

Human Rights Consultation Committee
Department of Justice
55 St Andrews Place
East Melbourne VIC 3002

29/7/05

Dear Consultation Committee,

Re: Victorian Human Rights Charter Consultation.

The Office of the Public Advocate appreciates the opportunity to comment on this important initiative towards promoting and protecting the rights of Victorians. Rather than respond directly to the ten questions outlined in the Committee's discussion paper, the issues are addressed as part of three broad concerns:

- How a charter of human rights would benefit Victorians, particularly Victorians with disabilities;
- A response to the Government's preferred model for a charter, as outlined in its *Statement of Intent*, and
- What strategies must be implemented to support a Human Rights Charter.

I welcome your concern with improving the protection and promotion of human rights for Victorians and would be happy to discuss our submission further with you.

Yours sincerely

Julian Gardner
Public Advocate



OFFICE OF THE
PUBLIC ADVOCATE

Submission to the Human Rights Consultation Committee of Victoria

29th July 2005
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This submission is endorsed by the Public Advocate, Julian Gardner

It does not contain any confidential material.

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Executive Summary

The Public Advocate in Victoria welcomes the opportunity to make this submission to the Human Rights Consultation Committee. In making this submission, the Public Advocate draws attention to how a human rights charter would improve the lives of people with disabilities.

The Public Advocate gives strong support to the introduction of a Victorian Human Rights Charter. The issues raised within the Consultation Committee's Discussion Paper are addressed as part of three broad concerns:

- How a charter of human rights would benefit Victorians, particularly Victorians with disabilities;
- A response to the Government's preferred model for a charter, as outlined in its *Statement of Intent*; and
- What strategies must be implemented to support a Human Rights Charter.

The Public Advocate believes the objectives of a human rights charter must be:

- The promotion of the universality of human rights as part of the culture of the Victorian community;
- The protection of the rights of all people.

Recommendations

- 1. The Public Advocate supports the creation of a Charter of Human Rights for Victoria.**
- 2. The Public Advocate does not support the creation of 'special rights' for people with disabilities within the charter.** To include 'special rights' may weaken the potential of a human rights charter to foster greater equality within Victoria; people with disabilities have the same rights as all Australians. However, an individual's disability-specific needs may require consideration to ensure effective protection of his or her rights.
- 3. The Public Advocate supports the proposal that encourages a 'best practice' approach to the planning and development of legislative policy.** Every effort should be made to remove, or at least reduce, features of legislation that create further disadvantage for people with disabilities or adversely affect their human rights.

4. **The Public Advocate argues for the inclusion of economic, social and cultural rights in a human rights charter.** A human rights framework should have a far-reaching vision that takes as broad a scope as possible for improving the lifestyles of Victorians. Improvement in rights protection is possible within the government's current capacity, and planning for future growth could take place around the needs of Victorians and the commitments made to meet those needs.
5. **A charter of human rights must set the parameters for the restriction or denial of rights.** The charter should also contain positive obligations on public authorities to promote compliance with human rights.
6. **The strategies used to support the introduction of a charter must aim to promote respect for a culture of human rights.**
7. **Further community engagement should be undertaken.** Resources must be dedicated to in-depth community consultation and awareness-raising about the benefits of having a charter.
8. **To support the Charter, it is essential to establish:**
 - **A Human Rights Commission,**
 - **Ongoing education on human rights,**
 - **Adequate advocacy support,**
 - **A Human Rights Action Plan.**
9. **A Human Rights Commission should have a generalist focus that reflects the universality of rights.**
10. **The procedures and timeframes for monitoring the Charter's effectiveness must be established within the Charter.**

Introduction

The Public Advocate in Victoria welcomes the opportunity to make this submission to the Human Rights Consultation Committee. In making this submission, the Public Advocate draws attention to how a human rights charter would improve the lives of people with disabilities.

The Public Advocate gives strong support to the introduction of a Victorian Human Rights Charter. Rather than respond directly to the ten questions outlined in the Committee's discussion paper, the issues are addressed as part of three broad concerns:

- How a charter of human rights would benefit Victorians, particularly Victorians with disabilities;
- A response to the Government's preferred model for a charter, as outlined in its *Statement of Intent*; and
- What strategies must be implemented to support a Human Rights Charter.

The Office of the Public Advocate

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986 (Vic)*. The Office represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

The Public Advocate delegates his authority to his staff, who provide advocacy, guardianship and investigation services to people with disabilities. The office also coordinates the Community Guardians Program, the Community Visitors Program, the Independent Third Person Program and the Private Guardian Support Program in Victoria. Further material on the role of the office can be provided if required by consulting the Office of the Public Advocate's (OPA's) website: www.publicadvocate.vic.gov.au

While in other Australian states there are Public Advocates, please note that within this submission, when OPA is mentioned in text or as part of a citation, the reference is to the Victorian office.

1. Why Victoria needs a Charter of Human Rights

The Public Advocate believes change is required to better protect and promote the human rights of people with disabilities, and therefore supports the introduction of a charter of human rights to Victoria. Human rights are the aspects of life to which we believe we are entitled solely on the basis of our humanity– they reflect what it is to be human. When rights are breached, one’s sense of dignity and humanity are diminished. However, if rights are enshrined in a charter, there exists a greater chance of enhancing one’s sense of dignity and realising one’s potential. This argument is explored by addressing the two broad outcomes that should underpin the reason for enacting a Victorian Human Rights Charter:

- The promotion of the universality of human rights as part of the culture of the Victorian community;
- The protection of the rights of all people.

RECOMMENDATION 1: The Public Advocate supports the creation of a Human Rights Charter for Victoria

1.1 Creating a culture about the universality of rights

Having a charter of human rights would in time bring about change in Victorian culture so that societal issues would be seen through the lens of human rights. This would reinforce the principle that human rights apply universally to all, and in turn help promote the rights of people with disabilities. Disability is not a problem that belongs to the individual but rather a concern of the whole of society. A human rights focus on issues reinforces this perspective, directing attention to the physical, social, attitudinal and other barriers which prevent people with disabilities participating in the lives of their community, and complements the social model of disability (Lawson 2005, 133). A human rights focus draws attention to structural deprivations rather than individual causes to problems (Lynch 2005, 2) and in this sense has the capacity to create change in the way that disability is commonly conceived. It is hoped that the promotion of a rights-based culture would assist people with disabilities, and equally all Victorians, to live without discrimination, and with dignity founded in their humanity.

