



Office of the Public Advocate

Submission to the Review of the Victorian *Charter of Human Rights and Responsibilities Act (2006)*

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Contact: John Chesterman
Manager, Policy and Education
Office of the Public Advocate

Written by:
Liz Dearn
Policy and Research Officer

With input from:
Damien Norris
Phil Grano
Claire McNamara
Rebecca McParland



Introduction

The Office of the Public Advocate (OPA) has considered the terms of reference for the Inquiry into the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) and welcomes the opportunity to comment.

The scope of OPA's work is defined by the *Guardianship and Administration Act 1986* (the Guardianship Act). OPA provides advocacy, guardianship and investigation services to people with a decision-making disability. OPA coordinates the Community Guardianship Program and the Private Guardian Support Program as well as the Community Visitors Program and the Independent Third Person Program.

The Charter is embedded in OPA's organisational culture and the organisation uses the Charter in every aspect of its work. The Charter is used as a framework by OPA across program areas in performing our everyday functions and it informs the organisation's approach to systemic and legislative issues. There is a practical interaction between the Guardianship Act and the Charter in our approach to guardianship and advocacy.

An important issue which arises through guardianship and advocacy is the lack of a right to services, including health, housing and mental health services for people with disabilities. These rights are considered universal rights by the United Nations conventions to which Australia is a signatory. As such, OPA considers that the Victorian Charter should include all the human rights contained in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), including the right to self-determination.

OPA is in a unique position from which to consider the benefits of the Charter on the provision of services and performance of other functions by public authorities, particularly the impact on vulnerable people and people with disabilities and complex needs, who are some of the most marginalised and disenfranchised members of the community. It is our experience that the net effect of the Charter is to provide an additional layer of scrutiny to decisions by public authorities, cutting through complex bureaucratic problems and systems and in the process benefiting ordinary people and families.

While this submission to the Inquiry will focus on the tangible benefits of the Charter in its current form for ordinary people, there is one procedural issue that we would like to raise: OPA submits that the requirement should be repealed that the Attorney General and the Victorian Human Rights and Equal Opportunity Commission be notified where a party raises a question of law that involves the Charter in the County and Supreme Courts.

OPA was involved in one case where the appellant refrained from raising the Charter as she did not wish the costs of the case to balloon out further through the process of notification and possible joining of the Attorney General and the Commission. OPA was involved in another case where such notification was given, requiring significant responses from those bodies to review voluminous material, only for them to determine that involvement was not necessary. As such, OPA considers that the use of the Charter in interpretation should be regarded as usual and ordinary, not something that requires notification to the Attorney and the Commission.

OPA considers the following to be the key benefits of the Charter. These will be elaborated on in the submission.



Key benefit 1: Being able to explain a decision in the context of having considered relevant Charter rights as well as the principles of the *Guardianship and Administration Act 1986* demonstrates how consideration of the person's rights has been central to a guardianship decision.

Key Benefit 2: The additional layer of scrutiny of guardianship imposed by the Charter provides a means for balancing rights and restrictions.

Key benefit 3: The Charter provides a 'universal language' that facilitates:

- the securing of better outcomes for people with a disability
- collaboration towards a solution in complex cases.

Key benefit 4: There is evidence that the Charter is encouraging recognition of the importance of civil and political rights in Victoria.

Key benefit 5: The Charter highlights the need to ensure people with a disability receive recognition and equality before the law.

Key benefit 6: The Charter creates a climate wherein government authorities are more accountable for their decisions.

Key benefit 7: The Charter is a useful instrument for public authorities to use in attempting to solve service delivery concerns.

Key benefit 8: The Charter is a useful advocacy tool for people who are subject to restrictive orders.

1. Applying a Charter lens to guardianship

Key benefit 1: Being able to explain a decision in the context of having considered relevant Charter rights as well as the principles of the *Guardianship and Administration Act 1986* demonstrates how consideration of the person's rights has been central to a guardianship decision.

Many of the Charter issues that arise during the course of OPA's work are related to guardianship. Guardianship is the appointment of a substitute decision-maker for a person with a disability who is unable to make reasonable judgements in respect of matters relating to his or her personal circumstances. OPA would argue that guardianship is a benevolent and 'protective', often even liberating mechanism. However, in legal terms, it may involve a substantial limitation on one's human rights as the appointment of a substitute decision-maker limits the represented person's autonomous right to decision-making.

