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## **REASONABLE LIMITS AND EXEMPTIONS: VICTORIA'S HUMAN RIGHTS CHARTER AND ITS IMPLICATIONS FOR YOUNG PEOPLE.**

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In 2006 Victoria became the first major jurisdiction in Australia to embrace a statutory 'bill of rights' when the Victorian Parliament passed the Charter of Human Rights and Responsibilities Act 2006 in July of that year. The Charter took partial effect on 1 January 2007 coming fully into effect on 1 January 2008. The Charter recognizes and grants some 22 civil and political rights that are derived from the International Covenant on Civil and Political Rights 1966. The expressed intent of the Charter is firstly to specify and protect these civil and political rights in the state of Victoria. Secondly the passage of the Charter, requires that all employees of state and local government agencies as well as public authorities take into account the extent to which their delivery of services. Thirdly and this is the focus of this paper the Charter obligates the government when developing policies or introducing new legislation that it comply with the Charter. In short, from 1<sup>st</sup> January 2008 the Charter requires the government, its employees and those working for a public authority to act in ways that conform with human rights (Section 38 (1) (2)). Like its Canadian predecessor this Charter relies on a 'dialogue model' which calls on the government to dialogue with those who believe it is not conforming with the Charter rather than relying on the courts or a body like VHREORC to declare the legislation, policy or practice illegal (Evans and Evans 2008).

Given the significance of these developments, there are good grounds for interest in the effects of such a potentially far-reaching innovation. While it might be too soon to make any conclusive statements about the value of the new Charter, several things can be observed. Conservatives, who have long been opposed to attempt to legislate for human rights especially on the grounds that such legislation confers excessive power on the courts have not seen any of their dire predictions confirmed. Equally those who have argued for this reform are no less likely to have had their expectations of dramatic improvement realised. One possible explanation for this may relate to the nearly complete absence of any publicity campaign to let Victorians know they have a Charter. Few Victorians are currently either aware that they now have a Charter of Rights, or can specify any effects, either negative or positive which the Charter has had. To put it another way the Charter remains a largely invisible part of the Victorian government's policy profile with much of the action taken to date to implement the Charter occurring inside government departments and outside of the normal highly visible aspect of political life.

Among its objectives the Charter of Human Rights and Responsibilities is intended to ensure that human rights are observed and incorporated into new laws, policies and programs in Victoria.

While the relative novelty of the Charter makes it difficult to assess its impact at this time, we ought to be able to begin to assess its capacity to improve the rights of groups who have historically been the subject of deep and lasting prejudice like young people as well as other groups like indigenous people, people with disabilities and women. In this article I ask whether the Charter has so far demonstrated a capacity to redress the experience of discrimination which young people have long experienced and continue to experience.

It is for example well established that young people in Australia experience an ambiguous if not paradoxical socio-legal status in Australia. On the one hand young people (defined as those aged 12-25) are one of the most regulated and governed groups subjected to many kinds of prohibitions on activities others have access to or else subjected to special institutional and legal interventions like special legal health and educational provisions. Equally many if not all young people lack basic legal protections, entitlements and civic rights associated with being a citizen that have long been taken-for-granted by most others. This includes the right to participate in democratic practices

such as voting (for under 18 year olds), the right to be free from age-based discrimination or basic rights to freedom of expression, of association and to assemble in public spaces or to enjoy a right to privacy. It is currently lawful for example for employers to discriminate against 16 to 21 year olds on the basis of age by paying them lower wages than other employees for work of equal value (in the form of the 'youth wage'), and to do so in the context of legislation that decrees age-based discrimination unlawful for all other citizens. In some jurisdictions children and young people are also subject to police stop and search powers and curfews (Morgan, 2007 pp, 11-19) Added to this are practices that deem certain quasi-public spaces like some public university campuses and shopping centres to be 'child-free' or 'youth free' zones. Young people are also largely excluded from knowledge making about themselves with the requirement for parental or guardian consent for their participation in research.

