



Commission for Children
and Young People

improving young lives



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CCYPD/15/376

Mr Michael Brett Young
Charter Review Secretariat
Level 24, 121 Exhibition Street
MELBOURNE VIC 3000

Dear Mr Brett Young

The Commission is pleased to provide this submission to your review of the *Charter of Human Rights and Responsibilities Act 2006*. It is understood that the Attorney-General, the Hon Martin Pakula MP, issued the Terms of Reference for this eight-year review of the Charter of Human Rights (the Charter) and that the intent of the review is to identify ways to enhance the effectiveness of the Charter and improve its operation.

The *Commission for Children and Young People Act (CCYP Act) 2012* provides the legislative mandate for the Commission for Children and Young People (the Commission) which includes the establishment of a Commissioner for Aboriginal Children and Young People. Mr Andrew Jackomos PSM began his role as Australia's first Commissioner for Aboriginal Children and Young People in July 2013.

The objective of the Commission is to promote continuous improvement and innovation in policies and practices relating to the safety and wellbeing of vulnerable children and young people, and children and young people generally, and in the provision of out-of-home care services for children.

The principles set out in the Charter's preamble include:

Human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community.

Human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social and cultural and economic relationship with their traditional lands and waters.

The Charter places obligations on public authorities to respect the human rights of all people; however, it is the view of the Commission that insufficient attention is being paid to the human rights of children, particularly vulnerable children, and notably, the rights of Aboriginal children and young people.

Although the Charter requires public authorities to act in ways that are compatible with human rights, the Commission submits that despite statements of compatibility being made at the time legislation is drafted, an approach which protects human rights is not always evident or consistently applied when legislation is administered.

Victoria's children and young people deserve legal protection and the lived experience of the achievement of their human rights. The greatest scrutiny of government decision making in this regard needs to be applied to those under the care of the State.

Children and young people involved in the child protection system are some of this State's most vulnerable members and in many instances are disenfranchised and in effect, may not know their legal human rights; know what to do if they think their rights have been breached or have others who will act on their behalf. These children, young people and their families may hold low expectations about their involvement with government authorities and feel powerless and voiceless.

The Commission appreciates the opportunity to provide comment on the three questions outlined in the Terms of Reference and, in response, will provide a particular focus on the safety and wellbeing of children and young people.

1. Ways to enhance the effectiveness of the Charter

The Commission's view is the impact of the Charter would be improved by an enhanced community culture of human rights where government is accountable. Attention must be paid to making the Charter relevant, accessible and understood. A Charter that is well understood and effectively applied, is a powerful tool to supplement Parliament's intention in legislation.

Progress to achieve greater understanding would benefit from a dedicated focus on:

- **Education** to achieve broad community understanding of the value of, and protections for people's human rights, specifically, reaching those who are vulnerable and most likely to have their human rights breached
- **Support** to enable individuals, in particular, those who are most vulnerable who have had their human rights breached, are able to raise their concerns
- **Accountability** and transparency of government operations
- **Compliance** mechanisms that enable decision makers to be held to account.

Although community education has been undertaken by the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) consistent with its functions under the *Equal Opportunity Act 2010* and the *Racial and Religious Tolerance Act 2001*, obligations under the Charter remain legalistic in language and design and difficult for the common person to interpret.

Efforts to make the Charter more understandable and accessible to the broad community are important. One universal mechanism to assist would be human rights being taught as core curriculum in Victorian schools.

Specific engagement strategies are also required for some of the States most at risk and vulnerable people, including Aboriginal communities, communities from CALD backgrounds and young people in out-of-home care. As an example, Aboriginal Community Controlled Organisations (ACCOS) may be an appropriate entry point and focus for working with the Aboriginal community to strengthen their experience of human rights protections. Working with communities has produced innovations, such as the Report Racism initiative. This third party reporting project is being trialled with the Aboriginal community and enables people to report racism online or at community organisations as well as directly to Victoria Police or the VEOHRC. This is a good illustration of a strategy designed to meet the needs of a community via meaningful collaboration and consultation.