The exercise of authority by a guardian is couched within a rights framework and requires a guardian to 'act in the best interests of the represented person' (s28(1)) 'in consultation with the represented person, taking into account, as far as possible, the wishes of the represented person' (s28(2)(e)). The additional level of scrutiny provided by the Charter ensures that decisions made are congruent with a contemporary rights framework.

The Office of the Public Advocate (OPA), in exercising its statutory guardianship function, falls squarely within the scope of s 38 of the Charter. Section 38 states that it is:

'...unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.'



In order to give proper consideration to human rights guardians must identify which human rights may be affected by a substitute decision. Then, if a human right(s) is to be limited in some way, then the guardian must consider the nature of the right, the importance and purpose of the limitation, the extent and nature of the limitation, the relationship between the limitation and its purpose and whether any less restrictive means may be used to achieve the purpose the limitation seeks to achieve (section 7).

Case study 1 ‘Right to freedom of movement’

A magistrate at Broadmeadows Magistrate’s Court asked the guardian why he had not placed Mr Y in residential care. The advocate/guardian was able to explain his decision in the context of having considered relevant Charter rights as well as the principles of the *Guardianship and Administration Act 1986*. He submitted: ‘Your Honour, as Guardian Advocate for Mr Y, I am invested with authority to make decisions in the areas of accommodation and medical, dental and other health care. Any decision I make on behalf of Mr Y is guided by the principles in the *Guardianship and Administration Act 1986*, principally that the decision be the least restrictive, in Mr Y’s best interests, and as far as possible gives effect to Mr Y’s wishes. The decision is also informed by any potential impact on Mr Y’s rights, freedoms and liberties protected in the *Charter of Human Rights and Responsibilities Act 2006*. Your honour, Mr Y has expressed a desire to remain in the residence. I have undertaken an assessment of the relevant legislation and conducted a risk assessment and have decided to support Mr Y’s wish to remain in the current residence.’

2. Balancing rights

Key Benefit 2: The additional layer of scrutiny of guardianship imposed by the Charter provides a means for balancing rights and restrictions.

Guardianship decisions frequently limit some rights by prioritising others. For example, an accommodation decision that is enforced upon a person in order to secure that person’s safety will necessarily require an assessment of the tensions arising between a person’s right to privacy, freedom to choose where to live, freedom of expression, right to participate in community life, and protection from torture and cruel, inhuman or degrading treatment.

The analytical framework provided in section 7 ‘human rights – what they are and when they may be limited’, allows the guardian to engage in a more sophisticated assessment of a broad range of issues through a human rights lens and to carefully weigh the merits of any proposed limitation of a person’s human rights.

As guardianship decisions frequently involve matters of grave concern, often in highly charged and emotionally turbulent circumstances, the framework of section 7 provides additional weight, authority and transparency to the final decision.

Case study 2 ‘Right to freedom of association’

Vera lives in a nursing home. She is moderately wealthy. She executed a financial Enduring Power of Attorney (EPA) to one of her sons, Marvin. Marvin then used the EPA to buy himself a new car with Vera’s money. VCAT revoked the EPA. Whenever Marvin visited his mother he pestered her for money. Staff at the nursing home caught him threatening Vera who was scared. The Public Advocate was appointed Vera’s guardian to make decisions about access to Vera. Vera said that she wanted to see Marvin despite his threats. Vera has rights under the Charter such as freedom of association and protection of the family (sections 16 & 17). Vera also has a right under the Charter to liberty and security of the person (section 21).



The guardian made a decision to restrict Marvin's access to his mother so that he was only able to visit her when supervised by a third person or in a public area within the nursing home. In making her decision, the guardian had regard to the best interests of Vera as set out in section 28 of the Guardianship Act and also to the rights set out in the Charter. The purpose of placing restrictions on Vera's rights under the Charter to see Marvin is to protect Vera from Marvin's threats. The guardian considered that Marvin will not threaten his mother when there is a third person supervising them or when he will be seen by others at the nursing home. The limitation did not prevent Vera from seeing Marvin and so was proportionate to the purpose of the limitation (to protect Vera). The limitation is therefore reasonable and justified, accordingly it is lawful.