Many young people and children continue to be subject to forms of 'discipline' or punishment which if other citizens were subjected to, would constitute criminal assault. It is also the case that unacceptably large numbers of young people live in poverty (Bradbury 2003, James et.al 2007) and significant numbers begin their adult lives carrying major debts incurred by the cost of their education (Vittles, et.al 2008, Long, & Hayden, 2001). Considerable numbers also have poor access to health care.

While all of this may be known or acknowledged it is also judged by many Australians to be both normal and indeed proper. This judgement rests on long-standing assumptions and prejudices about 'natural' deficits that have been used and continue to be used to define 'childhood' and 'adolescence' (or 'youth') deficits usually attributed to their place in certain biological and social life cycle stages, and which render children and young people 'dependents'. These ideas play a major role in ensuring that young people continue to be subject to prejudice and unfair treatment across a wide range of socio-political and economic settings. One result is that young people routinely have their human rights breached and for this reason as many authors and organizations have urged, young people require clear sighted and rigorous protection of their human rights (Carson et.al 2000; Aitkens, 2001; NCYLC and Youthlaw 2007; Copeland 2004, pp. 40-45).

The new Victorian Charter clearly marks a positive first step in this direction and its potential for helping to ensure young Victorians aged between 12-25 have their rights respected can readily be granted. A proper regard for the right of children and young people to security of their person for example could mean that corporal punishment and similar forms of 'discipline' would no longer be tolerated or practiced. Likewise a proper regard for the right to decent shelter or housing would mean that the 32,500 young people who are currently homeless on any given night (ABS 2008), would not be sleeping rough or on the couches of friends and relatives. A proper regard for the right not to be negatively discriminated against on the basis of age would mean young people would not be subject to curfew by-laws introduced by local governments.

## **MECHANICS OF THE CHARTER**

As mentioned above amongst its several stated objectives the Charter of Human Rights and Responsibilities is intended to ensure that a regard for human rights is incorporated into both the design and interpretation of new laws, policies and programs in the state of Victoria.

Under the Charter the government and those discharging public functions are deemed to be acting unlawfully if they do not to give effect to human rights.

To help ensure a proper regard for human rights is achieved, Bills before the House must be accompanied by a statement of compatibility that explicitly states that in the opinion of the member of parliament who introduced the bill, that the proposed legislation is compatible with the human rights Charter and also how it is compatible. If the Bill is not compatible with the human rights then the statement must specify 'the nature of the incompatibility'.

The reason for the statements of compatibility is to ensure that members of parliament who introduce Bills take responsibility for making sure their legislation complies with the Charter, and if it does not then how it does not. As Evans explains it is also intended to provide information to Parliament that can help inform its deliberations on the legislation (2006 b).

Bills are vetted by the Scrutiny of Acts and Regulations Committee (SARC) which is a non-partisan, all-party Joint House Standing Committee to ensure compliance with the Charter, and needs to be accompanied by the 'Statement of Compatibility'.

Determining compatibility with the Charter relies on an assessment about the nature and extent of the social problem the legislation is attempting to address, the prospect of it being able to do so, and the expected impact that that legislation will have on human rights.

There is also a section in the Charter (Section 31(3)) that requires a statement from the supporter of a piece of legislation as to why they want to override the Charter by breach certain human rights. They are required to explain how and why the circumstances are exceptional enough to warrant taking precedence over certain rights or the rights of a particular group. The exception must be within the law, and also be justified by reference to the law. Section 31 also requires the state government to justify to abrogate or repeal rights as set out in the Charter.

The critical assessment is whether there is sufficient evidence and good reason to say a breach of right is justified, and who gets to say what sufficient and credible evidence and reason is.

This mechanism is designed to give effect to the dialogue model of human rights which emphasizes parliament's role and authority in giving meaning to human rights and for determining when rights ought to be limited. The aim is to achieve this by establishing communication between the legislature, the judiciary, government departments and public authorities. (that is agencies that receive funding from the state and local government). The main aim in having this approach is to avoid a more legalistic approach which some people fear will see the state become too deferential to the power of the courts (Evan 2006 a & b).