In addition, the Public Advocate believes that fostering a human rights culture must promote the notion that *all* Victorians are entitled to realise their potential. With

this aim, a human rights charter would benefit Victoria by heightening the sense of community and encouraging social cohesion. Education about the benefits of a charter should give equal emphasis to the responsibility to allow others to pursue their potential, and the new ways it will assist in the realisation of one's own potential. In this way, the realisation of the potential of all Victorians, and rights' protection, will come about as much through community education and a cultural shift as through the charter's reinforcement of legislated rights.

1.2. Protection of rights

The discussion paper prepared by the Human Rights Consultation Committee raises the issue of whether special rights for certain groups, including people with disabilities, should be drawn into a charter. To include 'special rights' may weaken the potential of a human rights charter to foster greater equality within Victoria; people with disabilities have the same rights as all Australians. However, an individual's disability-specific needs may require consideration to ensure effective protection of his or her rights. In this way, rights-protection should aim for equality of outcome and equal respect for the dignity of each individual, rather than uniformity of treatment. Victorians with limited access to opportunities that create advantage— such as education, housing, health services, employment and information— may need to have rights met with different approaches to those Victorians who have accessed these opportunities unhindered.

Legislative attempts to create attitudinal change towards equality for people with disabilities have not brought about adequate changes. The Productivity Commission's *Review of the Disability Discrimination Act (1992) (DDA)* reflects this, as it reports that "evidence suggests that people with disabilities face particular barriers to achieving equal treatment in the criminal and civil justice systems" (2004, 248). These barriers include a reportedly frequent denial of "the right to be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against him [or her]," and "to have the free assistance of an interpreter if he [or she] cannot understand or speak the language used in court" (UN International Covenant on Civil and Political Rights, article 14, s.3). Consequently, as the Productivity Commission (2004, 249) reports, "those charged with offences are thus more likely than people without a

disability to be found guilty and to receive more severe sentences.” The DDA has not adequately protected the rights of people with disabilities in the criminal and civil justice system.

The DDA also falls short of protecting the rights of people with disabilities who use disability-specific accommodation and support services. The following example about housing is taken from the OPA submission for the Productivity Commission’s review of DDA legislation (2003a, 5-9) and illustrates breaches of the right to autonomy.

People who rent rooms are usually entitled to the protection of laws relating to residential tenancy and this is currently covered by the *Residential Tenancies Act* (1997) (RTA). However, by reason of section 23 of that Act certain health and residential services are currently excluded from its operation. The excluded services cover people who live in shared supported accommodation (SSAs). The rationale for making this exclusion is a perceived need to provide special protection to residents in community residential units who may exhibit disruptive and violent behaviours as a result of their disability, which otherwise could result in their eviction if special protective measures did not exist prohibiting such evictions. This is made more complex because some of the special protective measures actually disadvantage people who live in SSAs whilst failing to ensure their protection, for example the ability to move residents from their home to another residence in order to change the “client mix” (OPA 2003a, 6). In addition, current legislation allows residents of SSAs to be moved from their home, with little or no consultation with them, and no clear mechanism by which the resident can voice their opinion, desire or needs in the decision-making process (OPA 2003a, 9).

Twenty years after the International Year of Disabled Persons (1981), a report on the changes in experiences of Victorians with disabilities and their families found that some participants “noted how changes in legislation and policy did not translate into changes in their everyday lives, and that they continued to struggle with access and integration barriers” (Quibell 2004, v). It is encouraging that many positive changes had been experienced by participants in this study as well, yet further changes could be implemented to create equality of opportunity in order to better protect and promote the rights of people with disabilities as equal to those of other Victorians. The Public Advocate believes a charter of human rights would help to

meet this goal. While special rights are not required, consideration must be given to how best to enable people with disabilities to exercise their rights.

RECOMMENDATION 2: The Public Advocate does not support the creation of ‘special rights’ for people with disabilities within the charter. To include ‘special rights’ may weaken the potential of a human rights charter to foster greater equality within Victoria; people with disabilities have the same rights as all Australians. However, an individual’s disability-specific needs may require consideration to ensure effective protection of his or her rights.

1.3. International examples of the benefits of a charter of human rights

In other countries with legislation similar to the DDA, such as the United Kingdom, the introduction of a human rights charter has been a useful addition to the means through which the rights of people with disabilities can be promoted and protected. The following examples are drawn from cases relating to the United Kingdom *Human Rights Act* 1998. They illustrate how that Act has provided better protection of the rights of people with disabilities than legislation alone.

1.3.1 The right to freedom from degradation and torture (Article 3)

The treatment of people with disabilities when criminally detained has also lead to challenges regarding the right to freedom from degradation. The following example illustrates an occasion requiring a change in procedures in order to uphold the rights of Adel Price, a woman who is four limb deficient and has a kidney condition. To this end, it was found that Article 14 rights, relating to the prohibition of discrimination, were also breached because “a state had discriminated against a disabled person by treating them in the same way as others despite material difference in their circumstances” (Lawson 2005, 144). For three days Adel Price was detained for contempt of court for failing to answer questions (Lawson 2005, 143). While detained, “she had to spend the first night in a cell which was dangerously cold for her and contained a bed she was unable to use; she had to be assisted in using the toilet by male staff (having been left sitting on the toilet for three hours...); and, at the end of her sentence, she required catheterisation due to lack of fluid and to urine retention caused by difficulties in using the toilet facilities” (Lawson 2005, 143). It was in the

European Court of Human Rights that her challenge was successful, after the UK court had found these conditions were not severe enough to be established as degrading treatment.