Through its work, the Commission has identified instances in which government has not complied with statutory obligations. Examples identified that are clearly to the detriment of children and young people include:

- Best Interests Planning – s 10 of the *Children, Youth and Families Act (CYFA) 2005*, states that the best interests of a child must always be paramount when making a decision, or taking action. When determining whether a decision or action is in the child’s best interests, there are a number of needs that must always be considered:
 - The need to protect the child from harm.
 - The need to protect the child’s rights.
 - The need to promote the child’s development (taking into account his or her age, stage of development, culture and gender.)

The Commission has identified many instances in which decisions made by government have not paid due attention to, or based on, the best interests of the child and have resulted in harm being caused to them. Such instances include hasty, poorly assessed and inappropriate out-of-home care placements that have resulted in sexual and physical abuse and harm to the child.

- The Aboriginal Child Placement Principle (APP) is a nationally agreed standard used in determining the placement of Aboriginal children in out-of-home care. The APP aims to enhance and preserve Aboriginal children's sense of identity by ensuring that they maintain strong connections with their family, community and culture. The APP is enshrined s13 of the CYFA. This section places an onus on government when, if it is in the best interests of an Aboriginal child to be placed in out-of-home care, to ensure the advice of the relevant Aboriginal agency is sought and where ever possible, for the child to be placed with an Aboriginal carer.

The Commission has identified instances in which DHHS has not given regard to the above legislative requirements, placing Aboriginal children in non-Aboriginal placements with no documented exploration of options within the Aboriginal community.

Within a human rights culture, a zero tolerance towards actions that jeopardise or breach human rights and government must lead by example. Vulnerable people must be provided with assistance to raise breaches of their human rights and be able to access appropriate legal support and advice to address these breaches. Initiatives such as the recent work by the Judicial College of Victoria in compiling the growing volume of Charter case law¹ will assist the legal fraternity and the public to understand human rights law, and how to use it effectively.

Given government policy and the practice of devolving the role and responsibility of government to provide care of children to the community service organisation sector; in effect acting on behalf of and for the government, it remains vital for the Charter to apply to non-State entities who provide State-funded services. In Victoria, approximately 6,500 children and young people live in out-of-home care services delivered by government funded community service organisations. Early intervention, family support and treatment services for children and young people all play key roles in supporting children and their families. In being funded to deliver these services, community service organisations must continue to have a legislative imperative to be compliant with the Charter.

¹ Judicial College of Victoria, *Victorian Human Rights: Charter Case Collection April 2015*

The act of listening to children and young people, with their families, is fundamental to gauging their views on whether their human rights have been upheld. In this regard, the Commission seeks to gain informed insight into their lived experience through a number of key activities:

- **Inquiries**

The Commission gains additional information and insight into the human rights of vulnerable children and young people through its inquiry processes under the CCYP Act. In this way, the Commission can gain information that might not otherwise be forthcoming from DHHS and funded services. The Commission seeks to influence positive change and promote improvements and innovations in all areas relating to Child Protection and more broadly across the service system via recommendations arising from its inquiries.

The Commission is working with VEOHRC to develop a human rights 'matrix' or assessment tool to assist in the assessment of human rights issues identified in its reviews and inquiries. It is intended that this tool will aid in the earlier identification of trends in human rights transgressions and provide a framework for analyses and the development of strategic responses.

Through collaboration with VEOHRC, the Commission sees potential to harness VEOHRC's Charter review function as a tool to encourage public authorities to review their human rights compliance records and systems.

- **Taskforce 1000**

Aboriginal children are grossly overrepresented in out-of-home care and youth justice systems.