This means that in Victoria the courts cannot determine that a piece of legislation is invalid because it does not comply with the Charter. It also means that the Victorian Parliament can override the Charter and enact legislation that is incompatible with it and does not need special authorization to override the Charter (see Section 31 (3)).

It is an approach that can only work though education and an accompanying shift in values and attitudes so that politicians, policy makers, and the community at large come to appreciate the value of human rights and are prepared to ensure laws and practices are informed by such a framework.

## **THE CHARTER: LAW, POLICY, PRACTICE AND COMPLIANCE**

The Charter has potential to re-shape laws, policies and attitudes, in ways that promote a regard for human rights. This is evident for example in section 44 of the Charter which specifies that the Charter be reviewed in 2011 and that that Review give consideration to including a wider range of economic and social rights. Strengthening of the Charter by including additional human rights like economic and social rights would have significant implications for a child's or young person's access to adequate welfare services, housing, health care, support child care and education.

Countermanding that promise however is evidence of the way the interplay between prejudicial assumptions about young people could continue to thwart attempts to improve their civic status. This is already evident in the material coming before the Scrutiny of Acts and Regulations Committee (SARC) which scrutinises Bills being considered by the Parliament. As mentioned above, this is used to determine whether the Bill is or is not aligned with the human rights prescribed in the Charter. Moreover, as part of that process Government departments can use the Charter's provision (Section 31 (3)) to claim exemptions from the application of the Charter.

The focus in this article is on this particular aspect of the procedure, namely the seeking of 'exemptions' that allow for a breaching of young people's rights normally protected by the Charter. I suggest there are reasons for concern given the precedents already set in respect to exemptions sought from the Charter on grounds that relate to young people's 'minority status', and which draw

on ideas about their immaturity, and relatively their lack of 'ethical' and 'cognitive competence'. There are other questions all of which I cant address where like whether statements about compatibility or Section 31 (3) statements about why legislation should override the Charter and breach certain rights are based on predictions about matters such as the likelihood legislation will redress the social problem its being introduced to fix and also what is the bases of such predictions.

Section 7 of the Charter sets out how the promotion of the human rights it specifies may be lawfully constrained by certain '*reasonable limits*' which allow for an exemption from the application of the Charter. The Charter suggests that certain restrictions on Charter rights may be justified when taking into account

... all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. (Charter Human Rights and Responsibilities Act 2006 (Act no 43/2006), p.10).

Although a significant number of exemptions have been granted in respect of new legislation since 2007 two Bills which affect or reflect on the civic status of young people stand out and I propose to look at these. They are:

- *The Graffiti Prevention Bill (2007)*
- *The Summary Offences Amendment (Body Piercing) Bill 2007*

### **1. The Graffiti Prevention Bill (2007)**

In respect of the Graffiti Prevention Bill, the SARC drew attention to the fact that the pending legislation appeared to conflict with the Charter on a number of grounds. The Bill in question discriminated against a specific age-based group by proscribing the sale of spray cans to any person under the age of 18 years, just as it breached the right to freedom of movement for persons under 18 years of age. The Bill for example enabled police to prevent what is described as 'would-be graffiti offenders' (sic) from entering public spaces should that police officer think they might spray paint graffiti (VEO&HRC 2007, p. 64). The Bill also the breached the right to privacy which is that people ought to be free from government intervention or excessive unsolicited intervention, a right breached for example by the Bill allowing police to lawfully stop a young person and prevent them from moving while they search them for evidence. Finally the Bill breached the right to a presumption of innocence. The Department of Justice successfully claimed exemptions from the Charter.

The Department of Justice claimed that it was reasonable to discriminate against young people beginning with its intention to restrict the sale of a specific item, namely spray cans of paint to any person under the age of 18 years, a restriction that discriminates against people on the ground of their age. While the prohibition on discrimination is reflected in the preamble of the Charter an exemption was made in respect to this legislation by referring to section 7 of the charter. The critical section reads:

'A human right may be subject under law to such reasonable limits as can be reasonably justified in a free and democratic society based on human dignity and freedom, and taking into account all relevant factors...(s7(2) (VCHRR Act 2006, p. 10).

