



Victorian Equal Opportunity  
& Human Rights Commission

# Talking rights

> Consulting with Victorians about the rights of people with disabilities and the Charter





## Victorian Equal Opportunity & Human Rights Commission

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March 2011

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Printed on Impact.

Printed by Typo Corporate Services.

ISBN 978-0-9808061-4-4 (print)

ISBN 978-0-9808061-5-1 (online)

### Abbreviations

Australian Human Rights Commission (AHRC)

Charter of Human Rights and Responsibilities (the Charter)

Convention on the Rights of Persons with Disabilities (CRPD)

United Nations (UN)

Victorian Equal Opportunity and Human Rights Commission (the Commission)

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# The Charter of Human Rights and Responsibilities

The Charter of Human Rights and Responsibilities (the Charter) outlines the basic human rights of all people in Victoria.

The law aims to build a fairer, more inclusive community.

The Charter affects the operation of the legislature, the executive (including public authorities), and the courts:

- A statement of compatibility with the Charter must be tabled with all Bills on their introduction to parliament that tells parliament whether they meet the standards set by the Charter.
- All legislation (including subordinate legislation) must be assessed for compatibility with human rights by the Scrutiny of Acts and Regulations Committee.
- Public authorities must act in accordance with human rights and give proper consideration to human rights in decision making.
- Courts and tribunals must interpret and apply legislation consistently with human rights and may have regard to international, regional and comparative domestic human rights law.
- The Supreme Court has the power to declare that a law is inconsistent with human rights but does not have the power to strike it down.

The Charter gives specific legal protection to 20 fundamental rights:

- recognition and equality before the law (including being entitled to protection from discrimination)

- right to life
- protection from torture and cruel, inhuman or degrading treatment
- freedom from forced work
- freedom of movement
- privacy and reputation
- freedom of thought, conscience, religion and belief
- freedom of expression
- peaceful assembly and freedom of association
- protection of families and children
- taking part in public life
- cultural rights (including recognition that human rights have a special importance for the Aboriginal people of Victoria)
- property rights
- right to liberty and security of person
- humane treatment when deprived of liberty
- children in the criminal process
- fair hearing
- rights in criminal proceedings
- the right to not be tried or punished more than once
- retrospective criminal laws.

In certain circumstances, rights may be limited. However, this must be necessary and reasonable and there must be clear reasons for the decision.

For more information about the Charter, visit the Commission's website: [humanrightscommission.vic.gov.au](http://humanrightscommission.vic.gov.au).

# The four-year review of the Charter

One important role of the Victorian Equal Opportunity and Human Rights Commission (the Commission) is to examine how the Charter – and the protection of human rights in Victoria more broadly – can be strengthened.

The Charter itself provides for ongoing reform, with section 44 requiring the Attorney-General to conduct a review of the first four years of the Charter's operation and to table a report of the review in Parliament by 1 October 2011.

While the scope of the four-year review is broad, it is specifically required to examine whether additional human rights should be included in the Charter. The review must include (but is not limited to) economic, social and cultural rights, women's rights and the rights of children as they are set out in the United Nations (UN) conventions.

The four-year review can, and the Commission believes should, consider the rights protected under all the major international human rights conventions which Australia has signed. This includes the Convention on the Rights of Persons with Disabilities (CRPD), which Australia

ratified on 17 July 2008 after the Charter was introduced. This ratification means that Australia has agreed that it will take all necessary steps to respect, protect, promote and fulfil the rights in the CRPD.

Persons with disabilities have the same economic, social and cultural rights as any other member of the community and include children with disabilities and women with disabilities. To this extent, the rights contained in the CRPD overlap and strengthen the rights of persons with disabilities found under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women.

This paper builds upon, and should be read in conjunction with, papers prepared by the Commission in 2008 and 2009 on themes relevant to the review, available at [humanrightscommission.vic.gov.au/charterreport](http://humanrightscommission.vic.gov.au/charterreport).

# Overview

Around 650 million people, or 10 per cent of the world's population, live with a disability. According to the World Health Organization, persons with disabilities form the largest minority in the world and the figure is increasing. Eighty percent of persons with disabilities live in developing countries, with women and girls with disabilities particularly vulnerable to abuse.<sup>1</sup>

According to the Australian Bureau of Statistics, four million Australians (18.5 per cent) had a reported disability in 2009.<sup>2</sup> In Victoria, nearly one million people live with a disability.<sup>3</sup>

Disability can include mobility, sensory, neurological, intellectual and psychiatric conditions, among others.

In recent years, a number of international human rights instruments, including the Convention on the Rights of Persons with Disabilities (CRPD), and domestic laws have been introduced to promote and protect the rights of persons with disabilities in Australia and around the world.

The purpose of this paper is to generate discussion on whether the Charter can be strengthened to better protect the rights of persons with disabilities, and whether the Convention on the Rights of Persons with Disabilities (CRPD) can help to achieve this.

This paper explores the protection of the rights of persons with disabilities under the Charter in light of Australia's ratification of the CRPD, on 17 July 2008.

The ratification of the CRPD means that Australia has agreed that it will take all necessary steps to respect, protect, promote and fulfil the rights in the CRPD.

The CRPD is the first legally binding international document that specifically promotes and protects the rights of persons with disabilities. It includes civil, political, economic, social and cultural rights without distinction and protects them all equally.

The CRPD represents a paradigm shift from the outdated 'medical model' and 'welfare based' approach to disability, to a 'social model' and 'rights-based' approach to the advancement and protection of the rights of persons with disabilities. It is significant

because it was the first time that non-government organisations were substantially involved in the negotiations for a United Nations treaty.

This paper also explores the way that the rights of persons with disabilities have been considered by courts in Australia and overseas. In Australia, the CRPD is not automatically part of domestic law but courts can nevertheless consider our international human rights obligations to help them interpret the law.

Australian and international cases demonstrate the way that the CRPD can assist to reframe governments' understanding of disability and their human rights obligations. There is no human rights Act or equivalent at a national level, and rights are protected primarily through anti-discrimination laws, the most important being the *Disability Discrimination Act 1992* (Cth) and also the *Disability Services Act 1986* (Cth). These exist alongside relevant Victorian legislation including the *Equal Opportunity Act 1995* (Vic)<sup>4</sup> and the *Disability Act 2006* (Vic).

The Victorian Charter protects the rights of persons with disabilities equally with all other Victorians. Discrimination in the Charter has the same meaning as in the Equal Opportunity Act, which includes ‘impairment’ as a protected attribute. A handful of other laws affect the rights of persons with disabilities in Victoria, including the *Mental Health Act 1986 (Vic)* and the *Guardianship and Administration Act 1986 (Vic)*, which are both currently under review to ensure they protect human rights appropriately in the light of the Charter.<sup>5</sup>

For more information on the Charter, the CRPD and other international, federal and state human rights laws protecting the rights of people with disabilities, see ‘The Human Rights Law Context’ and ‘Protection of the rights of persons with disabilities in Victoria’ in the body of this report.

## What Victorians with a disability have to say

The Commission held a forum in July 2010 to consider the current state of rights protection for persons with disabilities in Victoria. The forum brought together approximately 120 people with disabilities, advocates, service providers, support workers and members of government to discuss the key human rights issues facing persons with disabilities in Victoria.

The forum focused on the extent to which persons with disabilities were using the Charter, whether it was making disability issues more prominent in the development of laws and policy, and how it could be strengthened to better promote and protect the rights of persons with disabilities in Victoria, particularly in the light of Australia’s ratification of the CRPD.

The focus of the forum was on discussion in order to benefit from the expertise of participants. The views presented below are those of the participants.

