

Development of a charter of rights for children and young people in care

A discussion paper

Advocate for Children in Care

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Foreword

Last year, the Australian Senate released *Forgotten Australians*, a report of the experiences of former children who had lived in institutional or out-of-home care. These experiences paint a bleak picture of lost opportunities. They illustrate the profound importance of being part of a nurturing and caring environment where interpersonal and life skills can be imparted, laying strong foundations for future stable and loving relationships.

Previous national inquiries have also highlighted the need for out-of-home care systems to ensure the best interests of the child are the central focus of intervention. One way to make service systems more accountable is to put in place mechanisms with a core focus on the welfare and wellbeing of those they seek to serve.

In 2003, Minister Garbutt announced the government's intention to develop a 'Charter of Rights for Children in Care' as one strategy to strengthen accountability and raise the quality of standards for out-of-home care services. The Advocate for Children in Care was given responsibility to develop the charter.

The charter is a significant initiative because it is specifically for and about children in care and will continue to place their best interest at the heart of the out-of-home care services system. It will address major concerns and issues raised by children and young people in care in a respectful, meaningful and constructive way.

This discussion paper examines some of the drivers, issues and options associated with the development of a charter of rights for children in care in Victoria. It covers the background to establishing the charter, examines charters from other jurisdictions, and outlines some key issues to be addressed in the development of the charter.

The paper represents an early step on the road to developing a charter and is a platform for opening a dialogue that will assist with drafting the charter.

It is my goal to prepare a charter that ultimately will improve the experiences of children and young people in care and will articulate a set of 'rights' that are realistic, achievable and child-centred. The charter should also make the minimum standards applicable to out-of-home care services more understandable to the children and young people who receive these services.

This project is exciting as the scope, makeup, and essence of the charter will acknowledge the different views and opinions of the children and young people in care and those who are concerned and involved in their lives.

I strongly encourage you to participate in discussions that will take place in your local area over the coming months. Your feedback on this new initiative is welcomed and will be greatly appreciated by all the current and future children in care.



Toby O'Connor
Advocate for Children in Care

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Project overview

Objectives of the project

- To develop and draft a charter of rights for children in care. Design, presentation, piloting and forming a review and monitoring process are future tasks to be undertaken before a final charter is made public.
- To ensure the process used to develop the charter is consultative, including key stakeholders and groups, and children and young people in care.

Completed stages of the project

- The first stage of the project has been completed. This involved extensive research on areas such as: charters for children in care in other jurisdictions, human rights law in Australia, definitions of rights, rights theory and the differing views and opinions about the appropriate content of charters of rights. The discussion paper captures the key issues ascertained in the research stage and is to be used as a platform for consultation and discussion.
- The second stage of the project commenced in March and involved initial consultations with key stakeholders and groups on the drafting of a discussion paper. The aim of this process was to obtain input and advice from key stakeholder groups, including the Department of Human Services, on the issues and directions to include in a draft discussion paper and the possible structure and methods to be used during the wider consultation stage. The Office of the Advocate also proposed that representatives from some key stakeholders be invited to join a stakeholder focus group that would meet to consult and advise about issues that arise during the project.
- While initial consultations with stakeholders occurred, methods to best approach the different groups in the sector and community were investigated to ensure their input and participation is maximised. For example, the Office of the Advocate of Children in Care will work closely with CREATE and other youth stakeholders on how best to involve and engage children and young people in the process. Discussions with key stakeholders and the finalisation of all details regarding the wider consultation phase were completed by the end of April.

Stages to be completed

- The wider consultation stage with the sector and the community is planned to occur during May to July 2005. A range of methods will be used to engage in a dialogue about the charter and these will include: questionnaires, regional forums, relevant ongoing meetings and one-to-one meetings with individuals and groups.
- Parallel consultation processes will occur with Aboriginal communities. Initial meetings with Aboriginal organisations have commenced. The processes by which Aboriginal children and young people in care will be effectively involved in the project will also be explored and developed.
- It is proposed that during July and August 2005 a report will be prepared on the feedback received during the consultation phase. These findings will be discussed with the stakeholder focus group and will provide the basis for drafting a charter.
- Future phases of the project will include: determining how the charter will be presented, developing an implementation strategy that comprises dissemination and education processes, and development of monitoring and review processes for the charter. Input from interested parties will be crucial, as will be ensuring a range of tools and methods are used to achieve these aims.

1. Background - the move towards a charter of rights for children in care in Victoria

The impetus for the development of a charter of rights for children and young people^a in care is grounded in two movements: the movement supporting a greater emphasis on children's rights; and the movement arising from concern with the past, current and future treatment and wellbeing of children in state care.