1.3.2 The right to liberty (Article 5)

In the United Kingdom, fewer positive outcomes have occurred for challenges raised by patients with mental illness. However, Parker (2005, 155) notes that “By facilitating greater opportunities for legal challenge, the HRA has broadened the scope of judicial scrutiny of aspects of mental health practice such as detention, compulsory treatment and seclusion; but to date its impact on the planning and provision of mental health care, and ultimately the experience of those receiving mental health services... is less clear.” There are procedural differences for patients who are formally admitted, that is, using the Mental Health Act (MHA) for involuntary admission, and those who are admitted informally, that is who do not object to admission. As Parker (2005, 167) explains, “there is no requirement to help individuals who have been admitted into hospital informally (i.e, without the use of the MHA) in getting legal advice... individuals who lack capacity to consent to their admission to hospital for treatment for their mental disorder, but do not object to their admission, may be admitted informally.” Patients admitted informally are “generally older people with mental health problems and people with severe learning difficulties” (Parker 2005, 167). Given the lack of information regarding legal assistance, there is little hope for these people to have a rights’ breach addressed, even though poor in-patient care is a common finding within reports (Parker 2005, 163-165).

1.3.3. The right to private and family life (Article 8)

In the *East Sussex* case, two sisters with disabilities challenged the blanket ban by council on the manual lifting of people with disabilities. As Lawson (2005, 147) explains, “without manual lifting it would have been impossible for the sisters to go shopping, swimming or horse riding– activities which were important to them... Article 8 rights were engaged, both by reason of [the sisters’] dignity interest and also their participation or autonomy interest.” In another case, it was found Mrs. Bernard, a woman with disabilities and mother of six, had her rights breached because council allocated inappropriate housing. As her house was too small and inaccessible, Mrs. Bernard and her husband slept downstairs in a sitting room which they shared with

their two youngest children, separated only by a curtain (Lawson 2005, 146). In addition, given the inaccessible nature of the house, Mrs. Bernard lived in deplorable circumstances, spending most of her day in a shower chair which caused her pain, unable to access the toilet so soiling herself several times each day". She attempted to reduce this problem by drinking less, which exacerbated her diabetes... She was unable to cook for herself and her family. [She] was denied the means of caring for her children and, instead, was forced to adopt a completely dependent role... She was unable to answer the door or leave the house independently" (Lawson 2005, 144-146). While these conditions were not found to constitute degradation as defined by Article 3, freedom from degrading treatment, the judge did find that in relation to "private life and the right to personal integrity" (Lawson 2005, 145) these circumstances contributed to the breach of Article 8.

1.4 Summary of recommendations for section 1

1. The Public Advocate supports the creation of a Charter of Human Rights for Victoria.
2. The Public Advocate does not support the creation of 'special rights' for people with disabilities within the charter. To include 'special rights' may weaken the potential of a human rights charter to foster greater equality within Victoria; people with disabilities have the same rights as all Australians. However, an individual's disability-specific needs may require consideration to ensure effective protection of his or her rights.

2. Response to the Government's preferred model

The Public Advocate believes the boundaries set by government within the Statement of Intent are too narrow. If a Charter is to be established, the process should be undertaken with a view to protecting the future needs of Victorians, and accordingly the vision should be wide-ranging. The Public Advocate supports the enactment of a Charter of Human Rights as part of statutory legislation. However, within the stated model too much emphasis is placed on the sovereignty of parliament, and too little on the importance of economic, social and cultural rights. Creating a Human Rights Charter from within these parameters will not meet the stated aim of protecting the

most disadvantaged in our society. The arguments supporting this view are outlined below.

2.1 How should a Charter be enacted in law?

The Public Advocate supports the proposal for pre-enactment scrutiny that encourages a 'best practice' approach to the planning and development of legislative policy. As part of this process, the Attorney-General must be obliged to disclose evidence of rigorous investigation in relation to the Declaration of Compatibility made on legislation. Due consideration must be given to whether practices that are likely to arise from the implementation of policies and legislation will further disadvantage people with disabilities. Every effort should be made to remove, or at least reduce, features of legislation that adversely affect the rights of people with disabilities. The Public Advocate supports the review of existing legislation in addition to that of future legislation.

The Public Advocate has concerns that parliament would be held to account only through the election process. This is not a sufficient measure of accountability. Relying on this method, minority groups with limited economic and political power, such as people with disabilities, would be dependent on the majority for the protection of their rights. That the act of voting is itself problematic for people with a range of disabilities highlights the danger of this accountability measure. To this end, the Public Advocate believes that the courts should have more power in enforcing a human rights charter than that which is outlined within the proposed model.

If a ruling of inconsistency is given to legislation, parliament must be compelled to respond to the court on this matter, and within a reasonable timeframe. This would provide a clear definition for what is intended to be achieved through the process of dialogue between the court and parliament. In addition, it would strengthen current legislative review procedures, which allow a six month time frame for ministerial response to recommended changes to legislation that may not be adequately responsive in addressing legislative issues (SARC 2005). On matters where inconsistency is found on the grounds of discrimination against people with disabilities, the Public Advocate would expect timely parliamentary intervention to resolve any conflict.

The Public Advocate agrees that if a Charter were to be established, a more litigious society would not be a welcome outcome. However, the Supreme Court's

power should extend to the capacity to decide on appropriate remedies for a breach of rights. The Charter should contain an explicit provision for remedies. Individuals should be restored to their position prior to the breach of rights, and compensation should not be ruled out. Having remedies is viewed as very important in relation to the protection of rights for people with disabilities, as once in a position where rights are abused, more assistance will be required to bring about redress of the breach of rights.

RECOMMENDATION 3: The Public Advocate supports the proposal that encourages a ‘best practice’ approach to the planning and development of legislative policy. Every effort should be made to remove, or at least reduce, features of legislation that create further disadvantage for people with disabilities or adversely affect their human rights.

2.2. Why civil and political rights are insufficient

The Public Advocate argues for the inclusion of economic, social and cultural rights in a human rights charter. Including only civil and political rights may not address the most significant, day-to-day needs of people with disabilities. The issues faced by people with disabilities are generally around adequate housing, access to fair service for medical treatment, and social issues such as participating in the community. To this end, a failure to consider economic, social and cultural needs seems to run counter to one of the stated desires of government in undertaking this Charter consultation process – addressing issues of inequality and disadvantage for the most marginalised groups. The Public Advocate recognises that recent government policy publications have been dedicated to these issues (*A Fairer Victoria; Challenges in Addressing Disadvantage in Victoria*), and believes that the inclusion of economic, social and cultural rights within the Charter would strengthen these policies, assisting in the attainment of the objectives they announce. In addition, a Charter would reflect the level of commitment the government has to reaching these objectives.