The decision of the guardian also affected Marvin's rights under section 16 and 17 of the Charter. The same reasoning applies to the lawfulness of the limitation applied to Vera. In restricting Marvin's access to Vera the guardian has promoted and protected Vera's right to security as well as her right to freedom of association, showing how the Guardianship Act and the Charter can work hand in hand.

3. Advocacy

Key benefit 3: The Charter provides a 'universal language' that facilitates:

- **the securing of better outcomes for people with a disability**
- **collaboration towards a solution in complex cases.**

Advocate/guardians are frequently engaged in attempts to secure services for persons with multiple and complex disabilities. For example, a person may have an alcohol and other drug problem, a mental illness and a physical disability. People with complex needs are often provided with services from service providers governed by different legislation and different mandates. For example, the *Mental Health Act 1986*, *Guardianship and Administration Act 1986* and the *Disability Act 2006* have differing definitions of, and approaches towards, people with a disability. These legislative and jurisdictional differences are often a source of conflict when attempting to secure outcomes for the person with a disability.

The work of guardians and advocates (and community volunteers) have benefited from being able to use the Charter to cut across jurisdictional conflicts and focus on the needs of the person. The 'universal language' of the Charter has allowed guardians and advocates to have the 'the same conversations, with the same service providers, on terms that have helped keep the issue – the needs of the person with a disability – in focus.' (Quote, OPA Guardian Advocate)

Case study 3 'Right to take part in public life'

A represented person (Mr X) had not been appropriately discharged from one area mental health service to another. This meant that Mr X was without mental health services and essential case management. Despite continued efforts by the guardian to amend the error it was not until Charter issues were informally raised with the mental health service that change occurred. The language employed by the guardian was:

"You are a public authority like OPA and we have obligations under the Charter to consider the potential impact of our decisions on the human rights of our clients. I am beginning to think that there are several Charter issues arising here. Have you considered whether or not the delay in discharging the client is adversely impacting upon Mr X's rights? To me the delay may impact on Mr X's right to take part in public life, right to the enjoyment of life, and protection from degrading treatment."



Case study 4 ‘Right to freedom of movement’

In an advocacy/guardianship case in November 2009, a man with an significant intellectual disability was kept in 23-hour prison lock up and subject to restraint. The man was found unfit to plead by a jury to charges that included intentionally causing serious injury and committing an indecent assault on a child under 16. He was held in the Melbourne Assessment Prison for four months, longer than the prison sentence that would normally be served for this offence.

The Public Advocate was asked to step in because the Department of Human Services was arguing that there was no suitable shared supported accommodation where he would not present a risk to other residents. The man’s guardian argued that he had been heavily medicated in prison and that he had regressed enormously and that there was a link between the lack of services he had received and his deterioration. The guardian said that to continue in the current situation was a neglect of his needs and a significant breach of his right to ‘freedom of movement’ (section 12) and ‘recognition and equality before the law’ (section 8).

As a result of collaboration between all parties involved, the man was granted a non-custodial community supervision order and was released into 24-hour care at a residential unit.

4. Evidence of a rights culture in Victoria

Key benefit 4: There is evidence that the Charter is encouraging a recognition of the importance of civil and political rights in Victoria.

OPA is often involved in cases where a decision is being made by a court or tribunal where a level of facilitation is needed for the person with a disability to be involved in the hearing or, at minimum, to understand the implications of any decisions being made.

Case study 5 ‘Right not to be subjected to medical treatment without full, free and informed consent’

Mr Z is a man with an intellectual disability detained within a residential treatment facility for compulsory treatment under Part 8 of the *Disability Act 2006* and by a supervision order under the *Serious Sexual Offenders (Detention and Supervision) Act 2009*. A hearing was held at VCAT for a review of his treatment plan.

The treatment plan included the use of chemical restraint for libido suppression. This has serious health implications. The man's right under section 10 to provide full, free and informed consent to medical treatment could be overridden by the Tribunal order. VCAT undertook steps to help the man to understand and participate in the treatment plan by requesting OPA to assist him. This is consistent with section 7 of the Charter, by helping the person in relation to the exercise of their rights even when a right may be limited according to a proper legal process.



5. Involvement of people with disabilities in hearings

Key benefit 5: The Charter highlights the need to ensure people with a disability receive recognition and equality before the law.

The Charter provides an additional avenue through which to argue for the involvement of individuals in hearings, whether that is through advocacy or some other type of representation.