There has been ongoing debate about children's rights in Australia in academic circles, government and the non-government sector. This debate has focused on issues such as the nature of children's rights; the relevance, status and application of the *UN Convention on the Rights of the Child* (CROC)¹; and calls for the establishment of an independent office to advocate on behalf of children in general and to monitor compliance with children's rights where these exist.² Recognising and formalising children's rights is proposed as an important avenue for improving the situation of children, particularly vulnerable children.

The systems responsible for the protection of children and the experiences of children in state care have been examined at both federal and state levels.³ Several reports and reviews conducted in Victoria over the past decade have investigated the child protection system.⁴ Amongst many issues, these reports detailed concerns with the protective system responsible for children in care, the treatment of children in care and the outcomes, both socially and emotionally, for children who had been in state care. The experiences and treatment of Indigenous children in state care was also the subject of an inquiry that highlighted, amongst many issues, the devastating consequences of past government policies that removed Aboriginal children from their families⁵ and the overrepresentation of Aboriginal children^b in state care.⁶

This concern with the quality of out-of-home care resulted in a range of initiatives being implemented to address the issues.⁷ Two recent reports in Victoria, the Kirby Report⁸ and the Technical Options Paper⁹ indicated strong support for greater consideration of and emphasis on the wellbeing and developmental needs of children subject to child protection intervention.

In particular, the Kirby Report recommended that the current review of the *Children and Young Persons Act 1989* (CYPA) include an examination of:

- codification of the needs, rights and responsibilities of agencies involved with children;
- the development of a charter of rights for children in care; and
- an independent mechanism to monitor the welfare of children.¹⁰

The subsequent Technical Options Paper recommended that the Office of the Advocate for Children in Care be given a legislative basis in the new Act and, amongst other functions, be responsible for developing a charter of rights for children in care.¹¹

The Protecting Children Report identified:

*that new legislation should require the development of a charter of rights for children in care...and that the Advocate for Children in Care will develop this charter and monitor compliance.*¹²

The charter of rights for children in care will place children in the care of the state at the very core of the out-of-home care service system. It will provide a child-centred framework to those involved with administering and delivering the service system. It will inform children of what they can expect when they enter care. The charter will promote the obligations of the service system to act as a good parent in order to maximise the best interests of each child in care.

In line with the above, the Office of the Advocate for Children in Care has embarked on the process of developing a charter of rights for children in care. The preparation of this discussion paper is the first step in that developmental process. The purpose of the paper is to stimulate discussion within the out-of-home care and child protection systems and in the wider community that will inform and guide the development of the charter.

How do you think the charter will benefit children in care?

a. Throughout this paper reference to 'child' and 'children' will encompass children and young people unless otherwise specified.
b. Although the word 'Aboriginal' will be used in this paper it is acknowledged that the more correct or complete term is Aboriginal and Torres Strait Islander.

2. Human rights law in Australia

It is important to consider the movement towards a charter of rights for children in care in the wider context of human rights in Australia.

2.1 Australian laws and institutions aimed at protecting human rights

Australia has no Bill of Rights or any other similar human rights instrument that sits above the Federal Parliament. However, a number of limited rights are enshrined in the Australian Constitution, which are detailed below.¹³

Human rights can be incorporated into legislation (for example, *Commonwealth Sex Discrimination Act 1984*). Rights instituted by legislation can also be abolished or amended by the legislative process.¹⁴

In addition to the rights enacted in legislation, legal bodies have been created to promote and protect the rights of citizens, for example, the Commonwealth Human Rights and Equal Opportunity Commission (HR&EOC) and the various state and territory ombudsmen.¹⁵ Again, these bodies are created by legislation and so it is possible that legislative change can alter or reduce their powers.¹⁶

Legislation requiring a charter for children in care to be developed will assist in clearly establishing, promoting and maintaining the rights of this vulnerable group of children in Victoria.

2.2 The status of international treaties and conventions in Australia

The Commonwealth Parliament has ratified a number of international instruments.¹⁷ A treaty or other international instrument does not become part of Australian domestic law until it is legislated and is passed by Parliaments both at the federal and/or the state/territory levels. The CROC is an example of a convention that has been ratified by Australia but has not been incorporated directly into domestic law.

Two recent High Court decisions have created an exception to this position.¹⁸ A government administrative decision maker needs to consider the content of a treaty ratified by the executive government if the treaty is relevant to the issue under consideration. Whether it is unfair for an administrative official not to consider a treaty depends on the particular facts of each matter. The members of the High Court indicated that they did not agree with aspects of the first decision that created the exception; therefore, a different approach is likely to emerge should the right set of circumstances present themselves before the court.

In Australia, the current position is that international documents that are ratified but not legislated have a limited official legal status.