The 2015 Report on Government Services report revealed that there were 1308 Aboriginal children in out-of-home care in Victoria, an increase of 42% in the 12 months to 30 June 2014. The average Victorian placement rate for Aboriginal children is 62.7 per 1000 compared to 5 per 1000 for non-Aboriginal children.

At the end of May, over 300 child reviews have occurred as part of Taskforce 1000. The Taskforce reviews reveal that the most significant drivers of Aboriginal children being placed in out-of-home care are family violence and alcohol and drug use by parents.

Some of the disturbing concerns include the lack of meaningful cultural plans, the inordinate delay – or failure – to adhere to the Aboriginal Child Placement Principle, and the disconnection from family, culture, kin and community.

The Commissioner for Aboriginal Children and Young People welcomes the recent announcement by VEOHRC to pursue a community consultation about Aboriginal cultural rights and the development of resources to assist in the protection and advancement of cultural rights. The Commissioner for Aboriginal Children and Young People is committed to ongoing collaboration with VEOHRC as the cultural rights project progresses and places great value on the development of the cultural rights resources.

- **Independent Visitor Programs**

Consistent with the Commission's functions to provide advice to Ministers, government departments, health services and human services relating to the safety and wellbeing of vulnerable children and young people, promoting the interests of vulnerable Victorian children, monitoring Victoria's out-of-home care system and promoting child-friendly and child-safe policies and practices in Victoria, the Commission has developed and implemented Independent Visitor Programs (IVP). The IVPs engage with young people to hear their views and concerns and seek resolution of matters at either a local or departmental level. Currently three IVPs are in operation:

- Youth Justice Centres

The function of the IVP is to ensure independent monitoring of youth justice centres and to provide information and assistance to young people to improve their experience whilst in custody. Selected and trained community members, including Aboriginal people, visit the Victoria's youth justice centres on a monthly basis. Exit interviews are also conducted on a fortnightly basis utilising a questionnaire to gain anonymous feedback on the young person's experience in custody.

- Secure Welfare Services

The CYFA makes provision for children and young people aged 10 and over deemed at immediate and significant risk, to be secured in a facility for a period not exceeding 21 days (CYFA 2005, S.173(2b)). This period of containment can be extended for a further period not exceeding 21 days. This function is known as Secure Welfare Services (SWS). Separate facilities for males and females are in operation. It must be stressed that the young people placed in these facilities are there not because of criminal activity. The service exists to provide protection for highly vulnerable children and young people.

The Department of Health & Human Services (DHHS) has an obligation under the CYFA and the *Charter of Human Rights and Responsibilities Act 2006* to ensure children and young people's rights and opportunities are protected in SWS through the provision of quality services.

A pilot IVP operates using Commission staff who visit each of the facilities on a fortnightly basis. Visitors talk to children and young people about their placement at SWS, the care they received and programs delivered whilst in SWS.

- Residential out-of-home care services

A pilot IVP has been developed for residential out-of-home care facilities and is currently operating in the DHHS Southern Region in 12 residential units managed by six community service organisations. Selected and trained community members, including Aboriginal people, visit the residential units on a monthly basis.

- **Charter for Children and Young People in Youth Justice Centres**

It is concerning there has been no clear and accessible nationally consistent statement outlining the protections and obligations that apply to children and young people detained in mandated youth justice facilities.

The Commission has been party to the development of the Australian Children's Commissioners and Guardians (ACCG) *A model charter of rights for children and young people detained in youth justice facilities*². This national set of human rights is consistent with the United Nations Convention on the Rights of the Child. A copy of the ACCG model charter is provided as attachment 1.

Each of the Commissioners and Guardians has agreed to localise and adopt the Charter within their own jurisdiction, adapting it to suit the specific requirements of their State or Territory. In recognition of the need for synergy with the work undertaken by the ACCG, the Victorian Commission has commenced consultation with young people at the Parkville Youth Justice Precinct to develop a Victorian Charter for Children and Young People in Youth Justice Centres. The Victorian Charter for Children and Young People in Youth Justice Centres will be based on international agreements to which Australia is a signatory and has been developed to provide young people with an easy guide to their rights and entitlements while they are in custody.