While certain rights of persons with disabilities are protected in Victoria, significant improvements are needed to ensure “the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities” (Article 1 CRPD). These improvements include strengthening the Charter to better protect such rights.

## Common themes

Many of the issues highlighted are systemic, institutionalised and embedded into common thinking within the community, requiring much broader and concerted action by government to address than simply looking at ways to amend the Charter.

**Respect for human dignity:** A lack of acceptance and understanding of disabilities within the community, and the consequent stigma, is an obstacle to respect for the human dignity of persons with disabilities on an equal basis to others.

**Protection of rights:** The Charter affords weaker protections for the rights of persons with disabilities than the CRPD. Adding economic, social and cultural rights to the Charter would ensure greater protection.

**Enforcement of rights:** The protections provided by the Charter are ineffective without an enshrined enforcement provision. The current scheme where Charter complaints are made to the Victorian Ombudsman is too weak to protect such a fundamental matter as human rights. There is a disparity between the rhetoric of the Charter and its implementation in practice.

**Awareness-raising:** Lack of awareness about the Charter was the most significant gap in the promotion and protection of human rights in Victoria. Most participants had little knowledge of their rights under the Charter or how it can be used to advance and protect these rights.

**Accessibility:** People with disabilities experience accessibility issues across a range of areas including information, physical infrastructure, education, health, jobs, cultural pursuits, leisure, sport, employment and public life. The Charter should be strengthened to place more detailed obligations on public authorities in line with the model in the CRPD.

**Support and advocacy:** Support services should be funded and delivered based on a human rights model that empowers people with disabilities.

## Key human rights issues

**Work and employment:** Persons with disabilities experience a disproportionately high unemployment rate compared to other members of the community, which participants attributed to a bias against hiring persons with disabilities.

**Education:** A critical shortage of adequately trained teaching staff and lack of vital support, aids and equipment in schools due to insufficient funding mean that the education system is often failing children with disabilities.

**Housing and accommodation:** Affordable and accessible housing is in short supply, particularly in regional and rural areas, which hinders people from living independently and safely in the community. Due to the lack of appropriate housing, persons with disabilities are often forced

to live in respite care, particularly nursing homes.

**Health:** A lack of understanding by health professionals of the needs of persons with disabilities leads to the provision of inadequate health care. Involuntary medical treatment in the area of mental health was also a major concern.

**Participation in social and cultural life:** A number of barriers prevent people with disabilities from participating in social and cultural life – an inaccessible physical environment leads to exclusion, a shortage of Auslan interpreters can lead to isolation, and lack of adequate support services restricts people's social life.

**Respect for privacy:** The processes for qualifying for services can be highly invasive, with people often required to provide a great deal of personal information, such as medical details, to people whom they believe have no right to this information.

**Communication and access to information:** Much information in the public and private sphere, including government information, is in inaccessible formats. 'Authority to advocate' forms must be in a valid format before an advocate can act in the interests of a person with a disability.

**Participation in political and public life:** Fully accessible polling booths are not available in all electorates, leaving people with disabilities to vote in public or find an undignified way to enter a polling booth. Many people feel they are encouraged to seek an exemption from voting.

**Access to justice:** While communication devices are being used in court, often the person with a disability is not given the time they need to express themselves through the device.

**Transport:** The waiting time for accessible taxis is lengthy and people complain of not being treated with dignity. The shortage in accessible public transportation means that persons with disabilities can only travel at certain times when accessible services are running.

**Right to life and family:** The right of persons with disabilities to have a family is commonly taken away through forcible termination of pregnancies, particularly for people with intellectual disabilities. Parents with disabilities may be subject to child protection investigations after the birth, and in some cases have their children removed in the belief that they are unable to properly parent.

**Freedom from torture, exploitation and abuse:** Medical experimentation, chemical restraint and the use of electroconvulsive therapy continues to be used in Victoria's psychiatric wards, including without informed consent. Concerns remain about abuse or neglect by carers and support workers.

**Women and immigrants:** Minority groups such as women, Indigenous persons and immigrants who have disabilities are exceptionally disadvantaged.

### The Charter as an advocacy tool

The degree to which participants used the Charter to advocate for the support, promotion and protection of rights varied, but most reported having little or no knowledge of the Charter and had no experience using the Charter as an advocacy tool.

On the positive side, there was a general sense that the Charter has created a human rights dialogue in Victoria, which has enabled advocates to frame their arguments using the language of human rights, although this is coupled with an acknowledgment that many lack knowledge of how the Charter may be used to advocate for rights.

Participants felt that the Charter generally has not brought a 'disability lens' to the development of laws and policies, and when applied, there is often a significant disparity between policy and practice.

### Current gaps in the promotion and protection of the rights

The most significant gap in the promotion and protection of rights is the lack of awareness about the Charter, and consequently people are not empowered to self-advocate, or to advocate effectively on behalf of their clients.

The absence of a complaints mechanism is a considerable weakness of the Charter. While the Charter provides for certain rights to be afforded to all people, this protection is rendered powerless without an enshrined enforcement provision.

The absence of economic, social and cultural rights in the Charter is a significant gap in rights protection, as these rights are crucial to ensuring persons with disabilities lead equal lives.

Government could do more to support people with disabilities. Although laws and standards exist, they lack the necessary government support and funding to ensure they are observed.

## Limitations on the rights of persons with disabilities

**Rights limited by the Charter:** Section 7 is extremely broad and it is consequently too easy for people to justify any restrictive action as a reasonable limitation of rights.

Restrictions on the rights of persons with disabilities are sanctioned in several laws, including restrictive interventions under the Disability Act and involuntary psychiatric treatment under the Mental Health Act. It is concerning that these limitations are seen as 'reasonable'. Other laws seen as limiting the rights of persons with disabilities include Guardianship or Administration Orders in the Guardianship and Administration Act, the 'unjustifiable hardship' exception in the Commonwealth Disability Discrimination Act and occupational health and safety laws that put risk management above human dignity.

Negative perceptions of disability in society need to change before rights can be fully realised.

## Improving the promotion and protection of the rights of persons with disabilities

Participants identified numerous steps that could be taken to ensure the standard of life for persons with disabilities is significantly improved. The most frequently mentioned was improving access to training and education on the Charter for persons with disabilities, their organisations, their advocates, service providers, government and the legal community. A major media campaign by the government to raise the profile of the Charter would raise awareness among the general community and encourage respect for Charter rights.

The Charter itself could benefit from changes: a complaints mechanism and a process for enforcing legal remedies when rights are violated is fundamental, and tighter controls on when rights can be reasonably limited would raise the bar for justifying the restriction of rights. Economic, social and cultural rights should be included to recognise their importance for people with disabilities, as noted above. Interpreting the Charter consistently with the CRPD would address many of these concerns.

Issues concerning persons with disabilities require bipartisan support from government. Government should establish a specific department or officer to receive complaints regarding a breach of rights. The current option of complaining to the Ombudsman is not an effective one.

Government must continue its process of assessing the compatibility of legislation affecting persons with disabilities with human rights legislation such as the Charter and CRPD.

## Options for amendments to the Charter

Based on the forum discussion and international practice, a range of possible amendments to the Charter are offered.