2.3 The Convention on the Rights of the Child

2.3.1 An overview

The CROC was not the first international instrument aimed at enshrining children's rights. It was preceded by the *Declaration of Children's Rights 1924*¹⁹ and later by the *Declaration of the Rights of the Child 1959*.²⁰

The CROC is a more detailed and elaborate instrument than these previous documents. It covers a wide range of rights and situations, including protection from discrimination, abuse, exploitation, drug use, abduction, sale and torture. Rights to freedom of speech, assembly, thought, association, and privacy are included. It places significant responsibility on states to provide the necessary financial, legislative and administrative resources to ensure rights are available and deliverable. Parents are recognised as having primary responsibility for raising children. The state is given the responsibility of assisting parents in this role. In addition, the CROC addresses the needs of specific groups of children, such as the disabled, refugees, children in the justice system, Indigenous children,²¹ and children from ethnic or religious minorities.

2.3.2 Reaction to the Convention on the Rights of the Child

The rights assigned to children and young people in the CROC were, and continue to be, controversial. The main objections put forward are that the convention undermines family and parental rights, that Australian laws and society offer enough protection for children, and that it disregards democratic processes.²² Some critics support rights that protect children from harm but oppose rights that give children choice in areas such as religion, freedom of speech and association.²³ One reason for this objection is that 'to confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood'.²⁴ This need to ensure rights and their consequences do not have the opposite intended effect and place children at risk is a challenge that needs to be considered when developing the charter of rights for children in care.

Although the legal status of CROC in Australia is minimal at this time, ratification of the convention by Australia has had many positive implications for the development of children's policy at national, state and territory levels. The convention has influenced the development of some legislation and the interpretation of legislative prescriptions concerned with the wellbeing of children, for example, the notion of the best interests of the child is the guiding influence in the *Family Law Act 1975* and *CYPA*. The importance of children being represented and having their views heard has resulted in child representatives being standard in child protection legislation and in the *Family Law Act 1975*. The convention has also featured very strongly in the development of charters of rights for children from all manner of jurisdictions (federal, state, provincial and local council) across the world.

2.4 Sources of children's rights in Australia

There are very few examples of legislation in Australia that specifically address children's rights. Queensland's child protection legislation includes a charter of rights for children in care.²⁵

Legislation can contain what are described as implied rights, protective measures and standards that offer protection or a certain type of treatment but are not framed as a right.²⁶ Child protection legislation, although not stating specifically that children have a right to be free from abuse, detail the legal response to child abuse. The case planning principles listed in s. 119 of the *CYPA* contain objectives such as the welfare and interests of the child are paramount and children must be given the opportunity to participate in case planning meetings. They do not, however, confirm these intentions as rights.

Policies, procedures and administrative practices followed by government departments can create and acknowledge rights and direct how situations and issues are managed—the outcome of which can result in a change to the treatment experienced by particular clients or groups of clients. An example is the Aboriginal Child Placement Principle²⁷ and the development of a Protocol between the Department of Human Services and the Victorian Aboriginal Child Care Agency (VACCA).²⁸ These policies have had a positive impact on the way Aboriginal children are managed when they come to the attention of child protection services.

Another source of children's rights in Australian law is the law that is made by judges in the development of the Common Law and the law that results from judicial review and interpretation of legislation. The High Court of Australia in the decision of *Re Marion*²⁹ accepted and therefore introduced into Australian law a test³⁰ that stated that parental responsibility diminishes with the age of the child – so as the child matures and is capable of making decisions for themselves, parental authority declines accordingly until it eventually ceases when the child becomes an adult.

The decision in *Re Marion* demonstrates that, in some matters, the rights of both children and parents are limited. The case has also given significant weight to the proposition that children are able to be responsible for issues such as consenting to medical procedures when they are mature enough and not necessarily when they attain a fixed age.

3. Defining the boundaries: the charter of rights for children in care

3.1 Definition of rights

The word 'rights' is a term that is difficult to define. It is an abstract word whose meaning is influenced by the context, the subject area, type of society and the historical context in which it emerges.

When looking for a definition of rights in the children's rights literature, the following descriptive terms come closest to offering an acceptable and satisfactory explanation for the meaning of the word: created by others' obligations to you³¹, abstract³², helps define boundaries between people³³, changing³⁴, provision of basic necessities³⁵, protection of everyone's equal moral rights³⁶, protection of interests³⁷, rights establish a justified claim.³⁸

Dictionary definitions of the word 'rights' include phrases such as 'adequately supplied with'; 'a just claim or title, whether legal, prescriptive or moral'; 'that which is due to anyone by just claim'³⁹, and 'generally a benefit or claim entitling the person to be treated in a certain way'.⁴⁰

Taking these descriptions into account, it is proposed the following three definitional elements inform the development of the proposed charter of rights for children and young people in care:

Element One: A right is an entitlement to receive certain material/physical things, and/or services and to be treated in a manner that promotes human dignity.

This includes having one's emotional, social and psychological needs addressed.

Element Two: A right becomes activated due to the demands or actions of the right holder or the right can be activated due to the actions of others, without the right holder demanding the fulfilment of the right.

