Submission to the review of the Charter of Human Rights and Responsibilities Act 2006

Submission to Mr Michael Brett-Young, Independent Reviewer
www.charterreview.vic.gov.au

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1. **About the Office of the Public Advocate**

1.1. The Office of the Public Advocate (OPA) is a statutory office, independent of government and government services that works to protect and promote the rights, interests and dignity of people with disability.

1.2. OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments or mental illnesses. In the last financial year, 2013–14, OPA was involved in 1,519 guardianship matters, 362 investigations and 365 cases requiring advocacy.

1.3. Under the *Guardianship and Administration Act*, OPA is required to arrange, coordinate and promote informed public awareness and understanding through the dissemination of information about these topics.

1.4. The OPA Advice Service offers information and advice on a diverse range of topics affecting people with disability. The issues raised by people contacting OPA are often complex, requiring a high level of expertise. During 2013–14, the Advice Service handled 13,795 enquiries, which was a small decrease from the previous year. The contact patterns have been very consistent over the last few years. Most calls relate to guardianship and administration and enduring powers of attorney (25 per cent). The other significant category of calls relate to medical consent and healthcare treatment.

1.5. OPA coordinates a Community Education Program where staff address both professional and community audiences on a range of topics including the role of OPA, guardianship and administration, enduring powers of attorney and medical decision-making. Last year, the program delivered 180 presentations to a total audience of 7023 people. The largest audience group for presentations was health and community professionals. The remaining presentations were to general public audiences, tertiary students, and legal and justice services.¹

1.6. OPA is a public authority under the *Charter of Human Rights and Responsibilities Act 2006*.

**About this submission**

1.7. Advocacy on behalf of people with a cognitive impairment is fundamental to the work of OPA. This submission particularly focuses on human-rights promotion issues for Victorians having high support needs associated with a significant cognitive impairment.

1.8. OPA made a submission to the 2011 Review to which we refer.²

1.9. This OPA submission addresses the Terms of Reference for the 2015 8-year review of the *Charter of Human Rights and Responsibilities Act 2006*. 
2. Summary of recommendations

**RECOMMENDATION 1**
That the Victorian Parliament should provide more comprehensive human rights protection and promotion for Victorians with disability and mental ill health by expanding the rights covered by the Charter to better reflect the provisions of the UN Convention on the Rights of Persons with Disabilities.

**RECOMMENDATION 2**
The Victorian Government should negotiate with the Australian Government so that regulations are made under s.207(2) of the National Disability Insurance Scheme Act 2013 (Cth), to provide that the public authority obligations of the Charter come into effect whenever formal disability services are funded and provided in Victoria.

**Recommendation 3**
The Victorian government should promote the human rights culture fostered by the Charter through support for a well-conceived awareness-raising campaign that promotes the human rights of people with disability and mental ill health.

**RECOMMENDATION 4**
VCAT should be empowered to hear human rights arguments arising from the Charter.

**RECOMMENDATION 5**
The wording of section 7 should be simplified to make its operation clearer.

**RECOMMENDATION 6**
The review should seek the specific views of public authorities to determine the most appropriate form of establishing remediation processes for breaches of a person’s human rights.
3. OPA experience with the Charter.

3.1 Context
Since the 1980s, Victoria has increasingly implemented personalised and community-based services and treatment, consistent with human rights based approaches and the goal of inclusion in the mainstream of society. There has been an accelerating shift away from the de-individualised treatment of people with disability requiring significant assistance in daily activities. This shift in thinking and service approaches towards the advancement of human rights and inclusion is not yet fully completed.


OPA welcomed the introduction and operation of the Charter as it incorporates some fundamental rights and reinforces the understanding that people with disability are rights bearers in the same way as all other Victorians.

There has been an enduring tension in social and public policy responses to the rights, needs and interests of people with disability, identified in the pioneering policy development work done by the ‘Premier’s Committee’ in 1979. That committee identified the tension in public policy that existed between treating people with intellectual disability as if they were different, ‘a special, vulnerable group’, or as equals, ‘same as other people in their rights’.

The Charter operates in a still changing world where that question has been mostly, although not completely, settled. The Charter helps dispel the notion that the rights of people with disability can be treated as different, through its universal language approach. This helps ensure that Victoria continues to advance towards achieving the inclusive policies and services required by people with disability for a dignified and full life, articulated by the CRPD.