These are:

1. The addition of economic, social and cultural rights to the Charter. For persons with disabilities, it should also include the right to live independently and to be involved in the community.
2. The review of the general limitations clause in the Charter in the context of Article 4 of the International Covenant on Civil and Political Rights and the long-standing classification of certain rights as absolute rights allowing no limitation under any circumstances.
3. The recognition that human rights are particularly important to vulnerable or disadvantaged groups such as women, children, persons with disabilities, older persons and Aboriginal persons.
4. The clarification of the application of human rights to recognise that extra measures may be needed to ensure vulnerable persons can enjoy their rights on an equal basis to others.
5. The clarification of the obligation of public authorities to give special consideration to the human rights of vulnerable persons.
6. The expansion of the obligations on public authorities to include specific measures to protect rights.
7. The addition of a subsection stating that all persons, including vulnerable groups, have the right to enjoy legal capacity on an equal basis with others in all aspects of life.
8. Clarification of the entitlement everyone has to equal benefit from the law as well as equal protection.
9. The addition of a new section on 'Protecting the integrity of the person'.
10. The addition of a new section on 'Respect for human dignity'.
11. The addition of an enforcement mechanism.
12. Schedule the CRPD, and the other human rights treaties to which Australia is a party, to the Charter (similar to the way in which the International Covenant on Civil and Political Rights is scheduled to the Commonwealth *Australian Human Rights Commission Act 1986*).

For the detailed list of suggested amendments, see 'Options for amendments to the Charter' in the body of this report.

# What Victorians with a disability have to say

## Forum on the rights of persons with disabilities

The Commission held a forum in July 2010 to consider the current state of rights protection for persons with disabilities in Victoria. The forum brought together approximately 120 people with disabilities, advocates, service providers, support workers and members of government to discuss the key human rights issues facing persons with disabilities in Victoria.

In devising the key questions to be addressed at the forum, the Commission was advised by a reference group convened specifically for the event. The reference group consisted of members of the Commission's Disability Reference Group with experience in various areas including advocacy and rights promotion and protection. This group assisted the Commission in determining the general content and approach of the symposium over several consultations. The contributions of the reference group were vital to ensuring the success of the symposium.

The forum focused on how persons with disabilities were using the Charter, whether or not it was making disability issues more prominent in the development of laws and policy, and how it could be strengthened to better promote and protect the rights of persons with disabilities in Victoria. In particular, these issues were considered in light of Australia's ratification of the Convention on the Rights of Persons with Disabilities (CRPD).

*When I first came to the Convention on the Rights of Persons with Disabilities, I was amazed. The disability community is so diverse, and in the Convention process all of these people were able to come together with one voice. Different disabilities have different priorities but we all have the same basic need – human rights. It was really unifying, creating this powerful global voice – think global, act local.*

As well as discussing these issues, participants shared their personal experiences with the failings and achievements of the current system of rights protection, especially the impact the Charter is having on the protection of these rights in practice as opposed to 'on paper'.

The key questions addressed at the forum were:

1. What are the key human rights issues facing persons with disabilities in Victoria?
2. Is the Charter being used to advocate for the support, protection and promotion of these rights? If so, how does the Charter do this, and is the support and protection afforded by the Charter sufficient?
3. Has the Charter brought a 'disability lens' or analysis to the development of policies and laws? Do laws and policies now take into account the relevant barriers facing persons with disabilities in enjoying rights? If not, why?

4. What are the current gaps in the promotion and protection of the rights of persons with disabilities?
5. How are rights limited by the Charter? Does the procedure set out under section 7 need greater scrutiny or amendment to ensure the rights of persons with disabilities are respected?
6. How can the promotion and protection of these rights be improved?

The views presented below are those of the participants. They represent a diversity of people's experiences and lives. They are the opinions and anecdotes of the people who attended the forum and do not necessarily speak for every person with disabilities or the disability sector as a whole. Nevertheless, there was a great diversity of people present and a significant representation of the disability services sector in Victoria, and the findings provide a valuable insight into the issues facing persons with disabilities in exercising their rights in Victoria.

It became clear at the forum that while certain rights of persons with disabilities are protected in Victoria, significant improvements are needed to ensure "the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities" (Article 1 CRPD). These improvements include strengthening the Charter to better protect the rights of persons with disabilities.

The Commission believes the discussions held at the forum provide a vital first step in ensuring such improvements are made in Victoria, especially the contributions made by persons with disabilities at the forum who are talking from firsthand experience rather than a legal or academic viewpoint.

## Common themes

*Yes, we have come a long way, but there is a long way to go: we want the same rights and freedoms as everybody else. It's not about whether a person tolerates, or cares, but about ensuring a person has the same rights.*

The focus of the forum was on discussion in order to benefit from the expertise of participants. Small group discussions gave everyone a chance to contribute, but each group considered the same questions. Through discussion and the sharing of experiences, various areas were identified as particularly problematic for persons with disabilities. A number of common themes were raised in all groups, where participants believed the system of rights protection was failing most. These themes identify key areas where persons with disabilities are not able to enjoy their rights on an equal basis with other members of the community.

Many of the issues highlighted are systemic, institutionalised and embedded into common thinking within the community, requiring much broader and concerted action by government to address than simply looking at ways to amend the Charter. However, participants thought that the process involved in looking at the Charter in this way, starting with the forum, was a positive first step.

## Respect for human dignity

*When you go out into the community, there are some people who accept you and there are others who will not. Community attitudes towards persons with disabilities need to change.*

The most prevalent issue raised by persons with disabilities was the right to respect for their human dignity on an equal basis to others. The obstacle to achieving this was identified as a lack of acceptance and understanding of disabilities within the community. There is still a stigma and negative perception of persons with disabilities in the minds of many in the community.

There was general agreement that society projects the disability upon the individual, making this their identity rather than seeing the individual as an equal citizen of the community. A long-term change in attitudes is required to address this underlying issue.

People reported being treated condescendingly and spoken to 'like a baby'. Many people experienced being spoken about behind their backs and even when they were in the same room. Participants believed that this lack of respect is evident among some disability service providers and government departments, as well as members of the general public.

Participants believed a significant public awareness campaign based around the Charter and the rights of persons with disabilities is needed to foster respect for the rights and dignity of persons with disabilities. More generally, the campaign needs to combat stereotypes and ingrained prejudices relating to persons with disabilities by promoting awareness of their capabilities and contributions to society. The campaign must promote positive perceptions and greater social awareness towards persons with disabilities (taken from Article 8 CRPD).

## Protection of rights

The Charter does not afford the same coverage of rights protection as the CRPD. Consequently, participants felt the Charter is weaker in the protections it affords persons with disabilities.

The split of rights into the subsets of economic, social and cultural rights and civil and political rights was seen as artificial, and not relevant to the protection of rights in the twenty-first century. In order to make the Charter a stronger document, participants thought the Victorian Government should, in the first instance, add economic, social and cultural rights to the civil and political rights it already protects. In doing this, the Government would provide much stronger protections for people with disabilities in Victoria.

The Commonwealth Government should fully implement the CRPD by enshrining its human rights mandate into a human rights Act at the federal level. At the state level, Victoria should amend the Charter to take account of the rights of persons with disabilities.

For too long, disability has been dominated by inappropriate medical, welfare and charity approaches at both the Commonwealth and state levels, rather than the social and rights-based approach promoted by the CRPD. At the very least, the definition of 'disability' in the *Disability Discrimination Act 1992* (Cth) and 'impairment' in the *Equal Opportunity Act 1995* (Vic) should be altered to reflect the social model of disability.

## Enforcement of rights

There was concern about the Charter's inability to stand alone and allow a person to bring a case directly to court for a breach of Charter rights. Further, participants felt that while the Charter says certain rights are to be afforded to all people, this protection is lessened without an enshrined enforcement provision. The current scheme where Charter complaints are made to the Victorian Ombudsman was thought to be too weak to protect such a fundamental matter as human rights.

Without accountability and an enforcement mechanism, the Charter was thought by many participants to be nothing more than ‘window dressing’, a ‘toothless tiger’ lacking the strength to confront and deal with actual breaches of human rights. The overall feeling was that the protections provided by the Charter are ineffective without an enshrined enforcement provision.