This distinction is important, particularly when discussing children who may not be old enough to understand or enforce their own rights. A person can demand the fulfilment of a right (for example a passport application form) or can have a right upheld without asking for it due to the actions of others (for example, being treated fairly, equally and with respect).

Element Three: Rights are dependent on available resources and the compliance and actions of others. 'Others' refers to individuals, groups, wider services or the society at large.

In many situations a person's ability to enjoy a right depends on other people acting in a way that

promotes that entitlement and on the provision of services. Children, as will be discussed, are reliant more than adults on the actions of others and the availability of adequate resources. The charter has potential to focus attention on the service system and how it maximises the potential of children in care.

3.2 Why the need for a charter of rights specifically for children in care?

Rights documents can be developed for society as a whole or they can be developed to address the particular issues and needs of sections of that society. The CROC addresses the specific needs of children generally as it is recognised that children are in a particularly vulnerable position as they are dependent on adults to meet their needs and protect them.

However, it can be argued that a general children's rights document does not address the particular situations faced by children in care. A charter for children in care acknowledges and targets the specific issues and vulnerabilities experienced by this particular cohort of children.⁴¹

3.3 Children's rights in context: the child, parents and the state

In any discussion of children and rights it is important to acknowledge and address the inherent limitations on children's rights that emerge from the fact that they are children and, therefore, considered minors before the law.⁴²

Children are not autonomous.⁴³ Their rights are constrained by the rights and actions or inactions of others. They are dependent on others for food, clothing, protection, education, transport and so on. Thus, the availability of resources – whether from parents, the state or other sources – impacts directly on the quality and variety of children's lives and, therefore, the availability and access to rights.

Parents have significant control over, and impact on, the lives of their children. This right of parents over their children and the importance of the family as the main nurturer and carer of children is central to children's policy and is reflected in Victorian child protection legislation.⁴⁴ The existence and exercise of other people's rights also impact on children's rights. Children have a different status in law. Their ability to enter into contracts, vote, drive, access government benefits and so on, is limited by their age and their cognitive abilities.

Theories of children's rights address this issue of children having different status in law in varying ways. One position is that the best way to protect children's

fundamental rights is to emphasise adult obligations to children rather than to focus on developing children's rights.⁴⁵ Another position is that parental power should be conceptualised as being moderated by the future consent of the child; thus the parental role is to act in the child's best interests, safeguard their safety and maximise the child's development.⁴⁶

These limitations on children's rights should not necessarily be viewed as either positive or negative. They simply reflect the reality of the child's position. For the rights in a charter to be realistic and achievable, they must take account of these realities.

3.4 Including the responsibilities of the holders of rights and service providers in the charter of rights

Charters of rights in other overseas jurisdictions are increasingly including the responsibilities of rights holders in the same document.⁴⁷ There is a clear and increasing trend to regard the granting of rights as a reciprocal or two-way arrangement.

There are several explanations for this. Firstly, the move is influenced by a general trend in many western industrialised countries toward mutual obligation in welfare in the 'post welfare state' period. When you are provided something by the state there is an obligation that the receiver gives something in return. A second and alternate explanation is that a rights document is an opportunity to acknowledge the obligations, responsibilities, expectations or duties of the holders of rights, for example, the Monash Medical Centre's *Charter of Patient Rights* includes a number of patient responsibilities, such as an expectation that they provide accurate information about their backgrounds to their treating doctors.⁴⁸

3.4.1 Children's responsibilities

Rather than being negative and restrictive, recognising children's responsibilities is also seen as a way of confirming children's status in society. It has been argued that children, depending on their age and stage of development, are capable of accepting responsibility for different aspects of their lives and those around them.⁴⁹

Children are not just individuals who are totally dependant on parents and are passive recipients. Acknowledging children's ability to understand and take on age-appropriate responsibilities in other areas could be seen as confirming children's social citizenship rather than undermining it.

Although the rationale above is very convincing, it is important, for the sake of balanced argument, to acknowledge alternative views on the issue.

The inclusion of responsibilities could be seen as a separate issue without a place in a document concerned with children's rights. The acknowledgment of responsibilities could also be seen to compromise or mitigate the rights in the charter.

3.4.2 Responsibilities of the service system

Including the responsibilities of the service system to children in the charter is a further issue. The responsibilities and duties owed by the many agencies and services engaged in providing care to children in the out-of-home care system are addressed in a range of ways, including standards of care, Quality Assurance Strategy (QAS), Looking After Children (LAC) policy documents and funding agreements. When examining initiatives such as LAC and the QAS, it is clear that the areas covered are very similar to the rights expressed in the range of charters examined.

One benefit of including the responsibilities of the service system is that it would assist in informing children, who would understandably have little knowledge of the workings of initiatives like LAC and QAS, what the responsibilities of those caring for them are. This is a compelling argument.