In looking to serve the needs of future generations, a human rights framework should have a far-reaching vision that takes as broad a scope as possible for improving the lifestyles of Victorians. This is not to say that a Charter should be purely aspirational. The Public Advocate argues that improvement in rights

protection is possible within the government's current capacity, and planning for future growth could take place around the needs of Victorians and the commitments made to meet those needs. While difficulties with resource allocation has been nominated within the Committee's discussion paper as the major barrier to the inclusion of economic, social and cultural rights, other countries have overcome such difficulties in implementing similar initiatives.

For example, the *South African Bill of Rights* (1996) stipulates certain economic, social and cultural rights "which the state, through reasonable measures, must make progressively available and accessible." In Ireland, a "National Anti-Poverty Strategy" has been adopted that includes reforms to planning procedures with greater focus on inter-departmental approaches, "poverty proofing" policies, and commitment to increase resources to disadvantaged groups within specified time frames. Despite very little change in national economic indicators, Ireland has already had success in reducing rates of consistent poverty, "down from 9-15% in 1994 to 7 to 10% in 1997," and by 2001, consistent poverty had been reduced to 6-8% of the population (NAPS 2001). This illustrates what is possible when priorities of resource allocation change. Victoria experiences relative advantage compared to so many states worldwide, and our state is fortunate to have the option of reassessing state priorities around resource distribution. Provision for the progressive realisation of economic, social and cultural rights is a possibility and out of respect for the most disadvantaged Victorians, deserves serious consideration.

Omitting economic, social and cultural rights creates the possibility that in the minds of the general public, rights will be regarded as limited to those enshrined within the Charter, rather than the whole range covered by international covenants and declarations to which Australia is party. The education process that must accompany the introduction of a charter would be hindered by this omission.

RECOMMENDATION 4: The Public Advocate argues for the inclusion of economic, social and cultural rights in a human rights charter. A human rights framework should have a far-reaching vision that takes as broad a scope as possible for improving the lifestyles of Victorians. The Public Advocate argues that improvement in rights protection is possible within the government's

current capacity, and planning for future growth could take place around the needs of Victorians and the commitments made to meet those needs.

2.3. What needs to be included in a Victorian Charter of Human Rights

The Public Advocate stresses that as well as outlining the rights to be protected and promoted, a charter of human rights must set the parameters for the restriction or denial of rights. In keeping with the United Nations' Declaration on the Rights of Mentally Retarded Persons (1971, para.7) and the Declaration of the Rights of Disabled Persons (1975, para.4), "the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse." There are safeguards currently in place towards this end, enacted through the *Guardianship and Administration Act* (1986) and the *Mental Health Act* (1986). With this legislation, the lawful restriction of rights can occur by way of an appointment of a guardian and/or administrator, or involuntary admission to treatment of a person with mental illness. Enshrining the principles behind the restriction of human rights within a charter will add another level of accountability to the procedural processes of current safeguards. The safeguards enshrined within the Charter must be founded on procedural fairness, including the natural rights to be heard; to have representation; to have expert comment inform one's case; to know what allegations have been made; and to know the implications of providing information. Tribunals must be obliged to be fully informed about a person's disability and life circumstances before making decisions.

The charter should also contain positive obligations on public authorities to promote compliance with human rights, so that in time, "respect for human rights is at the core of their day-to-day work" (Home Office Human Rights Task Force 2000, 16). In this way, public authorities must not focus solely on negative risk assessment, but also the "positive securing of human rights" (Butler 2005, 72). The Public Advocate believes that for the purposes of the charter, the definition of 'public authority' must include private organisations contracted by government to provide services. Without this broad definition, as Butler explains, "users of public services provided by the private sector may not enjoy proper human rights protection and... whether they are entitled to it or not [would depend] on the status of the provider of the service" (2005, 72).

The Public Advocate supports the inclusion of a broad range of rights and freedoms related to the promotion and protection of civic, political, economic, social and cultural life within a Victorian Charter of Human Rights. The following discussion provides a list of rights that apply to some of the important issues relating to the dignity

of people with disabilities. They also serve to demonstrate the importance of education within the community about what is meant by universality of rights and equality of all. The examples have been singled out to illustrate the inadequacy of current measures for protection of the rights of people with disabilities. However, as all rights apply to people with disabilities, this list is not exhaustive.

RECOMMENDATION 5: The Public Advocate supports the inclusion of a broad range of rights and freedoms related to the promotion and protection of civic, political, economic, social and cultural life within a Victorian Charter of Human Rights. The Public Advocate stresses that as well as outlining the rights to be protected and promoted, a charter of human rights must set the parameters for the restriction or denial of rights. The charter should also contain positive obligations on public authorities to promote compliance with human rights.

2.3.1. The right to equality – prohibition of discrimination

Within a Victorian Charter of Human Rights specific reference should be made to prohibit discrimination against people with disabilities. Article 14, Prohibition of Discrimination, in the HRA (UK) does not specifically mention people with disabilities, but this article has been useful for challenges raised due to its reference to ‘consideration of material differences’. While in Victoria legislation such as the *Equal Opportunity Act (1995)* (EOA) also works to prohibit discrimination, in recognition that the rights of people with disabilities are not separate to human rights, this prohibitive clause must also be included within a charter of human rights. The following arguments made in support of the inclusion of other particular rights and freedoms all work to support the inclusion of the right to equality.

2.3.2. Freedom of movement

The Public Advocate believes that for people with disabilities, there are two issues encompassed by this right. The first relates to the traditional context of the right, which refers to arbitrary detention and is relevant today as it relates to civil detention, and the second relates to accessibility.

The Public Advocate has been drawing attention to the issue of civil detention for a number of years. There is concern that liberties have been removed from people with disabilities who are civilly detained without adherence to the proper process. The Public Advocate is aware that the Victorian Government, within the context of the review of disability legislation, is taking steps to re-evaluate this practice, and welcomes this progress. A charter of human rights would provide another level of protection for people who are vulnerable to the removal of their freedom of movement through civil detention.