OPA notes the following obligations upon the Victorian Government arising from the CRPD that are of particular importance for implementing inclusive approaches for people with disability:

- promoting and protecting human rights in all programs and policies (Article 4)
- recognition as persons before the law (Article 12)
- providing better services by promoting staff training (Article 16)
- ensuring all services and facilities are effectively monitored by independent bodies to prevent all forms of violence, abuse and exploitation (Article 16)
- identifying, investigating and wherever possible prosecuting all instances of violence and abuse (Article 16)
- providing accommodation support without obliging people to live in a particular living arrangement and supporting the opportunity to choose one’s place of residence and living arrangements (Article 19)
- access to appropriate disability services and supports (Article 19)
- support services deliver full participation and social inclusion (Article 26)
- access to public housing programs (Article 28)
- social protection (Article 28)
- support for political and social participation (Article 29)
- collect relevant information to inform policy (Article 31)
- collect relevant information to address barriers (Article 31)
In Victoria, we can proudly point to many measures that have advanced many of these provisions of the CRPD. For example, the ‘independent monitoring authority’, provisions of Article 16 are met to an extent by OPA’s operation of the Community Visitors Program.

A key concern of OPA in making this submission is that very many people with disability, particularly those with higher support needs, continue to lead a precarious life. We use the term precarious to refer to the situation of people with disability where many of the following experiences are a large and ongoing part of the person’s life:

- being socially isolated, even excluded
- having most of your relationships with people paid to be with you
- being dependent on others for everyday assistance causing a power imbalance in your relationships
- actual or threatened violence, neglect or exploitation
- being brutalised and bullied
- pervasive discrimination and devaluation; being treated as a second-class citizen or not a full person; de-individualisation
- not being automatically accepted as a participant, and only being accepted if an adjustment is afforded
- difficulties of communication and being listened to
- having your capacity to make your own decisions and to be in charge of your life constantly questioned or disregarded
- having people speak for you or being treated as if you are invisible
- having people, sometimes including your parents or other loved ones, make substituted decisions for you without them putting your wishes and personal and social wellbeing first
- having been institutionalised in the past or currently
- special schooling and separation from your peers, even in a mainstream school
- it being assumed that you are asexual and child-like in your needs and wants
- it being assumed that you have no or little quality of life and that this is a good reason for ending your life
- being treated as a potential menace or dangerous
- being treated as the source of risk that must always be managed and controlled
- being treated as if you are a contagion or disease
- being responded to by some individuals as if you are either a ‘holy innocent’ or embodying the ‘devil’ or punishment.

If you are a girl or a woman with disability, you are even more at risk of being treated in these ways. Girls and women with disability are more likely to be portrayed as unattractive and asexual or being treated as hypersexual and uncontrollable. While violence against people with disability is a considerable problem with significant consequences, it is particularly a problem for girls and women with disability.

This historical exclusion and pervasive devaluation of people with disability or mental ill health, denying them their humanity and dignity, is being increasingly countered through measures such as the Charter. This dehumanising tendency towards the social devaluation of people with disability is persistent however and still has a real effect, particularly upon those people with disability who have higher support needs, communication difficulties, significant cognitive impairment, or continuing behaviours of concern. As noted above, girls and women with disability are even more affected by these tendencies than are men.

OPA also recognises that much more needs to be done to develop measures that are culturally sensitive and appropriate for people from diverse backgrounds. OPA understands that Aboriginal and Torres Strait Islander People with disability confront issues and are treated in ways that require additional and culturally appropriate responses. As well, the treatment of
people from culturally and linguistically diverse backgrounds also requires additional consideration.

We are very concerned about the social inclusion of people experiencing compounding disadvantage from the intersection of several aspects of their individual identity and background; for example, a woman with disability from an Aboriginal background.

While governments have closed institutions that held large numbers of people with intellectual disability or other cognitive disability over the past 30 years, there is the real concern that accompanying this is an increase in the incarceration rate of people with disability and mental ill health. For example, initial research into the prevalence of traumatic brain injury in Victoria’s prisons suggests it is very high, affecting somewhere around half of the prison population.¹⁰

OPA is very concerned about this issue of over representation of people with disability or mental ill health and believes that our state’s prisons should not be allowed to become the new institution for people with disability in an era of human rights. The reasons for the over representation of people with disability and mental illness in our prisons indicate inadequate support of people with disability or mental ill health.¹¹ This issue has been highlighted in the recently published Equal before the law report of the Australian Human Rights Commission.¹²

The consultation process of the Australian Human Rights Commission for this report found a number of serious deficiencies in the current situation, in part because of compounding issues including ‘erroneous assessments’ of the ‘legal competence of people with disabilities’¹³.