There is an expectation that the state, in its role as the custodian and guardian of children, will act according to the standard of a 'good parent'.⁵⁰ Including a responsibility that clearly articulates the system's duty to act as a reasonable parent to children in care will assist in emphasising and setting this standard for the out-of-home care system. It will inform children of the system's responsibility to them, a responsibility that includes the duty to act as a parent, that is, someone who sets rules and limits and has expectations, as well as providing for the physical and emotional needs of the children in their care.

Do you think it is appropriate to include the responsibilities of:

- (a) children and / or**
- (b) the service system (including the department, the CSOs and carers) into the charter of rights?**

If responsibilities (of children and/or the service system) are included in the charter, how should this be done:

- (a) outlining the specific responsibilities in the charter itself**
- (b) outlining the specific responsibilities in associated supporting documentation or as an attachment to the charter**
- (c) other means – detail what these might be**

4. Comparative charters for children within Australia and in international jurisdictions

Three states within Australia – Queensland, New South Wales and South Australia – have established charters of rights for children in care. Western Australia and Victoria are both in the process of developing a charter. Numerous international jurisdictions have also established charters for children in care. The CREATE Foundation developed a Bill of Rights for Young People in Care at their first national conference in 1994.⁵¹

The charters have been established either by inclusion in legislation or as a document outside the legislative framework. Some jurisdictions refer directly to the CROC. Table 1 summarises this information.

Country	Charter in legislation	Charter outside legislative framework	CROC used or referred to
Australia	<ul style="list-style-type: none"> • Queensland • Western Australia* • Victoria* 	<ul style="list-style-type: none"> • New South Wales • South Australia • CREATE Bill of Rights 	<ul style="list-style-type: none"> • Tasmania
New Zealand		<ul style="list-style-type: none"> • New Zealand 	
Canada	<ul style="list-style-type: none"> • Ontario • British Columbia 	<ul style="list-style-type: none"> • Catholic Children's Aid Society 	<ul style="list-style-type: none"> • Saskatchewan
Ireland	<ul style="list-style-type: none"> • Republic of Ireland 		
UK	<ul style="list-style-type: none"> • Scotland 		<ul style="list-style-type: none"> • Department of Education and Skills
USA	<ul style="list-style-type: none"> • State of California • State of Florida • State of New Jersey 	<ul style="list-style-type: none"> • State of Maine • State of New York - (Lawyers for Children Org) • State of Carolina (Children's Law Office) 	

Table 1: Examples of jurisdictions with legislative provision for a charter for children in care, those with a charter for children in care outside of legislation and those who make a direct reference to the CROC

* *currently being developed*

During the course of research undertaken by the Office of the Advocate, a range of charters of rights for children in care have been examined. From this research it is apparent that many charters express identical or similar rights, although the extent of the commonality of these rights varies from charter to charter.

The rights addressed by all charters, in some expression or form, include a child's right to:

- live in a safe environment—safety aspects of home environments (includes no corporal punishment or abuse of any sort), choice, stability
- maintain key relationships—with family, friends, community— including via continued involvement in extra curricular activities

- be actively involved in decisions/decision making processes affecting them
- access information about themselves—including reasons for being in care, history, file, rules of placement, information about placement
- privacy—child's personal information only given to those people who require it to ensure best possible care of the child
- access to medical, dental and other therapeutic services
- adequate, safe and appropriate food and clothing
- access to education and support with education
- receive care and support after a placement has ended
- opinions, views, thoughts and complaints, and their right to have these heard
- be treated fairly and with respect
- expect maintenance of cultural/religious beliefs and practices.

Examples of those children's rights that are not consistently addressed by or specified in all charters include a child's right to:

- contact with siblings – some of the US states have specific rights and specific charters that deal with sibling contact
- contact with previous foster parents/carers
- regular access to workers
- knowledge of how to make a complaint and access to means to make the complaint
- their personal belongings kept safe and secure
- refuse/consent to medical treatment (problematic as this right is restricted by law in Australia)
- legal representation
- not to be placed with adults if incarcerated
- acknowledgement of Indigenous-specific issues, though these tended to be incorporated into rights for maintaining cultural and ethnic ties.

As will be discussed below, the charters differed in the breadth and extent of the rights granted, the language used, and in the detail in which the rights were expressed. Some charters (for example, Toronto's Rights and Responsibilities of Children and Youth in Care) have separate charters or rights for older and younger children, while others indicate certain rights are available when age-appropriate. Others do not create a distinction based on age. These developmental options will be discussed in the next section.

5. Content of the charter of rights for children in care

5.1 Preferred content and structure of a charter

The following is an experiential examination of charters for children in care from other jurisdictions as well as a proposal for the content, style and structure of the charter.

5.1.1 Underlying principle

The underlying principle and priority of the charter, like the CROC, will be to ensure the best interests of the child are the principal consideration.

Explanation:

This ensures the focus on children in care is paramount and that the rights are protective of children and their best interests. This is explored further in section 5.1.5.