The Department of Justice also claimed that breaching the right to freedom of movement for persons under 18 years of age was reasonable. This was entailed in the Bill's provision for preventing young people from legally entering certain areas while they possess or are suspected of possessing a spray can or related supplies.

The Department also claimed that it was reasonable to enable police officers, when they believed they have 'reasonable grounds' for suspecting a young person of possessing graffiti paraphernalia or if they feared that evidence might be lost or destroyed if a search is delayed, then they could lawfully detain a young person and prevent from moving while they search them for evidence. (A young person who appears to be over 14 and under 18 years of age can be searched ('pat down search'). This exemption from a legal requirement that they protect the right to freedom of expression was 'justified' by reference to lawful restrictions reasonably necessary for public order',

public health and public morality (see. section 15(3) of the Charter). Certain kinds of property rights and public order were also deemed to have priority and provide grounds for an exemption to the right to freedom of expression.

Exemptions were also sought and granted in regard to overriding the right to private property by reason of recognising a prior need to maintain public order. A police officer for example can seize spray cans and other related items if they have 'reasonable grounds for suspecting that the young person has in their possession a 'graffiti implement' or evidence that it may be lost or destroyed.

Finally the Bill gives police the right to search without being required to show they have reasonable suspicion or some other legitimate reason to search. It overrides the traditional legal principle concerning the presumption of innocence. According to s25 (1) of the Charter, a person 'charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law. The Graffiti Bill made it possible for young people under 18 to be stopped and searched by police and to have their possessions seized. The seizure of property without a finding of guilt is a penalty and as such an abrogation of the presumption of innocence.

This exemption was consistent with other parts of the Bill which enable police to prevent what is described as 'would be graffiti offenders' from entering public spaces should that police officer think they might spray paint graffiti (VEO&HRC 2007, p. 64). Prohibiting certain people from accessing public space is a penalty which means the young person is effectively given a sentence despite the fact there is no finding of guilt. In this way it abrogates the right to be presumed innocent until its proven otherwise.

In both cases an exemption was granted by referring once more to section 7 of the Charter. The justification for the exemption is said to 'assist the prosecution in securing graffiti offenders because relevant and adequate evidence is ordinarily very difficult to obtain and consequently convictions are difficult to secure' (VEO&HRC, 2007, PP. 65-66).

The deeply prejudicial nature of the basis for seeking exemptions from the Charter is revealed if we ask what evidence and analysis was used to back up the claim for this exemption? The prejudicial nature of the exemption is also reveal when it is understood that no such abrogation of the presumption of innocence is conceivable in cases where police might well believe that an adult might be about to commit a crime like rape or a financial fraud. Equally we see that securing a prosecution apparently overrides both the right of a young person to access to be presumed innocent until proven guilty and their right to access public space in ways that would never be countenanced if the subject was adult

In this way the codification the denial of under 18 year olds right to access public space into law by an instrument designed to enhance human rights of minority group is a concerning 'development'.

## **2. Summary Offences Amendment (Body Piercing) Bill 2007.**

The *Summary Offences Amendment (Body Piercing) Bill* was intended to insert a new section into the *Summary Offences Act 1966* with a view to preventing a person under 18 years of age from having any part of their body pierced without appropriate adult consent (VEO&HRC 2007, pp. 16-17).

Once more we saw certain rights over-ridden including the right to freedom of expression. That right was seen to be exempt because it competed with the overriding right to protection of family and children. In other words, permitting a person under 18 to make a decision about body piercing was read as not protecting that person. The assumption operating was that those over the age of 18 (namely, parents guardians) are better equipped than the young person themself to make decisions that are in their best interest and to secure their general welfare.

The degree to which this assumption can be made in the context of revelations of systemic abuse and neglect of young people at the hands of adult 'carers' acting in the role of loco parentis gives good reason for questioning such an assumption.