While the traditional definition of freedom of movement relates to arbitrary detention, a broader meaning is applicable for people with mobility impairments, for whom accessibility of the built environment facilitates the possibility to exercise many other rights. Provisions for the attainment of freedom of movement encompass accessibility of the built environment, outdoor environments, and adequate provision of transport (UNCRPD draft 2005, unnumbered). As one young man with Down Syndrome, Mitchell Levitz, has stated, “I use public transportation, and I don’t drive... Without access to public transportation, people like me are limited in their ability to be independent” (Levitz 2003, 454). Fair access to transport, in respect of cost, availability of services and physical accessibility must be available to people with disabilities. For many people with disabilities, and many other Victorians in regional centres, this represents the means to participate. Without transport, even the simplest activity in the community may be impossible, or extremely hazardous at best.

The isolation of the Rosebud supported residential houses in the Southern region means that the sharing of a vehicle limits spontaneous activities and disadvantages the residents. The four kilometre distance from the shopping centre over an unmade footpath means that walking for residents with mobility limitations is not an option and also presents a safety hazard.

—*Community Visitors 2004, p.13.*

There is evidence that changes to government policy around multi-purpose taxi subsidies have curtailed the capacity for people with disabilities to participate in community life. Because a strict medical model of disability provides the framework for eligibility criteria, some people with disabilities who do not have the capacity to access public transport have been excluded from the scheme. For people with disabilities who

rely on taxi travel yet do not qualify for a subsidy, this has a number of implications. It may create an economic disincentive to seek work. Those who do qualify may not use their subsidy when accessing taxis to attend recreational activities and shopping, which severely limits other forms of community participation. In a similar way, the automation of the public transport system has created additional difficulties for tram and train users, as Sue, a public transport user with a disability explains: “Buying a... ticket on a tram is very difficult. You’ve got to try to hold on to the tram handle, put the money in the machine, while you’re trying to keep your balance on a swaying tram. And the validators at both railways and on trams are difficult for people with poor motor coordination to do” (Quibell 2004, 52).

It is not possible to participate with a sense of dignity in civic, political, social, economic and cultural life if adequate access to these realms is not available. This is true of people with disabilities as much as other Victorians without independent transport means, particularly in regional locations. It is encouraging to read that these issues are being considered in the context of Victorian government social policy (DPC, 2005, 9). The Australian delegation to the United Nations Convention on the Rights of People with A Disability is researching the article on accessibility to be included in the international convention— implementing their suggestions will help reduce barriers to participation for people with disabilities.

2.3.3. The right to information

Accessibility of communication, information and services is another fundamental requirement for enabling people with disabilities to exercise their rights. There is a difficulty in outlining in detail the myriad possibilities for communication requirements of people with disabilities. These are issues that are not particular to people with disabilities, and relate to a range of Victorians with diverse linguistic and literacy needs. To this end, explicit provision should be made within the Charter to provide for consideration of these differences. As Levitz (2003, 455) argues: “to be responsible and make good choices, we need information that is written or explained to us in a way that we can understand so that we will be able to make the best decisions“. The recent proposal around the *Children and Young Persons’ Act* (1989), which supports the abolition of the caution given to parents prior to questioning by protective services workers, would represent a hindrance to the level of procedural fairness afforded a

parent with a cognitive disability. Without specific reference being made to the possible removal of a child, some parents may not have the capacity to determine the implications of an investigation of that nature.

2.3.4. The right to adequate housing

The right to adequate housing is considered a social right. In the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), this right is listed in article 11: “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”

The Public Advocate believes that the provision of adequate housing can greatly assist people with disabilities to live with more autonomy and enjoy full expression of other rights. The following report from a Community Visitor illustrates this point:

I saw in one house ex-Kew residents have moved into, something I've never seen before: a pile of picture books on the shelf. There are separate living areas – a TV in one and music in the other – so that if someone's listening to music, the others know they can go somewhere else and watch TV. I asked the supervisor (also ex-Kew) whether she'd seen any change in the residents since they'd moved in. She said they were much more interactive with staff, more independent, and assertive about what they want or didn't want. She also said they're much more relaxed in the sense of knowing they can have private space in their own rooms. As for being 'isolated' in the community: there are a couple of neighbours who regularly come over for coffee. (Community Visitors 2004, 9.)

Unfortunately there are still many people with disabilities living in inadequate housing. For example, “in the Hume Region, one woman has been living in a respite house for four years as there is no suitable home for her. At times she is required to share her bedroom. In the Barwon-South Western Region, two long-term residents are required to move out at weekends when respite users stay in their rooms” (Community Visitors 2004, 8). The rights of these residents to autonomy and privacy are being breached.

For many people with disabilities, finding appropriate housing is only one aspect of achieving adequate living conditions. An additional consideration is access to appropriate health care within the residential setting. Community Visitors (2004, 16) report that urgent attention is required to overcome the “acute shortage of appropriate supported accommodation options for people with complex care and support needs.” The majority of residents at pension-level supported residential services (SRSs) have a mental illness, a brain injury or multiple disabilities, and require additional support. Unfortunately, Community Visitors (2004, 16) have found that “very few pension-level SRSs are able to provide the supportive environment required to assist in the full recovery/ rehabilitation or support of residents who have a mental illness.” Enshrining the right to adequate housing within a charter of human rights would have far reaching consequences, improving the life of so many Victorians and enhancing their capacity to participate fully in their communities.

2.3.5. The right to autonomy

The fact that we might be unable to make some decisions without help is no reason to exclude us from making any decisions at all... I know people with intellectual disabilities who have never been asked to make choices. They are just told what to do. Indeed, some people have never been informed that they have the same rights to make choices as everyone else. It is our responsibility to ensure that people with disabilities have the right to self-determination— that is, having control of our own lives.

– Mitchell Levitz, self-advocate with Down Syndrome (2003, 459).

Historically many adults with disabilities have lived within the confines of institutions, which operated with rigid rules and routines and left little room for autonomous decision-making. Deinstitutionalisation, together with increased community awareness of the rights of people with disabilities, has created more possibilities for people with disabilities to enjoy their right to autonomy. In addition, deinstitutionalisation has engendered better protection of rights to privacy, and improved sense of dignity (Quibell 2005, 86). More recently, the renewed emphasis on person-centred planning for assisting and providing services to people with disabilities has further promoted the right to autonomy. The principles of a person-centred approach are best realised

when residents and program participants have ample opportunities to make choices and be self-determining as far as is possible.