5.1.2 Aboriginal children in care

An important aspect of the charter will be its ability to appropriately reflect and incorporate the particular and distinct experiences of Aboriginal children in care. There are numerous ways the charter could address these issues and the outcome will depend on discussions with relevant organisations and agencies in the Aboriginal communities. The changes flowing from the legislative review for Aboriginal children in care will have a significant impact on this issue.

How do you think the charter can best address the particular issues encountered by Aboriginal children who come into out-of-home care?

How can the charter appropriately address the requirements of children who have special needs (for example, children with a disability and children from culturally diverse backgrounds)?

5.1.3 Language

A charter that contains rights expressed in very plain language, as briefly and succinctly as possible, is preferred. Explanations of the rights or additional details can be included in a document that sits behind the charter. Therefore, there will be no double and triple barrelled rights.

Explanation:

The charter needs to be succinct and simple so that children can understand it easily. A clearly expressed charter will also be easier to recall and hopefully will be more likely to be referred to if it is simple and easy to read. The charter can't be like 'school work', that is, too academic and too much effort. It needs to be tailored to the variable concentration spans of children.

5.1.4 Accounting for the different developmental stages of children

One charter, rather than separate charters for different age groups, is favoured. To address the different developmental stages of children the charter could be presented differently to different age groups – with the basic content remaining consistent. In addition, the information that will sit behind the charter can also be developed for the different age ranges of children.

Explanation:

It is believed that developing separate charters for different age groups will cause problems in distribution, education, monitoring and review of the charter. Publicity, education and dissemination processes will be difficult and complex enough with one charter. Again, a simple and succinct document is preferred to increase the likelihood that children will read, understand and refer to it.

How do you think the charter can most effectively accommodate the different developmental stages of children?

5.1.5 Rights must be realistic and achievable

It is crucial that the rights included in the charter are realistic, balanced and achievable.

Explanation:

One of the challenges in developing the charter is to ensure that a balance is achieved in challenging and testing the current experience of being in care, while at the same time ensuring the rights included in the charter are realistic and achievable. This is important so that the charter does not become irrelevant and meaningless to the children and young people in care and to the sector.

It is also important that the charter does not grant children the right to do something if the fulfilment of that right would pose an unreasonable risk to the child or be unrealistic for the carers of the child. Also, the charter needs to account for the limitations on rights children experience as discussed in section 3.3 above.

Example of an aspirational right:

- One entitlement that can be described as aspirational but central to the wellbeing of children and young people in the system is for those who are responsible for their care and development to strive, like a 'good' parent would, to maximise their potential and life choices.

The inclusion of this entitlement will emphasise an important standard that challenges the sector in the way that it cares for children and young people.

Example of rights that are unrealistic and not achievable:

- 'Workers and carers have to explain why they won't do as you want.' This goes against better child rearing practices and is too wide. Some rules will always be non-negotiable and, depending on the age of the child, it will not be reasonable to explain all actions.
- 'You have the right to make choices about everyday matters such as the clothes you wear or the food you eat, just like other people your own age'. Again this is not realistic and against better child rearing practices; it is not appropriate for certain ages to choose clothes and food. Most children are not always given the choice of what they will eat for dinner or what clothes are bought for them. Therefore, a right that ensures adequate food, clothing and accommodation, rather than a blanket right to choose, is preferred.
- 'You have the right to take part in decisions affecting your life including your care placement'. The right needs to be preserved even when there may be limits on placement options and in accordance with the age of the child.

Examples of rights that need to be curtailed/limited in the interests and wellbeing of the child:

- Right to access all information on their file. It may be detrimental for children/young people to access some information on their file. There may also be information about family members that is confidential or information thought generally not appropriate due to the age of child.
- Right to contact with family/friends. This needs to be conditional upon court/worker believing it is in the child's best interests. Some charters do this; some do not (NSW).

5.1.6 The responsibilities of the children and service system and their inclusion in the charter of rights

The inclusion of responsibilities in the charter in any form requires further discussion. There are two ways the responsibilities of the children and service system might be included in the charter. Firstly, they can be listed in the charter itself alongside the rights of the children. Secondly, they could be included in the information that will accompany the charter. The preferred option is including responsibilities in the information that accompanies the charter.

Explanation:

This would ensure the charter is kept simple and succinct. Concepts of responsibility can be complex. Including them in the accompanying information allows them to be introduced and explained in greater detail, taking into account the different developmental stages of children.

It is important to remember that the document is not static. Developmental changes can be considered with expected reviews of the charter.

5.2 Outline of a draft charter

The range of rights detailed in the many charters cover many aspects of the issues facing children in care. These rights can be organised under the following four categories:

1. Identity and sense of self
2. Treatment in care
3. Quality of placement
4. Support and provision of services.

The following are the basic rights **for children**, not yet worded or expressed fully, that are considered essential for inclusion in the charter.