Participants were of the opinion that there is a disparity between the rhetoric of the Charter and its implementation in practice. This disparity may arise from the lack of a direct enforcement mechanism, resulting in certain public authorities only paying lip service to their obligations under the Charter.

## Awareness-raising

*The lack of awareness of the Charter at the level of individuals was a major concern, as in the words of one participant, ‘knowledge is power’.*

The most significant gap in the promotion and protection of human rights in Victoria is the lack of awareness about the Charter. There is a notable lack of knowledge in all sectors about the Charter and how it can be used to protect rights, let alone its possible uses as an advocacy tool. The vast majority of participants reported that they have little knowledge of their rights under the Charter or how the Charter can be used to advance and protect these rights.

Society, government and the private sector do not consider the rights of people with disabilities as a priority, because they do not look at the connection between persons with a disability and the rest of society. All the matters that affect persons with a disability affect everybody else in society. If we act to benefit persons with a disability, this benefits the community more widely as well.

## Accessibility

Participants noted that it is difficult for persons with disabilities to find the Charter in accessible formats, such as in Braille, in multiple languages or in simplified English. Many participants said they didn’t need a ‘dumbed down’ version of the Charter, but simply one in a format they could access and understand.

Participants believed that the complex nature of the Charter as a legal document makes it inaccessible for persons with disabilities and limits its ability to promote and protect rights. These issues need to be addressed if the Charter is to be used effectively by persons with disabilities to stand up for their rights.

In general, participants raised accessibility issues across a range of areas including physical infrastructure, education, health, jobs, cultural pursuits, leisure, sport, employment and public life. Participants stated that the physical environment is always considered first because it is visible to the public. Organisations tend to think that if they put ramp access into their buildings they are disability friendly and have ‘done their bit’. However, participants questioned whether the same consideration was given to other aspects of disability that are not so obvious.

Suggestions include having the Victorian Government enact legislation to require total accessibility to all government, business, commercial and community buildings and infrastructure within three years, with funding available to small and medium sized businesses to help them achieve these deadlines. This includes schools, housing, medical facilities, sporting facilities and workplaces.

The CRPD obliges governments to take a range of measures to address accessibility in all these areas, whereas the Charter places only limited obligations on public authorities under section 38 to act in

ways compatible with human rights and in making decisions to give consideration to a relevant human right. This section needs strengthening in order to place much more positive and detailed obligations on public authorities to ensure the Charter really does protect the rights of persons with disabilities. In the CRPD, there is a ready-made model to help in doing this.

## Support and advocacy

Support services must be funded and delivered based on a human rights model. Services must empower people with disabilities to live independently whether alone, with friends or with their families. This support should include the necessary personal, social, health, educational, leisure, sporting, cultural and employment related activities.

Advocacy services should be fully funded and run and controlled by persons with disabilities, independent of government and service providers. These services should provide systemic and individual advocacy to all levels of government.

## Key human rights issues

While the focus of the forum was on the rights of persons with disabilities in Victoria, the discussion around important issues occasionally raised federal issues. These concerns have been included in order to capture the range of difficulties faced by people living with disabilities in Victoria.

In each of the areas below, the discussions also raised the extra difficulties faced by certain groups of persons with disabilities including children with disabilities, women with disabilities, people with disabilities from non-English speaking backgrounds and newly arrived migrants.

## Work and employment

Persons with disabilities experience a disproportionately high unemployment rate compared to other members of the community.<sup>6</sup> Many participants perceived a bias against hiring persons with disabilities and attributed this to the presumption that persons with disabilities would not make capable workers. This bias raised concerns among participants about disclosing their disability to prospective employers. Persons with disabilities face a conflict between whether to inform employers of their disabilities in order for them to provide appropriate support and the reality that such disclosure is likely to diminish their chances of securing employment.

Employers need more resources to support employees with disabilities; however, issues surrounding disability in the workplace are often more a matter of workplace culture and attitude along with a lack of awareness and training. There is a need to take away the common perception that people with disabilities are a burden and promote the idea that they can be very valuable employees.

The experiences of persons with disabilities in the workforce are rife with stories of exploitation and significant mistreatment by employers. Participants spoke of low wages, poor conditions and a lack of support in the workforce. They spoke of how their career aspirations are limited, with little prospect of advancement due to being given menial work with minimal opportunities for professional development. There is also the issue of balancing the occupational health and safety of disabled workers against their human dignity. Participants felt the balance is too far on the work health and safety side, leading employers to offer fewer employment opportunities for persons with disabilities.

There was evident concern over the safety of persons with disabilities in emergencies and their inability to follow existing emergency evacuation procedures. The assumption of mobility in plans for evacuating a workplace is problematic for people with mobility limitations and those in wheelchairs. Many participants with hearing impairments spoke of being unaware of emergency alarms sounding and being left behind during practice evacuation procedures. Workplace procedures in case of emergencies need to be modified to ensure all members of the workforce, including persons with disabilities, can be safely evacuated. This can include installing equipment such as aural and visual alarms.

Participants generally believed that the current disability pension scheme administered by Centrelink discourages rather than supports persons with disabilities seeking employment. Persons with disabilities are reluctant to enter the workforce with the knowledge that their pension will be automatically terminated, leaving them with inadequate funding for support services.

*One participant spoke of her experience in the workforce and the discrimination she faced due to suffering poor motor skills in one hand. The participant requested training on an equal basis with other employees, so that she could have the same opportunities for career advancement. Her requests were denied and even mocked by senior staff, including the chief executive officer of the organisation.*

Participants believed that government should fund an awareness-raising campaign targeted at small to medium sized businesses with the aim of dispelling the myth that persons with disabilities do not make good workers. The campaign must aim to make sure that employers know

the rights of persons with disabilities in employment and their responsibilities in this regard. Governments must fully resource employment agencies to support people with disabilities to find and retain jobs and remove the barriers to promotion. As part of this, federal and state governments must open their public services to a far wider range of persons with disabilities and lead by example in terms of best practice. People with disabilities need a stable, non-means tested guaranteed government income base from which they and their families can live equal lives. Too often, the complexity of government payments forces people to restrict their activities to be sure they do not lose their government safety net.

## Education

One fundamental issue emerging from discussions was the state of education for children with disabilities. Australia might have one of the highest inclusion rates in education for persons with disabilities; however, simply putting students with disabilities in a classroom does not constitute inclusive education.

The critical problem identified was a shortage of adequately trained teaching staff. Teachers in both disability-specific and integrated schools do not know 'how to deal with' disabled students. Many teachers do not know how to deal with specific disabilities: for example, being aware that they should not speak whilst writing on the blackboard in the case of children with hearing aids, and ensuring autistic children are aware of any changes to the school routine to assist them to cope. Participants also raised concerns about the quality of teacher's aides. In practice, their role was seen as keeping the child quiet and preventing disruption, rather than encouraging the child's engagement and assisting with learning.

The prevalent lack of vital support, aids and equipment in schools due to insufficient funding was evident. Parents and advocates spoke candidly of their 'constant battle' with staff and the education department for children to receive the requisite support in integrated schools. Further, the physical environment of many integrated schools are deemed inappropriate for disabled children, due to problems with access and a lack of necessary facilities such as disabled toilets.

Many young people with disabilities are being home schooled because mainstream education has failed them. The system is too complex for many people caring for children with disabilities who feel that the education department is more interested in circumventing obstacles rather than implementing appropriate services to assist their children. In many instances, parents of children with disabilities feel it is 'them versus the school'.