An older resident moved out of the Sandhurst Centre during the year. Now she has a beautifully decorated bedroom, can walk into town, go shopping or to the movies, and with great excitement, was visited by a long lost family member after the move... The overwhelming majority of Sandhurst Centre residents would benefit from living in supported community-based housing and further community inclusion.

–*Community Visitors 2004, 7.*

Despite these vast improvements in the lives of some, the right to autonomy remains unrealised for many people with disabilities who live in shared supported accommodation (SSAs) and other residences operated by service organisations. The right to choose the particulars of one's life is frequently denied people in these supported settings. This has been confirmed consistently in the reports by Community Visitors to Parliament. For example, "there are still 17 shared bedrooms in permanent accommodation in the Northern Region, where several residents have clearly expressed a desire for their own room" (Community Visitors 2004, 9). Furthermore, with the provisions of the RTA discussed earlier, "residents of [SSAs] are able to be moved from their home, with little or no consultation with them, and no clear mechanism by which the resident can voice their opinion, desire or needs in the decision making process. Residents should participate in any decisions relating to their home" (OPA 2003a, 9). The Public Advocate acknowledges that this issue is linked to the availability of resources, and welcomes the Government's commitment to redeveloping the remaining institutionalised residential settings in Victoria.

In addition to resource allocation, however, there is concern that risk management and duty-of-care guidelines are causing undue limitation on the autonomy of some residents. The Public Advocate recognises that duty-of-care must be applied, however, all residents should be accorded maximum choice and freedom from unnecessary restrictions in their living. In light of the findings in the *East Sussex* case (Lawson 2005, 147-148), risk management policies must be reviewed in relation to how best to balance the conflicting rights of service providers and people with disabilities.

CASE STUDY

Bill is a 45 year old intellectually disabled man who lives at a SSA. He choked on his dinner and this caused him to have a heart attack. He was rushed to hospital with his carers. The hospital was keen for his carer to sign a Not For Resuscitation (NFR) certificate, despite the fact that the carer had no authority to sign the document. The treating team discussed with the carer about whether they should be offering treatment, given quality of life issues. It appears that the judgement had been made that because this person had an intellectual disability then he had a lesser quality of life than someone without a disability. When the carer asked what type of treatment would be offered to Bill if he was not disabled, and whether they would have been asked for an NFR certificate to be signed, the doctor advised that they would be offering treatment if Bill did not have a disability and would not want the NFR to be signed.

Bill required an intensive care bed and one was not available at the hospital. The usual course for matters such as this is for the treating doctor to negotiate an ICU bed in another hospital. The doctor asked the carer to negotiate with the other hospital for an ICU bed as it appears that the doctor could not think of why the bed should be offered to a person with an intellectual disability. *Bill was transferred to an ICU bed in another hospital and made a very good recovery. He is back home at the SSA.*

For people with disabilities, the right to autonomy is often challenged in relation to medical treatment. The Public Advocate may be appointed as a substitute decision-maker when a person with a disability is unable to provide informed consent to medical treatment; the Public Advocate acts so that decisions are made in accordance with the person's best interests and known preferences. This role frequently involves advocacy to ensure equality of treatment is accorded a patient who has a disability. Numerous examples can be provided where treatment has been withheld from patients or been deemed unnecessary because the patient has a disability. Often decisions made by medical staff around the futility of treatment for a person with a disability, which results in a decision either to not continue or not commence life sustaining treatment— such as certificate of 'Not for Resuscitation'— is “based, at least in part, on unfounded assumptions about the reduced value of life to people with severe impairments” (Lawson 2005, 142). As human rights principles are aligned with

the social model of disability, a charter may reinforce that there is no place for such assumptions when potentially life-changing decisions are being made.

2.3.6.The right to vote

For citizens to exercise political and civil rights, it is essential that they are able to exercise the right to vote. The Public Advocate has been represented at a number of forums organised as part of Victoria's human rights consultation process, and commends the many organisations and individuals who expressed commitment to reporting to the Consultation Committee on the barriers for people with disabilities when exercising the right to vote. With the understanding that the need for change to remove these barriers will be addressed in depth by other interested groups, the Public Advocate will provide less detailed discussion of this issue but supports the inclusion of the right to vote within Victoria's Human Rights Charter.

There are two main concerns around the ability of people with disabilities to exercise their right to vote. Firstly, people with disabilities are not always aware that they have the right to vote. The Public Advocate believes the education process that must accompany a charter of human rights would raise the awareness of people with disabilities about their entitlement to vote, and obligation to enrol. Secondly, people with disabilities have limited accessibility to the voting procedures. While the Electoral Commission has established alternative procedures, such as postal votes, that go some way to enabling people with disabilities to be involved in elections, there is concern that the current system does not always allow the right to secret ballot, for example, by people with vision impairments. Inaccessibility of voting buildings is also of concern, but the Public Advocate recognises that this has been circumvented to some extent by the postal voting system. A charter of human rights would raise the awareness of all Victorians, including people with disabilities, about the obligation and right to vote.

2.3.7.The right to privacy and family life

Breaches of the right to privacy and family life have been outlined already within this report in both Victorian and international contexts, particularly in relation to housing. The examples of privacy rights-breaches include: adults sharing bedrooms in respite houses; residents being required to move out of their homes to make room for

weekend-respite users; bans on manual lifting that curb the capacity for community participation; and inappropriate housing for a large family, including one person who uses a wheelchair. Whether living independently, with family or within SSAs, many people with disabilities require support in the home and community on a daily basis. To this end, people with disabilities are particularly vulnerable to having the right to privacy breached; ensuring its protection is essential for respecting the dignity of a person with a disability.