It is also somewhat paradoxical that the rights of a young person to be able to make decisions about their own body is more constraining and conservative in the context of a human rights charter than it is in other contexts in which one might reasonably think would be more limiting. Young people under 18 years of age are for example 'permitted' to make decisions about their

medical treatment. In Australia, we have legislative provisions and common law principles that acknowledge the developing abilities and competence of young people. Where a young person is either over a statutory age (it varies across jurisdictions from fourteen to sixteen), or of 'sufficient maturity' that they are able to comprehend the procedure and give informed consent to make decisions about the medical treatment they receive. (<http://www.loc.gov/law/help/child-rights/australia.php#f27> )

It is also worth noting that young people under the age of 17 are deemed capable enough to make a decision about join the armed services in which they are educated in the art of war and can soon after see armed conflict. The age at which a young person can enter to military schools, apprentices and members of Service cadet programs without parental consent are even younger, yet they are deemed to be capable of making a decision about having their ear pierced without formal consent from their parent.

Likewise in early 2007 the National Health and Medical Research Council, the Australian Research Council and the Australian Vice-Chancellor's Committee developed the National Statement on Ethical Conduct in Human Research which provides a guide for research in Australia. As part of their deliberations they took the decision to allow young people age under 18 years of age to make the decision about whether or not to participate in particular kinds research without parental or guardian consent (NH&MRC, ARC, AVCC, 2007, pp. 57-58).

## **DISCUSSION**

Although the Charter seems to promise much when it specifies a large number of rights and freedoms – the provision for seeking exemptions from its operation presents a general problem. As we have seen here, this provision seriously affects the capacity of the Charter to protect the rights of young people then there is real cause for alarm since it seems that the Charter continues to allow for and indeed in some circumstances legalizes age based discrimination.

There is a real risk that the Charter itself will compound popular prejudices about young people's moral status (eg., as not quite human or deserving of human rights and thereby deserving of the full protection of the law). In particular there is a risk that seeking exemptions as is permitted by the Charter will not only override young people's rights, but will make things worse by embedding and reinforcing prejudicial assumptions, many of them widely held in the community in current law and policy. In other words the mechanism for seeking and granting exemptions for the rights specified in the Charter clearly rely on and reinforce stereotypical beliefs about the adolescent or teenager as potential or likely delinquents or 'would-be graffiti offenders' (VEO&HRC 2007). This in turn may compound the way these attitudes enter into the formation of self identity by young people as they are internalized by young people themselves.

Paradoxically the Charter is likely to embellish the very problem it was ostensibly established to address namely the fact that young people were, and in many contexts are still not entitled to certain human rights that all other citizens are. This aspect of the Charter's operation in conjunction with the various regulatory practices already in place that over ride young peoples rights, combined with inequitable inter-generational power relations will mean that young people will not be any more able now to use legal and other protective mechanism to defend themselves than they were before. Indeed the Charter contributes to the continued *possibility* of abuse of power. The conditions for producing docile bodies subject to the power and whims of adult-authority figures have been historically created through an amalgam of regulatory mechanisms and narratives about the adolescent. In this way the 'lost generation' becomes a tragic metaphor not only of the realities of harm and neglect but also for abuses that arises when potent power is accorded to some over vulnerable others. These long-standing presumption have for too long sanctioned an absence of respect which in turn has in some instances systematic enabled cultures of abuse and maltreatment of young people, in the guise of 'welfare' at the hands of their 'carers' (Briggs 1996).

For many young people the identity of adolescent as troubled and trouble-maker, as fledging citizen makes it difficult for them to defend themselves. This is because as adolescent many young people lack the socio-legal entitlements and practical resources to protect themselves. The formation of such identities means that many young people experience themselves as the property of another, as subordinate, inferior, incapable of making decisions, and not always able to question

or resist adult authority. Historically, this scenario also applied to many women: the internalization of repressive sexist discourses made it difficult for them to defend themselves against assault.

Added to this is the reality that young people are always a numerical and moral minority making the prospect of challenge or redress of the status quo difficult. This is even more difficult given the popularity of utilitarianism or doctrine that the good or welfare of a community is defined by ensuring the greatest happiness for the greatest number.

Use of exemptions to override young peoples human rights in ways identified in this article also run the risk losing the opportunity offered by the Charter to protect their rights, but also to place by legal means Victoria's young people in what the Italian social theorist Giorgio Agamben calls a 'state of legal exception' (Agamben 2005).