2. Any desirable amendments to improve the operation of the Charter

Of particular concern to the Commission is compliance with the Charter and the need for ongoing scrutiny of the implementation of legislation that has been deemed compatible with the legislation.

VEORHRC, in its community and government education guide for Victorian public sector workers³, provides the following examples of Charter interpretation for guidance:

Section 9 – *Right to life,*

If the government takes on the care of a person in prison, child protection, or in an inpatient unit, then they must take positive steps to ensure that the person is in a safe environment and has access to health services that might affect their right to life.

In Section 19 – *Cultural rights,* VEOHRC identify that:

... people have different family, language, religious or cultural backgrounds. They can enjoy their cultural, declare and practice their religion and use their language. Aboriginal persons hold distinct cultural rights.

In adopting an interpretation similar to that described by VEORHRC above, the Commission is concerned about how recent legislation is consistent with this approach. The comment below provides an example in which the human rights of children and the drafting of legislation appear to be at odds and not justified in the Statement of Compatibility; in this instance, the Education and Training Reform Amendment (Child Safe Schools) Act 2015. Whilst supporting

² sited on 3 June 2015 at <https://www.humanrights.gov.au/our-work/childrens-rights/projects/model-charter-rights-children-and-young-people-detained-youth>

³ Victorian Equal Opportunity and Human Rights Commission, *The Charter of Human Rights and Responsibilities: A guide for Victorian public sector workers* (2014)

the legislative intent of creating safer schools, the Commission is concerned of the protections afforded to the rights of the child in some instances; and in particular:

The above Act provides that:

child abuse includes—

(a) any act committed against a person under the age of 18 years involving—

(i) a sexual offence; or

(ii) an offence under section 49B(2) of the Crimes Act 1958; and

(b) any of the following—

(i) physical violence;

(ii) serious emotional or psychological harm;

(iii) exploitation—

that does not include the reasonable discipline, management or care of the person or the participation of the person in reasonable family or community labour; and

(c) the serious neglect of a person under the age of 18 years

This definition implies that an act of physical violence against a child, or an act involving serious emotional or psychological harm of a child or exploitation of the child could constitute 'reasonable discipline, management or care of the person or the participation of the person in reasonable family or community labour' and therefore not fall within the definition of child abuse.

The Commission believes that no such act could ever be justified as 'reasonable' in the context of schools; physical violence, serious emotional or psychological harm and exploitation could never be considered 'reasonable discipline'. In particular, as corporal punishment is not permitted in schools, 'physical violence' directed against a child could not be considered 'reasonable discipline'. This results in the Act leaving physical violence and serious emotional and psychological harm open to interpretation, or misinterpretation, within a school setting; an outcome that would not appear to be consistent with the human rights of children and young people.

At a minimum, the Statement of Compatibility for the legislation should have addressed why the exception in (b) above was not inconsistent with human rights. However, the Statement of Compatibility does not address the issue at all and the Scrutiny of Acts and Regulations Committee (SARC) report on this legislation makes no comment on the legislation.

The Commission notes that the 2011 Charter Review, undertaken by the Victorian SARC, was specifically required to consider whether additional human rights should be included in the Charter. Areas for consideration at the time included the rights of the child and social and cultural rights. The SARC review did not recommend additional human rights be incorporated into the Charter, and consequently, Parliament did not make any legislative amendments to the Charter.

As submitted to SARC by the Commission, the Commission is of the view that children in our society require specific and special protection. To achieve this objective, the rights described in *The United Nations Convention of the Rights of the Child* should be considered for inclusion into the Victorian Charter. In recognition of Victoria's First People disadvantage and the overrepresentation in statutory child protection and youth justice systems, it is the view of the Commission that *The United Nations Declaration on the Rights of Indigenous Peoples* should also be included in the Charter. Given the current Victorian and national focus on family violence, a clear and positive statement would be made by the inclusion of the Convention on the Elimination of All Forms of Discrimination against Women in the Charter.