The right to family life has often been denied parents with a disability. For example, in the general population the proportion of adults with intellectual disabilities is less than one per cent, yet for 2000/2001, the percentage of cases at investigation in the child protection system involving parents with intellectual disabilities was 2.8% (DHS 2001, 19). While generally in these cases an array of risk factors is being investigated, the Public Advocate cautions against assumptions that a cognitive disability necessarily renders one incapable of parenting. Because it is underpinned by the recognition that information for all aspects of life must be made accessible to people with disabilities, the Public Advocate welcomes the implementation of the *Healthy Start* program across Australia, which aims to give learning support to the families of the “40,000 Australian children under five [with]... a parent with learning difficulties” (Victorian Parenting Centre 2005). A charter of human rights would help to assert the right to privacy and family life for people with disabilities, and ensure that due consideration is given to all factors, including access of information, when decisions are being made about whether to remove children from their families.

2.3.8 The right to a fair trial

In the context of human rights and people who have a disability, the concept of a fair trial has particular significance when the trial involves:

- The removal of people’s rights pursuant to the *Guardianship and Administration Act 1986*, or
- Being made subject to an involuntary treatment order pursuant to the *Mental Health Act 1986*, or
- The use of restraint and seclusion pursuant to the *Intellectually Disabled Persons’ Services Act 1986*.

The Public Advocate expects that if an individual's rights are to be removed, it will only occur when the correct legal process is followed. The trial process must ensure the following:

- due process and natural justice for the person the subject of the application, involuntary treatment order or restraint and seclusion;
- an inquisitorial process where the adjudicators have available to them all the information required to make a decision in the best interests of the person; and
- where necessary, any interventions for protection and care are the least restrictive of the person's autonomy as is reasonable in the circumstances.

The processes for removal of rights or denial of liberty are already enacted in the aforementioned Victoria legislation. However, the Public Advocate hopes that a charter of human rights would emphasise the responsibility to respect the dignity of those detained by adhering to the requirements of these processes.

2.4 Summary of Recommendations for section 2

3. The Public Advocate supports the proposal for pre-enactment scrutiny that encourages a 'best practice' approach to the planning and development of legislative policy. Every effort should be made to remove, or at least reduce, features of legislation that create further disadvantage for people with disabilities or adversely affect their human rights.
4. The Public Advocate argues for the inclusion of economic, social and cultural rights in a human rights charter. A human rights framework should have a far-reaching vision that takes as broad a scope as possible for improving the lifestyles of Victorians. Improvement in rights protection is possible within the government's current capacity, and planning for future growth could take place around the needs of Victorians and the commitments made to meet those needs.
5. A charter of human rights must set the parameters for the restriction or denial of rights. The charter should also contain positive obligations on public authorities to promote compliance with human rights.

3. Strategies to Accompany a Human Rights Charter

The Public Advocate strongly advises that a Human Rights Charter will have little capacity to create change without the establishment of instruments to enhance its effectiveness. Of particular importance are the processes adopted to foster a culture of respect for human rights, which as Butler explains: “has a moral rather than legal basis” (2005, 75). As discussed in section 1.1, this should be one of the major objectives for Victoria’s enactment of a charter of human rights. To create a culture of respect for human rights, the establishment of a human rights commission, ongoing education on human rights and adequate advocacy support are considered to be three essential requirements. In addition, the Public Advocate recommends that a Human Rights Action Plan be determined. This will provide the framework that enables government to lead by example in respecting a human rights culture.

RECOMMENDATION 6: The strategies used to support the introduction of a charter must aim to promote respect for a culture of human rights. It is essential to establish:

- **a Human Rights Commission;**
- **ongoing education on human rights;**
- **adequate advocacy support; and**
- **a Human Rights Action Plan.**

STEPS TOWARDS ACHIEVING A HUMAN RIGHTS CULTURE

A fully realised human rights culture would mean that:

- The vulnerable would be better protected from violations of their human rights;
- Government would operate within a human rights framework promoting human rights standards;
- Public authorities would institutionalise human rights thinking and treat people with fairness and respect thus safeguarding their dignity;
- In wider civil society, human rights standards would be popularly accepted as the principles by which we all live and treat each other and by which conflicts can be resolved; and
- People would recognise and value both their own rights and the rights of others and would be genuinely tolerant of difference.

–Butler 2005, 69.

3.1 A Culture of Respect for Human Rights

Evidence from the UK suggests that without the concerted development of a culture of human rights, even with a charter in place many vulnerable people will be left open to abuses of their rights (Watson 2002, 1). Furthermore, without the promotion of the principles that underpin a charter of human rights, as Watson reports, “the vicious cycle of unresponsive public services which lead to legal challenges cannot be broken” (2002, 2). To avoid the outcome of a more litigious society and draw attention instead to the social and moral aspects of a charter, the Public Advocate believes that human rights principles must be promoted through a variety of means that engender respect for a culture of human rights.

The Public Advocate believes that resources must be dedicated to in-depth community engagement about the benefits of having a charter. Participation in the development of a charter will be the best way to inform people about human rights, as this will help citizens to internalise the principles of human rights (Butler 2005, 76). At the close of the deliberative poll held in the ACT prior to the enactment of its human rights legislation, human rights’ awareness increased in all participants, by between 5 and 50 per cent (*The ACT Deliberates* 2002). In contrast, in the UK, “there was little public consultation before the HRA was passed... As a consequence, outside a small group of enthusiasts, there is little understanding of the potential that the HRA could contribute to achieving a culture of respect for human rights” (Butler 2005, 67).

While the Public Advocate commends the Human Rights Consultation Committee for the level of community engagement achieved since the Government’s *Statement of Intent* was released, it is disappointing the Committee was given such a short timeframe in which to make its report. As this has limited the scope of community consultation, the Public Advocate believes that if a charter is to be enacted, further community engagement should be undertaken. The greater the number of Victorians who participate in the charter-building process, the more likely it is that respect for a culture of human rights will develop. In addition, If Victorians participate in the consultation on a charter of human rights, they will be exercising their right to self-determination, and participating fully in public affairs and policy development (*ICESCR*, art.1, art 2(3)). This involvement should be cultivated because as Butler explains, “people will not be convinced of the value of human rights because they are told to be but rather because they see rights in action (2005, 76).” Relying on instructive, non-interactive publicity campaigns will not be a sufficient means of

educating the public and engendering a new culture— Victorians must be engaged to participate.

RECOMMENDATION 7: Further community engagement should be undertaken. Resources must be dedicated to in-depth community consultation and awareness-raising about the benefits of having a charter.

