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Review of Victorian Charter of Human Rights & Responsibilities

Submission from VALID Inc (Victorian Advocacy League for Individuals with Disabilities Inc)

VALID is funded by the State Government as an advocacy group for adults with intellectual disabilities and their families. VALID is managed by an independent Committee made up of people with disability, family members and concerned citizens. We are a leading state-wide agency funded to provide independent advocacy support to people with intellectual disabilities in Victoria. The Victorian Charter of Human Rights & Responsibilities (hereafter referred to as 'The Charter') provides one of the most useful and important tools for the protection and promotion of the human rights of more vulnerable citizens in this State and it is in this context that we make our submission to this Review.

The review of the Charter provides an opportunity to reflect on how well the Charter has been used to protect the rights of Victoria's more vulnerable citizens. It also provides an opportunity to consider where there have been any gaps or shortfalls in its application to its intended purpose and to identify ways of strengthening or extending these protections beyond the current parameters of the Charter.

Value of the Charter to Vulnerable Citizens

Criticisms that the introduction of this Charter would lead to a log jam in the courts and make lawyers rich has not proved to be correct. The experience of our individual advocates has been that no cases have reached a point where matters needed to go to court. The existence of the Charter has provided advocates for vulnerable people who rely on the State for services and support, an important tool that provides leverage where blanket policies and procedures fail to take into account individual circumstances. The Charter has been used to promote greater awareness and understanding among public servants about their responsibilities in relation to human rights. Use of the Charter as a framework for decision-making has led to successful resolution of some issues through negotiation without needing to take the matter to the courts.

An example:

1. A group of residents in a rehabilitation facility who had acquired significant lifelong disabilities that were non-compensable were being forced to move out of the facility at the end of two years of treatment and rehabilitation in line with an internal agency policy. The only alternative accommodation available immediately for this group of young adults was inappropriate placement in an Aged residential care facility. Pressures to move a backlog of patients in the acute care system into a rehabilitation program were cited as reasons for moving people currently in the rehabilitation program on to other options. The Charter of Human Rights & Responsibilities was used by the advocate as leverage to prevent inappropriate dumping of younger people into an aged care facility. This led to a more reasonable outcome for this group of vulnerable young people and their families until more appropriate accommodation could be built by the Victorian Government. In this case, the fact that the Charter had a whole of government scope was significant in preventing cost shifting activities between departments and between Commonwealth and State jurisdictions.

The first four years that the Victorian Charter of Human Rights & Responsibilities has been in operation has also coincided with major reforms in the funding and provision of services to people with disabilities as set out in the Victorian State Disability Plan. In a climate of change and reform, recourse to the Charter by people with disabilities and their advocates has been lessened as their attention has been directed to engagement with the process of service reform. It is expected that once these reforms are more settled, the Charter will continue to be an important tool in holding public officials accountable to the goals and objectives of recently introduced disability legislation.

Extension of the Charter to include economic, social and cultural rights

While the current scope of the Charter covers political and civil rights, it is our view that the Charter needs to be extended to cover economic, social and cultural rights. People with disabilities represent the citizens in Victoria that are most vulnerable to abuse and neglect and to breaches of their rights under the laws that govern this State. Competing interests within government administration and budget pressures can often lead to those who are more vulnerable being overlooked or pushed down the list of priorities because they may not have the same capacity and resourcing to make their voices heard. In this context, the Charter of Human Rights & Responsibilities is particularly significant for Victorians with disabilities.

Rights to have access to health, housing, employment, education and recreation and cultural participation are essential elements of citizenship in Victoria. Many citizens with disability who depend on the State for support to access these services find themselves short-changed by administrative barriers, budgetary constraints or general ignorance about how human rights and equal opportunity legislation applies to this section of our community. It is our view that extending the Victorian Charter to include all fundamental civil, political, economic, social and cultural rights will play an important role in strengthening the rights of more vulnerable Victorians that are perhaps taken for granted by other citizens.

Failure of consecutive governments at State and Federal level to address the full human rights of people with disabilities have led to:

- Very low participation rates of people with disabilities in employment,
- A severe lack of appropriate housing for thousands of people with disabilities that includes many still living with ageing parents due to lack of housing, institutionalised care in large congregate care facilities, younger people with disabilities living in aged care settings and many others with intellectual disabilities, acquired brain injury and mental illness living in risky and vulnerable circumstances in boarding houses that have become social ghettos for the homeless,
- Lack of serious policy attention by State Department of Education to the rights of ALL Children to have an inclusive education and due and proper access to supports that provide a solid education and preparation for adult life,
- Access to the social and cultural life of the community continues to be a challenge for those with higher disability support needs as disability support packages do not adequately provide support for activities in the evenings, weekends and holiday periods when many existing services do not operate or are significantly reduced.

While the Victorian State Government, under the State Disability Plan, has made some positive and progressive steps in the right direction, the Charter will continue to be a significant tool for advocacy groups to hold administration (and the agencies they fund to deliver disability support) accountable for effective delivery of services.