*Many participants shared stories revealing the significant mistreatment of children with disabilities in educational settings. In disability-specific schools, there were reports of staff using inappropriate physical restraints, including sitting on children who were difficult and locking children alone in rooms. In mainstream schools, reports of bullying from non-disabled students were prevalent. There was also concern about a lack of understanding and compassion from teaching staff and other parents, who in one circumstance, reportedly referred to disabled children in the class as 'miscreants'.*

*Many students with disabilities are discouraged from completing VCE studies by teaching staff, on the basis that the school does not want their presumed poor performance on its record and so has no desire to support them through VCE.*

Governments must fund schools and universities to ensure they are fully accessible for persons with a disability. They must fund relevant training to all teachers so they know how to teach children with disabilities in a compassionate and appropriate way. Teacher's aides must be similarly trained so they know how to support the needs of children with disabilities in integrated schools. Bullying must be stamped out. Governments must fully fund local access to special teachers, teacher's aides, interpreters and methods of learning and participation in school sport and activities, as well as vital aids and equipment. Therapy services are not school activities and must be funded separately and delivered outside school hours to lessen the impact on a child's education.

## **Housing and accommodation**

There is a lack of affordable, accessible housing for persons with disabilities. Housing that is available is often of a poor quality with inadequate emergency exits in case of fire. The problem is even worse in regional and rural areas. This is a real concern about enabling persons with disabilities to live independently and safely in the community.

Under Article 19 of the CRPD, governments have to ensure "persons with disabilities have the opportunity to choose their place of residence ... and are not obliged to live in a particular living arrangement". However, due to the lack of appropriate housing, persons with disabilities are often forced to live in respite care, particularly nursing homes, where they are unable to communicate with other people. This is a reality for many deaf-blind people and persons with debilitating disabilities. One participant reported that the son of a friend had to live in a nursing home for the elderly even though he was only nine years old.

Many people with experience in the area of respite care believed that persons with disabilities receive inadequate care. For example, it was reported that persons with disabilities living in community residential units are often forced to wait until staff are available to take them to the toilet and then left on the toilet until staff are ready to take them off. They are also unable to go out at night, as there is a shortage of night staff. Some residents with disabilities are not given a key to their unit and can only leave the community residential unit at certain times when their units are not locked. This provides a standard of living for persons with disabilities in respite care that is inadequate and overly restrictive.

*Many participants raised stories of abuse that occurred due to the lack of supported accommodation combined with poor quality carers. One participant spoke of a client who was living in deplorable conditions and suffered great neglect by his visiting carer. He was “drinking ants in his kitchen” and the state of his bathroom was appalling. Yet due to his disability, the client was unaware of the poor standard of his living arrangements and thought his carer was “the best thing since sliced bread” as she sometimes took him shopping.*

*An elderly woman with multiple disabilities had no disability aides and only received a few hours of care per week. The house was in desperate need of maintenance yet, due to her vision impairment, she had no idea how appalling her living conditions were.*

All public and private housing and accommodation in Victoria must be accessible and affordable for persons with disabilities. Participants suggested the Victorian Government must legislate to ensure all new dwellings are completely accessible and undertake a comprehensive retrofit program for all other dwellings to be accessible in three years. The Charter should be amended to include the right to adequate housing.

## Health

There was a general sense of frustration by participants about provision of health services in Victoria and treatment of persons with disabilities. Participants felt that there is a lack of understanding by health professionals of disabilities, leading to the provision of inadequate care. Addressing this lack of understanding in the medical profession is of paramount importance because persons with disabilities tend to have poorer health than the rest of society.

A major concern raised by participants was involuntary medical treatment in the area of mental health. Some people reported being forcibly hospitalised and treated, which participants felt was a clear breach of their human rights. They questioned how people in a state of sedation could advocate for their own rights and asked who makes the decision as to what is reasonable or justified in deciding upon forced treatment. There is a lack of training for staff in these situations. Voluntary patients often become involuntary patients against their will and are unable to complain about their treatment due to being isolated or sedated.

*A person with a mental illness who finds it difficult to deal with doctors was admitted to hospital. Doctors had no idea how to deal with this person but didn't have time to talk to him. As a result, they misdiagnosed him with depression.*

## Participation in social and cultural life

*Wherever you have human nature, you have discrimination: we can't get rid of discrimination.*

Persons with disabilities reported that they felt secluded from social and cultural life. This is in part due to the physical environment not being 'disability friendly' and being inaccessible to persons with disabilities.

*Several participants expressed frustration by the lack of cinema access, with only 0.3 per cent of screenings in Australia accessible for persons who are deaf, blind or have a hearing impairment or vision impairment.<sup>7</sup>*

*One participant confined to a wheelchair spoke of the difficulty she has in taking her children to the local playground because the step surrounding the play area prevents her accessing the playground.*

This lack of access limits the right of persons with disabilities to fully participate in the community and get involved in various areas of life available to everyone else. There is a particular lack of access to culturally diverse services. For example, due to the shortage of Auslan interpreters, people who are deaf and use Auslan can find themselves isolated from their communities, especially if they live in regional and rural areas of Victoria. This is more a result of lack of resources than a lack of knowledge of services.

The lack of adequate support services also restricts a person's right to socialise with their peers. This is particularly evident in the experiences of young adults with disabilities involved in community day programs. Several participants spoke of an inability to participate in social life due to lack of resources, funding and knowledge of the particular needs of young persons with disabilities.

*One group of disabled young adults wanted to go clubbing, another wanted to go to the pub to watch the football, yet neither was allowed due to a lack of support staff.*

*One participant's son has a disability and attends a day program twice a week. Whenever the day program takes participants on an excursion, her son is left behind and told he cannot participate. This is because he requires two support workers and the program will not cover the cost.*

There are particular issues with members of the police force lacking the skills and training in dealing with persons with disabilities out in the community. This needs to be addressed by Victoria Police in a systemic way through education and training of recruits and re-training of experienced police officers.

*One participant with a hearing impairment spoke of his encounter with authorities after he pressed the emergency button on a train. The man pushed the emergency button after witnessing a brawl, yet as he could not communicate what he had seen to the driver, it was assumed that the man was deliberately interfering with security. The police were called to arrest him as a result.*

*Another participant, an advocate, shared the experience of a deaf-blind client who was assaulted and robbed in public. When the police arrived on the scene, the man was shouting incoherently and waving his fists to protect himself from the attackers he could not see. The police assumed he was a drunk or suffered a mental illness and consequently put the man in handcuffs and "threw him into the back of their paddy wagon".*

## Respect for privacy

The privacy of information is an important right afforded to all people. Despite this, participants were highly concerned about the preservation of this right. Many participants considered the processes in place for qualifying for services are highly invasive.

*One of the participants was asked by Centrelink to prove his daughter had a disability. He provided the documentation but Centrelink didn't accept it. In the end, the father had to take his daughter into the Centrelink office as they wouldn't believe him otherwise.*

According to reports by participants on the current system, persons with disabilities are required to provide a great deal of personal information to people whom they believe have no right to this information. This shows a lack of respect for a person with disabilities' privacy and personal records compared to the rest of society. For example, participants reported that many times they have to provide private medical information to people who do not need to know this information, but who just need to know what action they need to take to accommodate the disability.

*In order for a person to have their subsidy for taxi services increased, they must detail all medical appointments they have attended in the past and may need to attend in the future. One participant was contacted by the Department of Transport and asked for the contact details of all of her doctors and medical professionals. All her doctors were then called to verify her attendance at appointments and the content of those appointments. The participant did not want to go through this invasive process again, so she stopped applying for subsidies and her movement is now restricted.*

## Communication and access to information

The law does not respect different modes of communication, which presents difficulties for many persons with disabilities. This is a problem commonly encountered by disability advocates, who are required to receive 'authority to advocate' from their clients.