This situation is intolerable for a civilised society based on human rights and the rule of law. OPA supports the key recommendation of this report for an over-arching response to these issues. To date, the operation of the Charter has not yet been a sufficient prompt for tackling these fundamental human rights issues.

This context outlined above provides the focus for our submission.

3.2 Capacity and equality before the law

The CRPD contains a number of ‘dignity and equality’ provisions, which flow from Article 3(a):

Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons

The equal-treatment-before-the-law provisions of the Convention are particularly pertinent to the Charter:

Article 5 (1)
States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

Article 12
1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance
with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person’s circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person’s rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property…

Some individuals and organisations rely upon these provisions to argue that substituted decision-making is always illegitimate and must be entirely replaced by supported decision-making practices. This view was firmly stated with some authority by the UN Committee on the Rights of Persons with Disabilities in its recent report.  

The Charter contains the following provisions in s.8, Recognition and equality before the law:

(1) Every person has the right to recognition as a person before the law.  
(2) Every person has the right to enjoy his or her human rights without discrimination…

In exercising its statutory guardianship function, OPA must comply with s 38 of the Charter, which makes it:
‘…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.’

OPA’s position differs from some others on the role of substituted decision-making as a response to impaired legal capacity. OPA’s view is that substituted decision-making in appropriate circumstances is a valid and necessary adjunct for supporting and enabling the legal personhood of the person subject to guardianship or administration. It is OPA’s position that substituted decision-making performed as guardianship or administration, in accordance with the rule of law, including the operation of the Charter, is compliant with Article 12 of the CRPD. Under s.28 of the Guardianship and Administration Act, the guardian must act in the best interests of the person they are representing. To do this they must take account of a number of factors including the person’s wishes.

As discussed in our previous submission, the additional level of scrutiny provided by the Charter helps ensure that decisions made by guardians are congruent with a contemporary rights framework. The Supreme Court of Victoria has addressed this issue in Patrick’s Case. …

…where [it is] sought to justify limitation of a person’s human rights – the onus is on the party seeking to uphold the justification. …

If the inherent purposes of the [Guardianship and Administration Act] GAA can, despite safeguards, give rise to a culture of paternalism, the express object of the Charter is to promote a culture of justification…. The GAA is capable of being, and in law must be, administered compatibly with human rights. But the enactment of the Charter means that stronger regard must be had to the human rights implications of guardianship and administration orders and decisions than was previously the case.

The framework provided by s.7 obliges the guardian to take a sophisticated approach when weighing the merits of any proposed limitation of a person’s human rights. When acting to limit a right in some way, 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. Guardianship decisions often involve highly
contentious and grave matters in emotionally turbulent circumstances. The s.7 framework provides additional weight, authority and transparency to the final decision. The case study below briefly outlines a situation where this process was followed and a decision reviewed.

Case study 1

VCAT made a guardianship order for a nursing home resident because of differing views of the adult children about what was best for their mother, particularly in relation to contact with them. The guardian’s decision to restrict access for one of the daughters to overnight stays every weekend was objected to by family members. They argued their mother’s human rights had been breached. The decision was reviewed and the access arrangements were varied to enhance the mother’s right to freedom of association.
4. The human rights important to OPA

4.1 Indivisibility of human rights.
OPA has previously submitted that 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) are important, including the right to self-determination.

As stated in the Preamble to the UN Universal Declaration of Human Rights, a central purpose of reaffirming and upholding human rights is ‘to promote social progress and better standards of life in larger freedom’. The third point of the Preamble to the CRPD is the following statement.

*Reaffirming* the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination.

This affirmation states clearly the relationship different human rights enjoy with one another. Human rights are interdependent and indivisible. All the human rights stated in the Universal Declaration of Human Rights and since in International Covenants on Human Rights are important to OPA.

The framework provided by the CRPD is of particular importance to OPA for its emphasis on protecting, respecting and fulfilling the human rights of people with disability.

**RECOMMENDATION 1**

That the Victorian Parliament should provide more comprehensive human rights protection and promotion for Victorians with disability and mental ill health by expanding the rights covered by the Charter to better reflect the provisions of the UN Convention on the Rights of Persons with Disabilities.
5. The key benefits and challenges of the Charter

5.1 Advocacy for human rights and fairness

OPA has been able to use Charter provisions successfully in its advocacy for people with disability who are being treated unfairly and with insufficient regard for their human rights. OPA has found these arguments to be persuasive as they are lawful obligations for public authorities that are difficult to brush aside.

