural and social rights and child rights

The ability of the Charter to promote children’s rights effectively is undermined by the narrow scope of civil and political rights and exclusion of important social and economic rights in the Charter, in particular the right to education, health and housing.

The Convention on the Rights of the Child (CRC) affirms the indivisibility and interdependence of all human rights by including civil and political, as well as economic, social and cultural rights within the same treaty. This is reflective of the way young people perceive their human rights. In our experience, they do not talk about human rights using an arbitrary division of rights as “*civil and political*” or “*economic, social and cultural*”. Rather, they talk about human rights as a collective set of rights, many of which are interdependent and mutually re-enforcing.

Youthlaw submits the inclusion of economic, social and cultural rights will provide a clear statement from the Government about the rights the community expects to enjoy.

Recommendation 7 – The Charter should add economic, social and cultural rights, as detailed under the *International Covenant on Economic, Social and Cultural Rights*.

Children’s rights

Youthlaw submits that rights specific to children and young people should be further protected by the Charter, so as to reflect and address the special needs and experiences of children and young people. The specific inclusion of children’s rights will help ensure laws and policies are made with reference to CRC principles, the specific needs of children, and serves as a powerful reminder that *children alongside* adults are holders of human rights.²⁶

²⁵ Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, report No. 84, “Seen and Heard: priority for children in the legal process” recommendation 164, p.431, “The Charter should create a legally enforceable obligation on the part of the relevant.”

²⁶ Committee on the Rights of the Child, General Comment No 5 (2003) on the General Measures of Implementation of the Convention CRC/GC/2003/5 (27 November 2003), paragraph 21.

The Charter currently includes provisions protecting children and families,²⁷ the best interests of the child²⁸ and children in youth justice²⁹ and the criminal justice system.³⁰ In particular, none of the Charter's counterparts in the ACT, New Zealand, or United Kingdom introduce the 'best interest principle' in the way it is embedded in:

"Every child, without discrimination, has the right to such protection as is in the best interests of the child and which is needed by reason of being a child."

However, the Charter does not make specific reference to other rights of children designed to address the special needs and experiences of children and young people, as detailed in the CRC³¹, ratified by Australia. There is a growing trend and awareness at both the international and domestic level of the need to specifically protect and promote the rights of children and young people, reflecting key principles in CRC. Well over twenty national constitutions have provisions dedicated to the protection of children's rights.³²

Children's rights need to be elevated to practical implementation at every level of government and community service delivery.³³ Unfortunately there are still examples of Government and public authorities not appropriately considering children's rights, for example:

- Diversion is legislated for adults, but it is not legislated for children; and
- the *Bail Act* applies to children in the same way as it does to adults, despite their special protection needs.

Youthlaw believes the right to participation as outlined in section 18 of the Charter does not go far enough, providing that:

"Every person ... has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives".

Given young people under 18 years do not have the right to vote, we question how – under the Charter – they are being encouraged to participate in public life and have their opinions taken into account in decision making. The specific inclusion of a child's rights to participate in all decision making impacting on them would, in our assessment, make the Charter more effective and inclusive. The CRC (Article 12) states that a child who is capable of forming their own views has the right to express those views and have them taken into account in all matters affecting them.³⁴ The weight given to the child's view will be assessed according to the child's age and whether the child has sufficient understanding and intelligence to understand fully what is proposed.³⁵

Recommendation 8 – The Charter should expand its focus to include rights detailed under the CRC, in particular a right to participation in line with Article 12. This would guarantee and enhance the participation of children and young people in public life.

²⁷ Charter s 17.

²⁸ section 17(2) of the Victorian Charter

²⁹ Charter s 23.

³⁰ Charter ss 24, 25.

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

³² National Constitutions with a section dedicated to the rights of children: Albania, s54; Angola, s30&31; Brazil, s227; Colombia, s44; East Timor, s18-19; Ecuador, s47&50; Ethiopia, s36; Finland, s5(3); Gambia, s29; Ghana, s28; Honduras, s119-126; Malawi, s23; Moldova, s 50; Nicaragua, s75; Namibia, s15; Paraguay, s54; Portugal, s69&70; Romania, s45; Slovenia, s56; South Africa, s28; Uganda, s34; Poland, s72; Thailand, s53; Ukraine, s52; Switzerland, s11.

³³ Drug & Crime Prevention Committee, Victorian Parliament, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* (July 2009) 76.

³⁴ Collins, T and Pearson, L, 'What does the "best interests of the child" mean?' *Discussion Paper*, 6 April 2002, http://www.sen.parl.gc.ca/pearson/htmlfiles/hill/17.htm_files/Committee-e/Tara-ABestInterests.pdf

³⁵ Collins, T and Pearson, L, op.cit, p 3.

Charter regulations

In December 2013, new regulations were made under the Charter to continue the exemption of the Adult Parole Board, Youth Residential Board and Youth Parole Board as public authorities under the Charter.³⁶ This continued on from previous regulations, which has the effect that these Boards are not required to consider and comply with the Charter. The regulations were accompanied by an exemption certificate, which meant that a regulatory impact statement or human rights certificate was not provided, on the basis that they would not have any significant human right impact. When the same regulations were made in 2009, a regulatory impact statement was provided.³⁷

Given the issues raised with youth justice transfers noted above in Part A and the role of the parole boards in transferring young people to the adult system, the absence of a requirement to take the Charter right of the best interests of the child (section 17) into account at key points, is just one example of the human rights impact that can result from this exemption.

Recommendation 9 - Discontinue regulations that exempt certain public authorities (e.g. the Adult Parole Board, Youth Residential Board and Youth Parole Board) from considering and complying with the Charter.

Part D – Term of reference 3: Further review of the Charter

Youthlaw would support ongoing reviews every 4 years.

Recommendation 10 - Charter reviews should continue to be conducted every 4 years.

³⁶ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013.*

³⁷ The Allen Consulting Group Pty Ltd, Regulatory Impact Statement, proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009, October 2009.