Identity and sense of self

- Maintaining relationships with family, friends, community, previous carers and other significant persons (such as mentors) and the right to have their views about the level of contact with significant others heard and considered.
- Extra curricular activities and developing and maintaining interests.

- Privacy of information.
- Maintenance of cultural/religious beliefs and practices.
- For Aboriginal children, a right that specifically expresses the importance of maintaining contact with extended family and community, the applicability of the Aboriginal Child Placement Principle, and use of Aboriginal services if available and appropriate. This is a guide only and needs to be discussed with relevant Aboriginal communities. It may be that other options are preferred, for example, a separate section for Aboriginal children and young people.

What core rights do you think need to be included in any charter?

Do you think there are any rights that should not be included in the charter?

Treatment in care

- Treated with dignity.
- Treated with respect.
- Right to hold opinions and views and to have these respected.
- Information on how to complain, who is there to help you and so on.
- Free from abuse of any kind.
- Age-appropriate involvement in decision making.

Quality of life in placement

- Living situation/placement is safe, appropriate (meets physical and emotional needs) and stable.
- Choice (involvement in placement decisions) when appropriate and possible.
- Adequate, safe and appropriate food and clothing.
- Be encouraged and provided with the opportunity to reach or to maximise their potential.

Support and provision of services

- Access to quality and appropriate medical, dental and therapeutic services.
- Regular access to competent workers and relevant support organisations.
- Access to education and support with education.
- Entitlement to care by the system that meets the standard expected of a 'good parent'.
- Support after leaving care.

6. Conclusion

This paper has examined many issues involved in the development of the charter of rights. Although the preferred direction on some issues of the Office of the Advocate for Children in Care is specified, the content of the final product will be greatly influenced by the opinions and feedback received during the consultation phase.

Discussion and debate of these matters is a crucial step in finalising the direction and content of the charter. We encourage all parties to participate in the discussions that will be organised. All opinions, views and suggestions will be welcomed and considered.

Any further comments about:

- a. the rights that might be included in the charter
- b. any of the issues raised in the discussion paper
- c. other aspects related to the development of the charter of rights

Endnotes

- 1 Ratified by the Australian Parliament on 16 January, 1991.
- 2 See: Alston, Parker & Seymour (1992) (Eds) *Children's rights and the law*. Clarendon Press. Freeman & Veerman (1992) (Eds) *The ideologies of children's rights*. Kluger Academic Publishers.
Jones, M. (1998) *Myths and facts concerning the Convention on the Rights of the Child in Australia*. AIFS Conference, Melbourne; Australian Law Reform Commission (1997) Report 84. *Seen and heard: priorities for children in the legal process*. Chapters 3, 5, 7 & 17.
Report from Victorian Family and Children's Council to Minister for Community Services Victoria (1992) *The rights of children*. CSV: Melb.
Diamond, S. (2004) 'An analysis of child protection, and protecting children from rights and public health perspectives.' International Symposium on Human Rights. *In Public Health*. Melb.
- 3 Senate Community Affairs Reference Committee (August 2004) *Forgotten Australians*. A report on Australians who experienced institutional or out-of-home care as children.
Western Australian Department of Community Development (July 2003) *Submission to the Senate Community Affairs Reference Committee Inquiry Into Children in Institutional Care*.
Senate Community Affairs Reference Committee (August 2001) *Righting the record*. Report on child migration.
HR&EOC (1997) *Bringing them home*. Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families.
- 4 Allen Consulting Group (2003a) *Protecting children: the child protection outcomes project*. Final report.
Department of Human Services (2003b) *Public parenting: a review of home-based care in Victoria*
Department of Human Services (2003c) *Pathways to partnership: the final report of the out-of-home care partnership case study review*.
Department of Human Services. *The 2001 audit of children and young people in residential care, home-based care and kinship care*.
Victorian Auditor-General (1996) *Protecting Victoria's children* Special Report Number 43
Fogarty (J) (1993) *Protective services for children in Victoria: a report*.
- 5 HR&EOC (1997) *Bringing them home*. Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and their Families, April 1997.
- 6 Department of Human Services (2003) *Public parenting: a review of home-based care in Victoria*, June 2003, p. 29.
- 7 For example of recent initiatives: Minimum Standards, Quality Assurance Strategy (QAS), Looking After Children (LAC), Aboriginal Child Placement Principal – Department of Human Services August 2002; and the Protocol between Department of Human Services and the Victorian Child Care Agency (VACCA) – August 2002. Although the word 'Aboriginal' is used in the paper, it is acknowledged that the more correct or complete term to use is Aboriginal and Torres Strait Islander.
- 8 The report of the Panel to oversee the consultation on *Protecting children: The child protections outcome project* (The Kirby Report) April 2004.
- 9 Department of Human Services (2004) *Protecting children: ten priorities for children's wellbeing and safety in Victoria* Department of Human Services August 2004 ('Protecting Children Report')
- 10 Kirby Report, *op cit.*, p. 30.
- 11 Technical Options Paper, *op cit.*, pp. 33-34.
- 12 *Op. cit.*, p. 10.
- 13 The rights in the Constitution include:
s. 51(31): Cth acquisition of property must be on just terms
s. 80: right to trial by jury for an indictable offence against the Cth
s. 92: trade, commerce, and intercourse between the states shall be free
s. 116: Cth can't establish a religion and cannot prohibit the free exercise of religion
s. 117: resident of a state cant be subject to discrimination in another state
- 14 For example, the Commonwealth Government amended the *Racial Discrimination Act 1975* to enable passage of the *Native Title Amendment Act 1998* as the content of the latter Act breached provisions of the *Racial Discrimination Act 1975*.
- 15 Commonwealth Government (2004) *Australia's national framework for human rights – National Action Plan*. Canberra: AGPS, pp. 5–6.
- 16 An example was the Kennett Government's changes to the role of the Victorian Auditor-General in the 1990s that limited the power of the Auditor-General.
- 17 For a comprehensive list of see Austlii – austlii.edu.au/au/other/dfat/
- 18 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and *Re Minister for Immigration and Multicultural Affairs v Lam* [2003] HCA 6.
- 19 League of Nations (1924) (Known as the Declaration of Geneva).
- 20 United Nations (1959) Resolution number 1386 (XIV) 20 Nov 1959.