Jeffrey Chan and Karen Nankervis have argued that the CRPD provides ‘an additional layer of safeguards to contribute to clinical efficacy and effectiveness to guide clinicians and practitioners’. The Charter too provides this extra dimension to understanding service provision precepts, including the fundamental dignity and human rights of all people needing to access the service. This point has been made above at 3.2 of this submission in relation to OPA’s own guardianship practice. The case study below highlights how the Charter makes a practical difference for a woman with disability and her child who are being disadvantaged by an initial lack of appreciation for their human rights.

**Case Study 2**

OPA is providing advocacy for a mother of an infant child. A perinatal unit in a public hospital has denied her access to their specialist services on the basis of cognitive and parenting skills assessments. The unit could provide the mother and her child with a time-critical intervention that could significantly enhance the mother’s emotional and psychological relationship with her baby.

The OPA advocate is relying upon three separate arguments derived from Charter provisions, and the requirement that the hospital consider human rights when developing policies, making laws, delivering services and making decisions.

The advocate is questioning the hospital as to whether its decision to exclude the mother on disability grounds is consistent with s.8 that gives everyone the right to equal and effective protection against discrimination. The advocate is also referring to s.17 (families are entitled to protection) and s.24 (fair hearing) of the Charter.

The advocate is using these arguments in tandem with the s.10 best interests of the child principals in the Children Youth and Families Act 2005. It is expected that the hospital, as a public authority, will have to review its decision and provide the mother and child with the supports they need at this critical time.

5.2 National Disability Insurance Scheme and jurisdiction challenges

Australia is moving towards full implementation of the National Disability Insurance Scheme (NDIS) over the next few years. Full roll-out of the NDIS will occur in Victoria from July 2016. The NDIS transforms disability service responsibility in Australia, moving funding and other responsibilities from the Victorian Government and others states and territories to the Australian Government.

While the NDIS is a welcome reform, the transfer of disability service funding and oversight responsibility does raise some challenges, including those relating to the quality and safeguarding framework for disability support funded through the NDIS. Victoria has a well-developed framework of safeguards, including the Charter and its powers relating to public authorities. Victorian Government funded disability services, through their activities, have obligations under the Charter as public authorities.

While it is not clear whether the provisions of the Charter will continue to apply to people delivering services on behalf of the federal government, the current indications are that existing...
human rights protections will only apply if governments take action. A cornerstone of the NDIS is individualised approaches, including individual planning. The Australian Government produced legislative rules to operate in Victoria that refer to human rights and the CRPD without reference to the Charter.25

The related issue of Charter statements of compatibility raised by national uniform legislation schemes was addressed in the previous SARC review of the Charter. OPA refers to the discussion at page 95.26 OPA considers that these issues remain unresolved and are pertinent for the fundamental change to the disability service landscape wrought by implementation of the NDIS.

A key provision of the National Disability Insurance Scheme Act 2013 is s.207. It provides that:

(1) It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act
(2) The regulations may prescribe kinds of laws of States and Territories as examples of laws to which subsection (1) applies

Considering the key benefits of the Charter, OPA is not aware of any substantive impediment to the Charter operating concurrently with the NDIS. OPA recommends that the Victorian Government negotiate that regulations made under this provision of the NDIS Act prescribe that the public authority obligations of the Charter come into effect whenever formal disability services are funded and provided in Victoria.

**RECOMMENDATION 2**

The Victorian Government should negotiate with the Australian Government so that regulations are made under s.207(2) of the National Disability Insurance Scheme Act 2013 (Cth), to provide that the public authority obligations of the Charter come into effect whenever formal disability services are funded and provided in Victoria.
6. How the Victorian Government should promote and protect human rights

6.1 Public Education Campaign

OPA supports the conduct of a sustained awareness-raising campaign by government to promote the human rights of people with disability. There have been some sporadic past campaigns, commencing with the activities of more than 30 years ago for the International Day of Disabled Persons in 1981.