'Authority to advocate' forms are only recognised as valid in specified formats and many forms of communication used by persons with disabilities do not amount to legal consent under this definition. This presents a barrier where people cannot write or sign documents or, in the case of one participant's client, can only communicate by squeezing someone's hand. When the advocate attempts to intervene on behalf of their clients with service providers, they will not be heard because they do not have the correct authority to advocate. If the person cannot sign the form, few other options are available to them. As a result, some persons with disabilities are unable to have their interests protected by advocates and accordingly do not have equal protection under the law.

Access to information is vital for persons with disabilities to participate fully in public life. However, persons with disabilities face significant barriers to accessing information, much of which is inaccessible. Information in the public and private sphere is often not provided in accessible formats, such as Braille, audio/visual and simplified text. Government documents in particular are often provided in PDF format, which cannot be reformatted into an accessible document. Language barriers can also make it difficult for persons with disabilities in accessing information. Having the Charter in as many different languages as possible is very important to enable persons with disabilities from non-English speaking backgrounds to access it.

A concern with inadequate data collection and reporting was also prevalent. People stated they have no access to information regarding the effectiveness of policies or the current situation concerning housing and employment for persons with disabilities.

## Participation in political and public life

Some persons with disabilities are unable to exercise their right to vote due to physical problems in accessing polling booths and the lack of information in accessible formats allowing them to make an informed decision.

In some electorates there are no fully accessible polling booths, leaving persons in wheelchairs to fill out their ballot papers in public. In others, there is only assisted wheelchair access which people find an undignified way to enter a polling booth. Both situations are demeaning for persons with disabilities trying to exercise their right to vote in the same manner as everyone else. People reported feeling as though they, or the process of voting, are turned into a spectacle, which they find very embarrassing. Persons with disabilities are able to get an exemption from voting and many participants believe this is the encouraged course of action for those with intellectual disabilities.

The right to vote is one of the bedrocks of a democratic system and the lack of accessible polling booths for persons with disabilities to exercise this right is unacceptable discrimination against people with disabilities in fully enjoying the same rights as everyone else in society. Governments should ensure that persons with disabilities have equal access to the electoral process and are able to vote in the same way as anyone else.

## Access to justice

Communication devices are used in court but often the person with a disability is not given the time they need to express themselves through the device, especially when it is not an electronic device. This means that persons with disabilities are often not seen or heard equally by the court.

Participants felt that all those involved in the administration of justice, from judges and court officials to police and prison officers, need educating on the right of access to justice for persons with disabilities on an equal basis with others. In court, this would include training judges and court officials on the need to allow a person with a disability enough time to express himself or herself using whatever means of communication is appropriate.

## Transport

Accessible transportation is necessary for persons with disabilities to exercise their freedom of movement and participate in the community. Many persons with disabilities, particularly those with vision impairment, encounter problems accessing taxis. The waiting time for a taxi is lengthy, made worse by the poor attitude reported of many drivers when picking up persons with disabilities. Taxi services and drivers need training in the rights and needs of persons with disabilities so they can treat them with the same dignity and respect as other passengers.

The limited number of taxis prepared to offer their services to persons with disabilities poses significant barriers for them in practising their right to freedom of movement. This issue is particularly acute in regional and rural areas.

*Many participants with vision impairment had experience of being deliberately overcharged by taxi drivers, who take advantage of their inability to see. Additionally, people with guide dogs report that they are often refused access to taxis.*

The shortage in accessible public transportation means that persons with disabilities are unable to freely use trains and buses, and can only travel at certain times when accessible services are running.

Transport providers need to be made aware of these problems so they can work out solutions in partnership with governments and disabled persons' organisations.

*Participants experienced great difficulty and disrespect when encountering public transport that does not cater for persons with disabilities. In one case, three people confined to wheelchairs were forced to travel in the baggage compartment of a train, as the passenger carriages did not cater for wheelchairs.*

Transportation of children with disabilities to and from school was raised as a significant concern. Many participants were alarmed by the standard of care for children with disabilities on buses, which often consists of several hours of constrained travel per day and minimal stimulation.

*One participant spoke of her child being physically restrained in a school bus for four hours every day, despite the school being located within a 20-minute radius.<sup>8</sup>*

Public, commercial and community transport must be funded to achieve full access to buildings, infrastructure, vehicles and rolling stock in a non-discriminatory manner within three years. Funding must be provided to assist persons with disabilities and their families to purchase and modify vehicles to make them accessible.

## Right to life and family

Participants expressed concern about the choice to terminate fetuses with disabilities such as Down syndrome. Participants believed that broader society does not see a life with disabilities as valuable; it may not be the quality of life a doctor or society views as perfect, but it is still a human life.

*Society has chosen to say, "Down syndrome babies – they're disposable".*

The right of persons with disabilities to have a family is commonly taken away through terminating pregnancy without consent. Many courts in Victoria and interstate have shown their willingness to approve the forcible termination of pregnancies, particularly for people with intellectual disabilities. Participants believed that this is due to the 'prejudicial' belief that these people cannot make good parents. Additionally, parents with disabilities may be subject to child protection investigations after the birth of their child, which they found humiliating and insulting. In some cases, this results in adults with intellectual disabilities having their children removed against their wishes.

*One participant spoke of being forced to show she could put a nappy on her child as an assessment of whether she would make a good parent.*

## Freedom from torture, exploitation and abuse

The right of persons to be free from torture, exploitation and abuse was raised by many participants in regards to people with psychiatric disabilities. Medical experimentation or treatment without a person's full, free and informed consent is prohibited by section 10(c) of the Charter. Regardless of this, medical experimentation, chemical restraint and the use of electroconvulsive therapy is standard practice in Victoria's psychiatric wards. Participants felt that this reflected the inadequacies of the mental health system, particularly the failure of medical practitioners to assess the actual need of people with mental disabilities, resorting instead to the use of these intrusive therapies.

A prevalent issue was the excessive use of electroconvulsive therapy in Victoria without the consent of patients.<sup>9</sup> Participants noted the irony that an involuntary patient is able to consent to treatment, yet it is not possible for the patient to refuse treatment. People in such situations do not have the opportunity to provide “free, full and informed consent” as required by the Charter.

There were reports of carers and support workers abusing persons with disabilities. Others spoke of situations involving serious neglect of persons with disabilities by their carers; for example, where people with mobility disabilities are left in poor housing without proper support. Participants believed that these significant cases of neglect constitute a form of abuse, particularly when the neglect is perpetuated for an extended period.

*One participant revealed that her son was physically and emotionally abused while in care. This participant said it took two years of encouragement and support before her son would engage in the community again. She also said her son identified the abuser, yet she received no help from authorities and her claims were ignored.*

*Another participant, who worked with a service provider, spoke of a supervisor in her organisation who was emotionally abusing disabled clients. When the clients were approached about the abuse, they would not speak against their abuser out of fear.*

## Women and immigrants

Participants recognised that minority groups such as women, Indigenous persons and immigrants who have disabilities are exceptionally disadvantaged. Immigrants were considered particularly disadvantaged due to language barriers preventing access to information and advocacy services.

*One participant spoke of a client with a disability who wanted to immigrate to Australia on a skilled migration visa. The client has three degrees, spoke four languages and has family members living in Australia. Despite her eligibility, she was denied a visa on the basis of her disability. This client had no protection from discrimination under the law.*

## The Charter as an advocacy tool

The degree to which participants used the Charter to advocate for the support, promotion and protection of rights was dependent upon the individual’s involvement with advocacy organisations and to which particular organisation they were connected. Some participants reported that their organisation frequently applied the Charter when advocating for rights and experienced high levels of success where the Charter was employed. However, the vast majority of participants, both individuals and those representing advocacy organisations, reported having little or no knowledge of the Charter and had no experience using the Charter as an advocacy tool.