3.2 A Human Rights Commission

The Public Advocate believes an independent Victorian Human Rights Commission should be established. New Zealand, South Africa, Canada and the ACT have all created human rights commissions. The failure to establish a human rights commission at the time of enacting the HRA (UK) hindered the level of awareness about human rights outside the legal field (Watson 2002, 2). A Victorian Human Rights Commission should have responsibility for monitoring the protection and promotion of human rights. In relation to the protection of rights, it should be given the power to conduct inquiries into matters of public policy regarding questions of human rights. This power should extend to the investigation of systemic issues that relate to individual incidents of rights breaches with which the Commission is involved. Similar powers are afforded the Canadian Commission within the Proactive Initiatives Program, which aims “to look into systemic issues that have an impact on a group of people or on the overall human rights system and to propose action” (Proactive Initiatives 2005).

In relation to the promotion of rights, the role of the Commission should be to ensure the positive obligations of Government and public authorities are being met, and to monitor the promotion of human rights undertaken by these bodies. As Butler argues, the Commission’s “function should not be to assume anyone else’s responsibilities to promote and protect human rights but to check that they are being met sufficiently” (2005, 71). With these duties, a Human Rights Commission would assist in promoting widespread respect for a culture of human rights, but Government and public authorities would still be charged with the responsibility of leading the protection and promotion of human rights.

In keeping with the promotion of the universality of rights, the Commission should be a single body representing human rights protection, rather than being

segregated for the protection of separate interest groups, such as a Disability Commission. One benefit of this unified approach would be that “for the public at large, fairness and respect for the dignity of each individual will be a more powerful message than a disjointed promotion of what may appear sectional interests” (Spencer 2005, 41). The Public Advocate expects that the issues of people with disabilities will be given adequate attention without a separate disability commission. If all people are well informed about their rights, the need for specialist commissioners will be greatly reduced. In this way, effective training and education programs will be essential for the success of promoting the universality of rights. The Public Advocate has a significant role in the promotion and protection of the rights of people with disabilities and aims to maintain a role of leadership in this area.

3.3 Ongoing Education

The Public Advocate believes the most effective method of educating Victorians about human rights is to encourage individuals to be actively engaged in the process of establishing a charter. However, to support the enactment of a charter specific education programs on human rights must also be established. If a Victorian Human Rights Charter is to bring about better protection of the rights of people with disabilities, they must be well informed about the existence and relevance of the charter. The Committee could use the opportunity of further community consultation to ask people with disabilities, and organisations for people with disabilities, how best to structure and deliver education and training about their rights. Consultation on the delivery of training is particularly important in light of reports from the UK, in which it has been found that a major barrier for people with disabilities in addressing rights-breaches is “a fear of repercussions” when rights are breached by providers of vital services (Lawson 2005, 152). To minimise this outcome, education campaigns for people with disabilities should be organised collaboratively between advocacy agencies and service providers. The Human Rights Commission would provide oversight of this process to ensure all parties are meeting their obligations.

A significant aim of education about human rights should be a reduction in the incidence of rights-breaches. Education and training campaigns must be conducted for public servants, judges, police and community organisations. In the United Kingdom, many service providers were found to have a defensive approach to human rights (Parker 2005, 169; Lawson 2005 152-3). Victoria can learn from this response

by ensuring comprehensive education within health, public and community services at all levels, and establishing clear guidelines for good practice. To this end, in conjunction with a charter of human rights, strategies must be implemented to make rights-protection meaningful at the level of practice.

3.4 Adequate advocacy support

To assist Victorians to assert their rights, adequate advocacy support must be made available. For people with disabilities, and particularly people with cognitive disabilities, access to this support will be essential if their rights are to be enforced. Rather than establishing specialist human rights advocacy organisations, advocacy support should be made available through existing organisations such as Legal Aid, OPA and other existing advocacy agencies. Mainstreaming human rights advocacy in this way is consistent with the view that human rights should be part of Victorian culture.

RECOMMENDATION 9: A Human Rights Commission and advocacy agencies should have a generalist focus that reflects the universality of rights.

3.5 Human Rights Action Plan

The Public Advocate recommends that a Human Rights Action Plan should be implemented to accompany a charter of human rights. The strategies with which Government will build a culture of human rights should be outlined within this plan. As a starting point, the Public Advocate would argue that a Human Rights Action Plan should include:

- A statement of responsibility for meeting positive obligations;
- Targets, measurement tools and indicators for improvements in human rights protection;
- Plans for collaboration across departments as part of 'best practice' policy development;
- Direction for the appointment of Human Rights Officers within units or departments;
- Standards for human rights education within the public service.

3.6 Monitoring the effectiveness of rights promotion and protection

The Public Advocate expects that within the charter, review procedures will be set.

The reviews should:

- Occur one, five and ten years after the enactment of the charter.
- Seek to evaluate the efficacy of the remedies being ordered, and
- Determine whether additional rights need to be included.

This will be particularly significant if the model enacted resembles that stated by Government prior to consultation to be its preference, which does not include economic, social and cultural rights.

RECOMMENDATION 10: Procedures and timeframes for monitoring the Charter's effectiveness must be established within the Charter.

3.7 Summary of recommendations for Section 3

6. The strategies used to support the introduction of a charter must aim to promote respect for a culture of human rights.
7. Further community consultation should be undertaken. Resources must be dedicated to in-depth community engagement about the benefits of having a charter.
8. To support the Charter, it is essential to establish:
 - A Human Rights Commission,
 - Ongoing education on human rights,
 - Adequate advocacy support, and
 - A Human Rights Action Plan.
9. A Human Rights Commission should have a generalist focus that reflects the universality of rights.
10. Procedures and timeframes for monitoring the Charter's effectiveness must be established within the Charter.

Conclusion

The enactment of a Charter of Human Rights would benefit all Victorians. Emphasising the inherent dignity of all, a charter and its accompanying strategies would engender a sense of Victorian community founded in our common humanity. A rights-based culture would encourage each Victorian to realise his or her full potential, and emphasise the responsibility to respect others who strive to do the same. The Public Advocate has a strong belief that the rights of people with disabilities will be better protected when the universality of rights is promoted within the context of a charter, and supports the enactment of a Victorian Charter of Human Rights.

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