Fundraising by charitable organisations has not always promoted a positive image of disability. Particularly before the 1990s, there was considerable emphasis on pity as a motivating force for charitable giving. Through the advocacy of people with disability and their organisations, a lot of this negative imaging in popular media reporting and advertising has reduced, but not been eliminated. Some media outlets continue to use highly negative stereotypes to demonise people with disability requiring specific behavioural support. Government can be uncertain of how to best respond to these harmful, unethical and fear-inspiring practices and will not usually publicly challenge them. 27

While these negative campaigns do sometimes erupt, there are positive developments too. Anti-discrimination measures and connected public education measures around discriminatory practices have had an effect, but more needs to be done. Extensive public education measures linked to the Charter would be of benefit. Based unambiguously on human rights, such a campaign could avoid the pitfalls of other attempts.

Some other awareness raising efforts, although coming from a positive motivation, can reinforce a distorted view of the social relations at issue. This issue can be more easily seen in the employment context. Disability employment services trying to assist and place people with disability and mental ill health into mainstream employment have to do many marketing-like activities to find employment opportunities. They have to counter the ‘myths and misconceptions’ of the still prevalent social attitudes discussed at the beginning of this submission and the consequent illegal discrimination practiced by resistant employers. These marketing efforts often rely upon portraying people with disability and mental ill health as ‘deserving’, playing into negative historical stereotypes, rather than such people being entitled to access and equity based on their human rights and humanity. 28

Extensive demystification of disability and mental ill health is still required, which needs to be tied to human rights rather than health. This is a real human rights problem, not just a theoretical or activist concern, because people downplay the quality of life of people with disability based on ableist values, rather than the actual experience of life lived with disability. 29 It leads to a lot of unnecessary shame and despair. As Sheila McLean and Laura Williamson have pointed out; how the fact that people with disability report a high quality of life in research investigations is repeatedly represented as a paradox shows how deeply entrenched the negative valuation of disability is in our society. 30

For the long-term success of a human rights culture and protection, it is necessary to challenge the negative portrayal of disability. There needs to be a more sophisticated and shared understanding of the personal and social experience of disability, from the perspective of people with disability or mental ill health. This includes the understanding that their condition can be a big and defining part of them and their experience, without it defining or limiting everything about them as a person.
6.2 Simplifying and enhancing the Charter
The Charter can be simplified to make its provisions more accessible and practical. For example, as raised in our 2011 submission, s.35, which requires notification of proceedings brought under the Charter, should be repealed.

Another example of the way that the use of the Charter could be simplified concerns the competence of VCAT to deal with Charter related arguments, rather than reserve these for the Supreme Court. In OPA’s experience, VCAT members of the Guardianship List have always had to deal with considering and balancing human rights. They already hear matters with issues of the highest concern for human rights including involuntary sterilisation, special medical procedures and the appointment of substitute decisions makers. VCAT members could hear issues and decide on matters bearing on Charter rights in the first instance, or could be expected to do so with a modicum of training and professional development.

RECOMMENDATION 3
The Victorian government should promote the human rights culture fostered by the Charter through support for a well-conceived awareness-raising campaign that promotes the human rights of people with disability and mental ill health.

RECOMMENDATION 4
VCAT should be empowered to hear human rights arguments arising from the Charter.
7. Examples of effective ways to improve human rights outcomes in practice

8.1 On the operation of section 7

The Public Advocate may be appointed a person’s guardian and thereby have to make decisions that limit the represented person’s freedom of decision and action. As discussed above, the *Guardianship and Administration Act* 1986 sets out in various provisions how decisions are to be made in a person’s best interests.

In limiting a person’s rights, guardians must also consider section 7 of the Charter. OPA understands that section 7 is drawn from South Africa’s post-apartheid constitution. In that context, reference to a ‘free and democratic society based on human dignity, equality and freedom’ has real force by reason of the contrast with life under apartheid. It is less obvious what a guardian is to make of this provision in Victoria, when determining health care for a represented person, or placement of a person in an aged care facility. It is also not clear what this clause adds to the specific wording of the rights set out in sections 8 to 27.

Section 7(2)(a) requires that the decision-maker take into account ‘the nature of the right’ that is engaged by the postulated restriction. The decision maker must then form a view of what this is to mean in the often complex and highly conflicted situation to which they are responding, while also applying all the other statutory, professional and organisational considerations that apply in the situation.

In *Patrick’s* case, Bell J quotes approvingly Elias CJ of New Zealand in the case of *R v Hansen* that ‘the meaning of the right is to be ascertained from the “cardinal values” it embodies’. This suggests that public servants need to look behind the words of a right to tease out the cardinal values it might embody in the context of the situation they are dealing with. The further step required of the public servant then would be to apportion gravitas to the cardinal value identified in the correct measure. This gives rise to the difficulty that a breach of any right set out in the Charter must be considered grave, understanding the indivisibility and fundamental nature of human rights.