There was a general sense that the Charter has created a human rights dialogue in Victoria, which has enabled advocates to frame their arguments using the language of human rights. Participants who had experience advocating with the Charter believed that referring to the Charter and employing the language it uses reinforced their claim and gave more weight to their position.

*One participant described the Charter as a new tool that legally recognises the rights of persons with disabilities and accordingly provides advocates with a moral high ground. As a result, persons with disabilities “no longer have to beg for our rights”, as the Charter clearly declares the rights that are to be afforded to all people.*

Local governments are a public authority under the Charter with a duty to comply with the Charter and therefore have been responsive to calls for greater accessibility to public places based on Charter rights. Many participants were encouraged by the number of local councils running information sessions about the Charter. They felt this was a positive indication of council commitment to Charter objectives. However, they did caution that those within councils most aware of the Charter tend to work in the social work and care services area, whilst others for whom the Charter should be just as relevant to their everyday work, such as those working in building works departments, are completely unaware of what it requires of them as a public authority.

In other advocacy situations, people experienced a greater rate of success when invoking the Charter in addition to other relevant legislation. People reported that asserting a breach of a person's rights under the Charter in addition to an existing cause of action often led to a successful outcome for the client.

*One participant invoked the Charter alongside anti-discrimination legislation in a claim against a major airline. The participant believed the success of her claim was a direct result of employing the Charter.*

*Another participant spoke of their experience with a male client who shared his bed with his wife, yet was about to be forced to use a single bed in order to use a slide sheet for occupational health and safety reasons. The advocate successfully employed the Charter to prevent this from happening.*

Those who had no experience using the Charter cited many of the current gaps in rights promotion and protection. There is a lack of knowledge about the Charter and how it might be used to advocate for rights, as well as concern for the Charter's

inability to stand alone. Some participants expressed frustration at the fact that many of their rights are breached on a daily basis; thus, invoking the Charter to protect their rights is not a practical reality.

*One participant declared "I would spend the rest of my life using the Charter" as they encountered numerous breaches of rights every day.*

## **The impact of the Charter on law and policy development**

Participants were asked to consider whether the Charter has brought a 'disability lens' to the development of laws and policies. Specifically, they were asked whether the Charter has made disability issues more prominent in 'mainstream' law and policy, and whether it has made lawmakers and policy-makers give greater consideration to the rights of persons with disabilities. The answer varied amongst participants, but generally it was felt that it has not. Even when a 'disability lens' was applied, the majority opinion was of a significant disparity between policy and practice.

*A feeling amongst participants is that disability is not 'sexy' or 'cool', so governments are not interested in tackling the issues.*

There was some discussion on whether a 'disability lens' is needed at all when everybody is supposed to be equal. Some suggested it should not be necessary if we treat all people humanely, with respect and in a way that is 'acceptable to them', ensuring we do not discriminate against anyone. While this would be ideal, it is often not the case in practice and unless a 'disability lens' is used, the rights of persons with disabilities tend to be marginalised and forgotten in the development of laws and policies.

## Limited impact

Many participants did not believe that the barriers facing persons with disabilities are considered in policy development. Many people felt that there is great disparity between the practice of public authorities in reality and the legislative standards set by the Charter.

One participant working in a Victorian government department stated there is very little evidence that the Charter is being used at all in the development of policy. Many participants believed that the prevailing attitude among government and service providers is that adhering to a minimally acceptable standard is sufficient to meet their Charter requirements: for example, putting a disabled toilet on level three of a six-storey building, but not on the ground floor or levels 1, 2, 4, 5 and 6. Accordingly, even when the rights of persons with disabilities are taken into account when developing policies, this is more in the way of a 'feel-good exercise' than a serious attempt at overcoming the barriers persons with disabilities face in enjoying their rights and fully participating in society.

A particular concern raised by one participant was the lack of reference to the Charter in the review of the *Mental Health Act 1986*. This participant attended a consultation into the review and stated that there was no mention of the Charter. This was considered potentially a significant breach of the Charter, if the rights of persons with disabilities are not be considered or consulted in the development of an Act that directly restricts many Charter rights for persons with mental disabilities. This is particularly disappointing as the stated aim of the review is "to ensure that the Act appropriately protects human rights in light of the Charter of Human Rights and Responsibilities".<sup>10</sup> Audits should be done on all relevant laws to ensure compliance with human rights.

Many participants pointed to the current disability pension scheme as an example of a policy not taking into account the barriers facing persons with disabilities. Participants argued that the policy behind the scheme is based on an outdated medical approach to disability. It was generally believed that the policy to terminate a person's pension if they began to receive an income does not encourage persons with disabilities to seek employment and does not take into account the cost of support required for persons with disabilities to live equal lives.

More generally, several participants raised the broader system of government funding schemes as evidence that a 'disability lens' is not being applied at the policy or legislative level. Specifically, there is insufficient funding for support agencies or service providers who are trying to implement disability-friendly policies. This problem is particularly acute in rural and regional areas.

*The lack of funding is illustrated in the story of one participant, whose business has a policy to employ persons with disabilities and maintain an accessible working environment. When the business applied for funding to acquire an interpreter for a deaf employee, they received only a fraction of the necessary expenses and thus could not sustain the support required for their employee.*

## Positive impact

Not all participants were pessimistic about the impact of the Charter. Several participants stated that while change has been very slow, there has been a recognisable shift towards greater consideration of disabilities in the development of policies. One participant noted that the Office for Disability uses the Charter extensively in developing policies and has developed training programs on

the Charter for many of its funded agencies, including those within government.

Many participants recognised that several pieces of Victorian legislation touching upon the rights of persons with disabilities, including the Mental Health Act and the *Guardianship and Administration Act 1986*, are currently under review in light of the Charter. Participants wanted all existing Acts touching upon the rights of persons with disabilities to be similarly reviewed to ensure their compliance with human rights in the Charter and the CRPD.

One participant noted that the Charter has been responsible for a shift towards entitlement, recognising that persons with disabilities are entitled to certain rights, which policy makers now have a duty to satisfy under the Charter.

*One participant spoke of the establishment of the Mclvor Transit bus service in Bendigo. In that case, several volunteers began their own bus service in response to the lack of accessible, affordable transportation for persons with disabilities. After seeking outside funding and running the service themselves for a number of years, the volunteers approached the Department of Transport to fund and assist the program. The Department of Transport is now fully funding the bus service, which runs five days a week. This service has enabled persons with disabilities, particularly those in wheelchairs, to access transportation at an affordable price. Additionally, because of the bus service, several persons with disabilities have been able to find employment and are no longer dependent on the disability pension.*

Another participant spoke of positive developments in the Western Health area. In this example, Western Health has established a program to educate allied health professionals on a rights-based approach to the provision of services.

According to the participant, this has been very successful program resulting in greater understanding of the rights of persons with disabilities. Finally, several participants praised the current situation in Geelong, where a combined effort by council and service providers has resulted in increased accessible transport, hearing loops and aides for people with a vision impairment. One participant believed that Geelong's goal is to make all buses in Geelong wheelchair accessible by 2014.

Arguably, these success stories can be attributed to a greater understanding of disabilities and a greater respect for and commitment to upholding the rights of persons with disabilities. The Charter has played a significant role in this positive progression. The Charter is responsible for many service providers and government agencies having a much greater awareness of the rights of persons with disabilities, and the responsibility they now have to consider these rights when developing new policies and procedures and reviewing or modifying existing ones.

## **Current gaps in the promotion and protection of rights**

Participants identified certain gaps in the protection and promotion of rights that directly relate to the Charter and its application. Other broader gaps were identified that hinder the promotion and protection of rights, which have not been rectified by the enactment of the Charter.