3. A recommendation under section 45(2) as to whether any further review of the Charter is necessary

The Commission is firmly of the view that further and ongoing reviews of the Charter are warranted and necessary to build a human rights culture and to continue to validate the need for the Charter. Everyone's human rights, but in particular, those who are vulnerable and without a voice, must be placed firmly in the public eye and scrutinised with a contemporary lens.

We would be pleased to provide you with further information at your request and look forward to enhancement of the Charter and the positive impact this will have on Victoria's vulnerable children and young people.

Yours sincerely,



Bernie Geary OAM
Principal Commissioner



Andrew Jackomos PSM
Commissioner for Aboriginal Children and Young People

Attachment 1

A model charter of rights for children and young people detained in youth justice facilities

The following fundamental rights are drawn from:

UN Rules for the Protection of Juveniles Deprived of their Liberty: the 'Havana Rules' or JDLs (1990)

UN Minimum Rules for the Administration of Juvenile Justice: the 'Beijing Rules' (1985)

Convention on the Rights of the Child (1989)

The Charter

This Charter of Rights tells you what you can expect while you are detained. The rights apply to everyone so you have to respect other people's rights.

You have the right:

- To be treated equally, and not treated unfairly because of your sex, sexuality, race, religion, disability or other status (CRC 2, JDL 4).
 - To be treated with respect and dignity by staff and to be kept safe while you are in the youth justice centre (JDL 1, 12, 31, 66,87)
 - To be given a copy of the rules of the centre, and information about your rights and responsibilities, in a language that you can understand (JDL 24)
 - To see a doctor or nurse whenever you need to, and to receive proper healthcare (JDL 49)
 - To receive help for your mental health if you need it, and to be transferred to a mental health facility for treatment if required (Beijing 26.2, JDL 53)
 - To get help if you have problems with drugs or alcohol (JDL 54)
 - To have special care and protection if you are vulnerable or have special needs (JDL 27,28)
 - To have regular contact with your family and friends through visits and phone calls (JDL 59,60, 67, CRC 37, Beijing 26.5)
 - To get help to see a lawyer, and to talk to them privately (JDL 18(a))
 - To have an interpreter for formal meetings or medical examinations if you are not fluent in English (JDL 6)
 - To get information and news about what is happening in the world (CRC 17, JDL 62)
 - To have a say in decisions about your rehabilitation and other issues that affect you (CRC 12)
 - To participate in activities and programs that help your rehabilitation (JDL 12)
 - To continue your education, or to do training to learn useful skills for work (JDL 38)
 - To get exercise every day, and to go outside every day except in bad weather (JDL 47).
 - To have enough good food (including food that is suitable for your culture or religion, or dietary requirements), and to have drinking water available whenever you need it (JDL 37)
 - To have clean clothes, and to wear your own clothes if you go out of the centre (JDL 36)
 - Not to be punished unfairly, and only in accordance with the rules of the centre or the law (JDL 66-71)
 - Not to have force used against you, or restraints used on you, unless absolutely necessary, and never as a punishment (JDL 63 - 64)
 - Not to be isolated from other young people unless necessary to keep you or others safe, and never as a punishment (JDL 67)
 - To practice your religion or express your culture and, whenever possible, to be able to see religious or spiritual advisors (JDL 4, 48, CRC 30))
 - If you are Aboriginal or Torres Strait Islander, whenever possible, to participate in cultural activities and celebrations with other Aboriginal or Torres Strait Islander people (CRC 30)
 - To make a complaint about your treatment to an independent person (like an official visitor) and to be told what happens with your complaint (JDL 75 and 76)
 - Before you leave the centre, to get help with somewhere safe to live and ongoing support. (JDL 80)
-