What this discussion is suggesting is that there is insufficient guidance for public servants to put into operation this clause of the Charter. As a public authority that is called upon to consider the Charter many times each day, OPA recommends that the wording in section 7 be simplified to facilitate its practical application.

**RECOMMENDATION 5**

The wording of section 7 should be simplified to make its operation clearer.
8. What should happen if a person’s human rights have been breached

9.1 Remedies for breaches of human rights

OPA supports accessible, affordable and effective remedies for breaches of human rights. This might be provided through VCAT, as suggested above and discussed further below.

9.2 Human rights complaints handling body

Amending the Charter to create a civil cause of action if a person’s human rights have been breached by a public authority requires consideration of what body would hear, conciliate or determine such matters.

Currently, the Administrative Law Act 1978 and the judicial review process of the Supreme Court regulate reviews of the decisions of the Public Advocate. These processes are rarely used. They are costly and not accessible without legal assistance.

OPA has instituted two internal processes to assist people with a grievance over a decision or action. These are a review process and a complaints process. The complainant may raise issues regarding human rights and the application of the Charter in pursuing these processes. If a complainant remains dissatisfied, that person is referred to the Ombudsman.

OPA has advocated for an external review of its decisions, preferably through an application to VCAT. Such a review would enable complainants to seek remediation of their complaint that would bind OPA. OPA supports the development of processes that would enable external scrutiny of its decisions. In such matters, human rights would be evaluated alongside other rules of administrative law applying in the particular decision. In such cases, the remedy is one of administrative law, with regard given to the human rights that also apply.

Implementing a cause of action for a breach of human rights irrespective of the administrative action undertaken raises additional issues. OPA’s position is that the hearing of the cause of action must have regard for the legal and factual context of the decision made by OPA. For example, a decision to place a person in a nursing home may limit that person’s freedom of movement. In evaluating whether this is a legitimate limitation of the person’s freedom of movement, regard would be had not only to the Charter but to the obligations a guardian has under the Guardianship and Administration Act 1986 and to the usually complex circumstances in which the decision was made.

Accordingly, OPA considers that VCAT would be an appropriate body to consider any breach of the Charter as it has the institutional structure to have regard to the broad legal and factual context, and the ability to provide both alternative dispute mechanisms and to determine the matter if it is not amenable to resolution. OPA’s position on review of its decisions as a public authority by VCAT may not extrapolate to other public authorities and so OPA is cautious of proposing a specific solution. However, OPA does support there being a remediation process that is accessible, affordable, effective and determinative regarding breaches of human rights.

RECOMMENDATION 6

The review should seek the specific views of public authorities to determine the most appropriate form of establishing remediation processes for breaches of a person’s human rights.
9. Summary

The government should strengthen the Charter by simplifying and streamlining provisions. This will make it more accessible to the community, and help make it owned by the whole community. The Charter has advanced the human rights culture in Victoria. This should be further extended through enhancements and public education campaigns so it is more than just the province of legal practitioners and more enlightened services and authorities.

The Charter should be enhanced by adding provisions relating to economic, social and cultural rights to deliver upon key founding principles from the preamble, notably that

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community.

For people with disability this largely means looking at how the UN Convention on the Rights of Persons with Disabilities can be implemented in Victoria. The Charter could sensibly incorporate key provisions of the CRPD, so that people with disability and mental ill health can lead better lives, with full respect for their dignity as human beings.
10. Endnotes

6 After Fiona Kumari Campbell, who suggests this term as a more pertinent alternative to the concept of vulnerability. Fiona Kumari Campbell, Discover: Ableism with Fiona Kumari Campbell. (Critical Disability Studies, Manchester Metropolitan University, 2011).
13 Ibid., pp 5-6.
14 See for example: Frohmader and Women with Disabilities Australia, "Submission to the National Inquiry into Equal Recognition before the Law and Legal Capacity for People with Disability," p.39.
17 PJB V Melbourne Health & Anor (Patrick’s Case), VSC 327 (2011).
21 Ibid., p. 152.
guarding%20framework.pdf.

See for example: Peter A. Ubel et al., "Do Nonpatients Underestimate the Quality of Life Associated with Chronic Health Conditions Because of a Focusing Illusion?" *Medical Decision Making* 21 (2001).


PJB v Melbourne Health & State Trustees Ltd, [2011] VSC 327 at paragraph 35.
11. References


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