- 21 Other international documents that address the issues of Indigenous people include: Draft Declaration on the Rights of Indigenous Peoples and the International Labour Organization Convention 169
- 22 Jones, *op. cit.*; *Additional comments on the United Nations Convention on the Rights of the Child*. Senators Abetz and O’Chee and The Hon Peter McGauran August 1998.
- 23 Hafen & Hafen (1996) ‘Abandoning children to their autonomy: The United Nations Convention of the Rights of the Child.’ *Harvard International Law Journal*. 37(2), pp 450–458.
- 24 Hafen *op. cit.*, 461.
- 25 *Child Protection Act (Qld) 1999*. Schedule 1.
- 26 Unpublished Literature Review (2004) Housing Services Department of Human Services pp. 37–39.
- 27 *Op cit.*
- 28 *Op cit.*
- 29 *Secretary Department of Health and Community Services (NT) v JWB & SMB* (1992) 175 CLR 218. In this case the High Court had to consider the issue of the sterilization of an intellectually disabled young person. The High Court decided that the parents did not have the legal capacity to consent to a non therapeutic medical procedure in such a situation.
- 30 The Gillick test was developed by the House of Lords in *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112. In this case, a parent initiated action against the local health authority and medical professionals for giving contraceptive treatment to her 16 year old child without her consent.
- 31 Jones and Basser-Marks (1996) ‘Mediating rights: Children, parents and the state’. *Australian Journal of Human Rights*. 2(2), pp.1–3.
- 32 *Ibid.*
- 33 *Ibid.*
- 34 *Ibid.*
- 35 Diamond, *op. cit.*, p. 4.
- 36 Campbell ‘The rights of the minor: As person, as child, as juvenile, as future adult.’ In Alston *op cit.* 1.
- 37 *Ibid.*
- 38 Weldon, cited by Wolfson ‘Children’s rights: The theoretical underpinning of the ‘Best Interests of the Child.’ In Freeman & Veerman (1992) (Eds) *The ideologies of children’s rights*. Kluger Academic Publishers. p.9.
- 39 *The Macquarie Dictionary*.
- 40 *Concise Australian Legal Dictionary*. 2nd Edition. Butterworths: Australia.
- 41 See reports previously cited.
- 42 Jones & Basser-Marks, (1994) ‘The dynamic developmental model of the rights of the child: a feminist approach to rights and sterilization.’ *International Journal of Children’s Rights*. 2(2), pp. 265–291.
- 43 Jones and Basser-Marks (1996) *op. cit.*
- 44 For example see the *CYPA 1989* – s. 87(a), (b), (c), (e) & (j).
- 45 O’Neill, O., (1992) ‘Children’s rights and children’s lives.’ In Alston *op.cit.* pp 24–25.
- 46 Jones & Basser-Marks, *op. cit.*, p. 5.
- 47 Examples include: Patient Charters of Rights at the Royal Children’s Hospital – Brochure *Partnerships in care*; Monash Medical Centre, *Rights and responsibilities of patients*; The Commonwealth Mental Health Strategy; Australian Citizenship information.
- 48 www.southernhealth.org.au/rights/default.htm
- 49 Such & Walker (2005) ‘Young citizens or policy objects? Children in the rights and responsibilities debate.’ *Journal of Social Policy*. 34(1), pp. 40–46.
- 50 *CYPA* s124(b)
- 51 CREATE Foundation (1994) Bill of Rights for Children and Young People in Care, first national conference.