Case study 6 ‘Right to recognition and equality before the law’

Mr P was set alight in his home by three young men in a violent assault in 2008. Mr P was an independent man who had lived his life with a disability but as a consequence of his injuries had to have a guardian and administrator appointed for him and was not able to return to his former independent life. Given the opportunity to make a statement at the Supreme Court hearing where the three perpetrators were being tried, Mr P chose not to articulate the impact of the crime, minimising the harm it had caused. Despite the initial hesitation of the Court, Mr P’s guardian was able to present a detailed Victim Impact Statement. OPA was ready to argue that the Court should accept the Victim Impact Statement from the guardian on the basis that to do so facilitated Mr P’s Charter right to ‘recognition and equality before the law’.

6. Transparency of decision-making

Key benefit 6: The Charter creates a climate in which government authorities are more accountable for their decisions.

OPA has made use of the Charter when providing a statement of reasons, which details the reasoning process behind a guardianship decision. The human rights framework provided by the Charter is useful in this context, enabling a thorough analysis of the human rights relevant to a decision. In addition, the language of the Charter is more accessible to the ‘every-day’ citizen than the language of the Guardianship Act.

By including a human rights dimension to a Statement of Reasons, OPA is able to explain the core issues that require resolution, clearly identify the relevant human rights and evaluate the competing interests in accounting for a decision.

7. Exchange of information between public authorities

Key benefit 7: The Charter is a useful instrument for public authorities to use in attempting to resolve service delivery concerns.

In May this year, OPA and the Disability Forensic Assessment and Treatment Service (DFATS) signed a protocol in relation to the sharing of information to ensure that residents’ rights are properly protected. Both the Public Advocate and DFATS are public authorities.

In developing the protocol, consideration was given to the rights of residents under the Charter, in particular section 12 ‘freedom of movement’, section 13 ‘privacy and reputation’, section 21 ‘right to liberty and security of person’ and section 24 ‘right to a fair hearing’.



8. Advocacy by Community Visitors

Key benefit 8: The Charter is a useful advocacy tool for people who are subject to restrictive orders.

Community Visitors visit facilities under the *Mental Health Act* 1986, the *Disability Act* 2006 and the *Health Services Act* 1988. They have a range of powers including the right to inspect premises, to see any resident, to make enquiries relating to the provision of services and to inspect any document relating to any resident. The Charter has given community visitors a helpful tool with which to advocate for and to safeguard the rights of patients.

Case study 7 'Right to recognition and equality before the law'

A patient in a mental health facility contacted the OPA advice service to request a visit from a Community Visitor. The patient had expressed concern about his involuntary detention in a highly restrictive environment and the adjournment of his Mental Health Review Board (MHRB) hearing. The patient's MHRB hearing, which is to be heard within 8 weeks of a person becoming an involuntary patient as prescribed by the *Mental Health Act* 1986, had been adjourned and the patient had lodged an appeal.

The patient's Legal Aid representative had advised that the hearing be adjourned to ensure a smooth transition from one unit to another. However, after three adjournments, on the basis that the patient's Charter right to recognition and equality before the law had been compromised, the issue was raised by the community visitor at a liaison meeting with the Area Mental Health Clinical Service. When the service reported that the service was unable to facilitate the MHRB hearings in alternative locations for people with high level needs, the issue was escalated to the Director of the Mental Health Clinical Services.

9. Recommendations

Regimes which impact on the human rights and freedoms of people with disabilities, such as guardianship and civil detention orders, have increasingly been required to ensure the protection of core human rights, and to be implemented in the least restrictive manner possible. The Charter provides an opportunity for balance and operates well as a tool, enabling good decisions to be made in situations where there are competing rights questions.

The Charter is also effective as an advocacy tool when utilised to cut through complex bureaucratic problems and obstacles, benefiting ordinary people with disabilities and their families.

In closing, OPA would like to make the following summary points and recommendations:

1. OPA recommends that the Charter be retained.
2. The introduction of accessible, affordable and effective remedies for breaches of human rights would be a valuable adjunct to the administrative remedies already in place via the Charter.
3. The Charter should include all the human rights contained in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), including the right to self-determination.
4. Section 35, which requires that the Attorney General and the Victorian Human Rights and Equal Opportunity Commission be notified of proceedings brought under the Charter, should be repealed.