It is also our view that extending the Charter to cover these additional rights, including the right to self-determination, would also bring the legislation into line with the more comprehensive and inclusive framework for human rights set out in the UN Convention on the Rights of Persons with Disabilities and the commitment to full participation in all areas of community life by people with disabilities as defined in the current Victorian Disability Services Act and State Disability Plan.

The Power of Legal Protection for Human Rights

Attempts to protect and promote the human rights of more vulnerable persons with disabilities through the establishment of service standards, program goals, quality auditing & complaint mechanisms have proved to be inadequate in providing protection for human rights and have often served to screen some of the ongoing breaches of rights at both a personal and a systemic level. For these human rights to be protected, all civil, political, economic, social and cultural rights in the Victorian Charter should be legally enforceable. In respect of economic and social rights, the State should be obliged to take reasonable steps to ensure the progressive realisation of these rights with provision of recourse to an independent judicial review to determine reasonableness and fairness.

People with disabilities in the criminal justice system

People with disabilities, particularly those with intellectual disability, acquired brain injury and mental illness, make up a disproportionately high percentage of those who end up in custodial prison settings. Significantly, lack of appropriate and timely provision of the right disability supports in a timely manner, is a contributory factor, not only in increasing the likelihood of receiving a custodial sentence, but also of increasing the likelihood of reoffending.

Advocates describe frustration with the lack of alternative approaches taken with this segment of the population to prevent individuals ending up in the Correctional Services system as well as inadequate accommodation of special needs of people with disabilities serving custodial sentences.

VALID supports the introduction of Specialist Courts as part of the remedy to these issues but believes that the Victorian Charter is a critical vehicle for addressing basic human rights for those who caught up in the criminal justice system.

People with disabilities who are subject to restrictive practices

As an independent advocacy organisation with a specific focus on protecting and promoting the human rights and well being of people with intellectual disabilities, VALID is often called to support individuals that present with what are termed, “behaviours of concern”. Such individuals can be subjected to restrictive practices and some reduction in the normal freedoms in the interest of their own safety or for the protection of others. It is VALID’s position that extension of the Victorian Charter of Human Rights & Responsibilities to include economic, social and cultural rights would provide stronger protection for those who are subject to these restrictive practices. While the Office of the Senior Practitioner, established under the current State Disability Services Act makes some useful provision for administration of restraints strategies and monitoring and auditing of service implementation for individuals who fall into this category, VALID is aware of how important it is to have a strong and legally enforceable human rights charter to keep this system accountable and vigilant.

Mandatory and Regular Auditing of Public Authorities

The report released by the Victorian Equal Opportunities and Human Rights Commission - *Talking Rights – 2010 report on the operation of the Charter of Human Rights and Responsibilities* - highlights the value of a continuous education and promotion of the Charter as a filter for assessing and screening all planning, policy and implementation strategies by all public authorities in terms of their implications for Human Rights. This needs to be backed up by an auditing and mandatory reporting framework that consolidates human rights considerations within the culture of public authority administration across all areas of government responsibility. This proactive and reflective process will play a significant role in reducing the need for recourse to legal action to enforce various rights set out under the charter.

VALID supports the view that the VEOHRC should play a proactive role in addressing system issues that emerge from individual cases or from its own research. The Victorian Charter should vest the Victorian Equal Opportunity and Human Rights Commission with an own motion authority to investigate and review policies, programs and practices within a human rights framework. This would be a significant vehicle for addressing systemic breaches or shortfalls in public administration in relation to meeting human rights for all Victorian citizens.

Access to effective remedies to breaches of human rights under the Charter

The struggle to survive and exist in the face of discrimination, rejection and ongoing segregation from community life increases the vulnerability many people with disabilities and their families experience.

Fear of losing services if one complains is still widespread and for many who have travelled the path of using equal opportunity and disability discrimination remedies, the process of pursuing fairness and justice can be a very gruelling experience, exhausting already limited energy and personal resources.

It is vital that any processes for pursuing a remedy for breaches under the Charter are accessible, affordable and provide effective remedies for breaches. It is also critical that such remedies are binding and that there are real consequences for inaction or ongoing breaches of human rights.

Conclusion

The introduction of the Victorian Charter of Human Rights and Responsibilities created an important mechanism for protecting and promoting the human rights and well being of many Victorians who experience significant vulnerability to abuse, neglect and denial of basic rights. The opportunity to review the Charter should be an opportunity to build on the existing framework and extend and strengthen the Charter to include some rights not included in its original conception. VALID strongly supports the Victorian Charter and the contribution it has already made to the well being and protection of those it is funded to support and encourages those undertaking this review to look at the issues under consideration through the eyes of those who need stronger protection of the rights as the primary beneficiaries of such a Charter.

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- *Talking Rights – 2010 report on the operation of the Charter of Human Rights and Responsibilities*
 - *VALID's Submission to the Victorian Parliamentary Inquiry Into Supported Accommodation 2008*
 - *Law Reform Commission of NSW, People with an Intellectual Disability and the Criminal Justice System (report no 80)*
 - *The Statute of Liberty – How Australians can take back their rights. Robertson, Geoffrey (Vintage 2009)*