By a 'state of exception' Agamben means a situation where a legal system or a constitutional government lawfully suspends either the rule of law or a range of fundamental rights and liberties. Typically and historically this was done because a state of emergency was deemed to exist. This is certainly not the situation in respect to young people in the state of Victoria.

Denying or restricting the right to be protected by common law for minority groups in a community, is not conducive to building a strong democratic society in which all members enjoy the capacity to seek legal redress to protect themselves. This issue matters because laws reflect and inform social practices, such that if we have laws that have proper regard for or respect the rights of a section of the community, then we can expect that social relations and civic practices are likely to follow suit. The 'state of exceptionality' in which young people find themselves now is made possible by virtue of the passage of a Charter of Rights which legitimates age-based discrimination. Determining that governments can seek exemptions from the Charter relies on the basic proposition that young people are not full citizens by reason of immaturity irrationality or relative cognitive-ethical incompetence (thus, needing protection in the forms of others deciding what is in their interest). To this is then added certain long-standing and popular beliefs that young people are a danger to themselves and others. In consequence they are not entitled to the 'normal' range of rights and liberties adults take for granted.

Making this point is not meant to evade the point of the observation that in a liberal democracy like Australia, governments confront tensions between a variety of competing imperatives in which human rights do have to be set against other values like public order, public health and public morality. When subjected to political pressure to be seen to be responsive to appeals to law and order from citizens concerned about graffiti, or other public order issues, key officials working in government departments can too easily be persuaded to privilege tough law and order rhetoric in preference to protecting basic human rights.

Legally enshrining human rights in instruments like Victoria's Charter is a good idea and can produce important practical and ethical consequences. Amongst other things 'bills of rights' can be used to re-shape the social identities of young people in ways that genuinely respect their human status and so are authentically protective of them.

The assumption operating here is that young people generally are not supposed to have knowledge or experience of 'adult' activities (ie., paid full-time employment, a sexual life, the capacity for responsible decision etc), that they lack the facility to fully reason or exercise human agency and are submissive, risk-taking trouble-makers. These are prejudicial assumptions that work to inhibit the capacity of many young people to be quipped in ways that they otherwise might be, to manage relationships and situations where they sometimes need to protect oneself. Yet as I argued earlier, if young people have their rights observed and legally recognised, then it is likely they will cease to be such easy targets for those interested in the paternalistic and exploitative exercise of power over them.

Without labouring the point, the case being made is that giving priority to imperatives like law and order or privileging assumptions that adults are automatically in a better position to decide what is in the young person's interest than young people, reproduces the conditions for continuing paternalistic practices that treat 'the child' and 'the adolescent' as if they really are naturally submissive or docile. Generations of living in settings in which young people are deemed to have no rights has tended to render them less and less able to resist those whose interests are served in continuing inequitable and discriminatory relations.

A major obstacle to recognizing young peoples' rights is the tendency to give preference to the guardianship/welfare position in respect to rights, which owes much to a refusal to recognize young peoples' varying capacities and competencies to exercise rights. It also relates to a failure to recognize an obligation that exists on the part of others (older people) to acknowledge any differences that constrain young peoples' capacity to exercise a right, and to provide support that enables them to exercise that right. That support may entail for example providing additional information, further explanations or use of language they can make sense of in order to make informed decisions in about matters in which they have a direct interest.

A major obstacle to recognizing young people's rights is this tendency towards guardianship and negative rights which is typically at the expense of positive rights, plus the general reluctance to recognize the duties older people owe to younger people to ensure all people regardless of age, ability, ethnicity or gender enjoy their human rights.

## Conclusion

The introduction of the Victorian human rights Charter promises to provide a framework of legally enforceable human rights for young people. However there is evidence of a willingness on the part of government to seek exemptions from its application especially when its provisions affect young people and in effect permit lawful discrimination against young people is a matter of concern. It is helpful to identify this tendency and highlight its capacity to inhibit the potential of human rights legislations like the Victorian Charter of human rights and responsibilities from being able to secure the human rights of young people.

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