### **Charter awareness**

The most significant gap in the promotion and protection of rights identified by participants is the lack of awareness about the Charter. The vast majority of participants reported that they have little knowledge of their rights under the Charter or how the Charter might be used to advance and

protect their rights. This was identified as a consequence of a lack in education and promotion of the Charter in the community and amongst organisations. The deficit in knowledge is evident at an individual level and at the level of advocates and service providers.

The gap is even more prevalent in ethnic communities. Some members of ethnic communities are unaware even of the disability services they can access (the example was given of Sudanese mothers of children with disabilities). They are certainly unaware of the Charter. Persons with dual sensory disabilities such as deaf-blind people are likely to suffer from an increased lack of awareness and accessibility.

The lack of awareness of the Charter at the level of individuals was a major concern, as in the words of one participant, “knowledge is power”. Unfortunately, the majority of persons with disabilities reported having no knowledge of their rights under the Charter, and consequently lacked the power to self-advocate. The Charter only becomes meaningful when it is put into practice, but people questioned where the tools, resources and training are to enable this to happen.

At the level of advocacy organisations, many advocates present on the day stated they had never used the Charter as an advocacy tool and instead used other legislation such as the Commonwealth Disability Discrimination Act. Advocates from national organisations in particular reported little awareness of the Charter, as management based in other states are not interested in Victorian legislation.

Many service providers admitted that the Charter is ‘not on their radar’ with several not realising the Charter applied to them. This was identified as problematic, as many persons with disabilities and their families are heavily reliant on service providers for assistance and support. One service

provider stated that while the Charter might be used at a high level, it is not widely known amongst people working with persons with disabilities on the ground level.

## **No remedy under the Charter for a breach of rights**

A great flaw raised by many participants was the Charter’s inability to ‘stand alone’; that is, allowing a person to bring a complaint directly to a court for a breach of their Charter rights. Many participants referred to the Charter as a ‘toothless tiger’ that lacked the strength or ‘teeth’ to confront actual breaches of rights. The absence of a complaints mechanism was believed to be a considerable weakness of the Charter. Without such a mechanism, the Charter is not really fulfilling its purpose but rather providing ‘smoke and mirrors advocacy’ without any real impact. Participants felt that while the Charter provides for certain rights to be afforded to all people, this protection is rendered powerless and nothing more than a token without an enshrined enforcement provision.

## **Accessibility**

Participants noted that it is difficult for persons with disabilities to find the Charter in accessible formats, such as in Braille, in multiple languages or in simplified English. Participants believed that the complex nature of the Charter as a legal document makes it inaccessible for persons with disabilities and limits its ability to promote and protect rights. This is particularly true for persons with disabilities who self-advocate, as they generally do not understand the content of the Charter and are too intimidated by the document to use it.

*One participant stated, “fear is a common reaction to something new, and the Charter is a new tool”.*

This fear was notable amongst the majority of participants, several of whom referred to using the Charter as 'wielding the big stick'. Participants indicated that they are reluctant to use this 'big stick' as they do not fully understand it. The lack of training on how to use the Charter is a key factor in its inaccessibility. Participants stated that unless people are educated on the Charter and how it can be used in a positive way, the fear attached to using it would remain. There was a general belief amongst participants that while the Charter does promote rights, implementation of the law is critical for its effectiveness.

*Participants said that the Charter needs to be seen as a "living, breathing document" rather than something that simply hangs on the wall in the office. As one participant said, "the Charter only becomes meaningful when it is put into practice".*

## Charter rights

Many participants contended that the Charter does not reach far enough in terms of the rights protected. Specifically, participants believed that the absence of economic, social, and cultural rights in the Charter is a significant gap in rights protection, as these rights are crucial to ensuring persons with disabilities lead equal lives. Participants also recognised that the Charter lacks a right to inherent dignity and respect, which is a fundamental right for persons with disabilities.

Many participants raised the issue that the CRPD provides for the promotion and protection of economic, social and cultural rights in contrast to the Charter. The CRPD also includes respect for inherent dignity and individual autonomy as one of its general principles. The Charter was seen as a much weaker document compared to the CRPD for the protection of the rights of persons with disabilities.

## Funding and support

The lack of government support for persons with disabilities was an issue raised by many participants. The majority contended that the current system of government funding and support for persons with disabilities is responsible for many of the practical problems they face in exercising the rights they do have. There is a discrepancy between policy and practice, which poor training and a lack of understanding of the issues within government makes much worse. Any potential for positive change is limited by negative attitudes towards disability, requiring a cultural shift within government at all levels. Things are even worse for persons with disabilities from ethnic communities.

The lack of priority in government decision making was also put down to the fact that persons with disabilities are a dispersed minority group, thus issues concerning disabilities are not major vote-winning ones. People felt that government is not interested in addressing concerns relating to disabilities because of its perceived lack of importance in the public's mind. Participants noted that while, on the surface, Victoria has a great deal of legislation and standards requiring the environment to be made more accessible for persons with disabilities, these laws and standards lack the necessary government support and funding to ensure they are observed.

Several participants noted that there is insufficient support and resources to satisfy the needs of persons with disabilities due to the level of funding and service provision available failing to keep pace with the increase in the numbers of Victorians with disabilities. As a result, there are not enough adequately trained teachers and support workers, as well as a lack of disability aids and accessible transportation. This is compounded by high cost of the support services that are available.

Many participants felt that there is little acknowledgement of the high cost of living for persons with disabilities and the expenses necessary in order for them to live a dignified existence on an equal level with others in the community. Participants attached to organisations also reported that the lack of a secure funding source – as funding can depend on annual budget surpluses – results in organisations having to ration their resources to protect themselves against future cuts.

*People who are deaf and blind require carers with particular communication skills, and there is a great shortage of support workers available. One deaf-blind participant receives only two hours of care in her home per fortnight. While Vision Australia used to conduct home visits for deaf-blind people like her who live in regional areas, these services have expired due to insufficient funding.*

*Many persons with disabilities live alone with very little access to carers. One participant is fearful about what might happen to her if she is alone and there is a problem, as there is no one she can turn to for help.*

## Continuity of care

A lack in continuity of care across agencies and service providers was identified as a gap in the protection of rights that has proved highly problematic for persons with disabilities, their families and carers. Participants stated there was no standardisation across care agencies, leading to a great disparity in the policies and procedures adopted by service providers. This was said to make coordinating care arrangements highly confusing and time consuming. Many participants confessed that having to navigate through the complex system was both mentally and emotionally draining, and

impacted on their ability to secure adequate care. Support staff and families reported feeling overwhelmed by the enormity of their jobs.

## Limitations on the rights of persons with disabilities

Participants considered several mechanisms by which the rights afforded to persons with disabilities under the Charter are limited. Many believed rights are unreasonably limited by section 7 of the Charter itself, through the interaction of other pieces of legislation with the Charter and due to the prevailing attitude of society.

Participants clearly stated that they felt certain rights should never be limited, thereby echoing Article 4 of the International Covenant on Civil and Political Rights, which has a set of rights that are protected from limitations. Participants felt the following rights should not be limited:

- right to life
- right to education (an economic, social and cultural right not included in the present Charter)
- right to respect for inherent human dignity (a principle of the Charter but not an explicit right)
- right to freedom from torture, and
- right to no medical treatment without consent.

The rights contained in the International Covenant on Civil and Political Rights can be suspended or restricted in times of public emergency which threatens the life of the nation (Article 4), except for the following:

- the inherent right to life
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment
- the right not to be subjected to medical or scientific experimentation without consent

- the right not to be held in slavery or servitude
- the right not to be imprisoned for a contractual breach
- the right against retrospective conviction
- the right to recognition everywhere as a person before the law, and
- the right to freedom of thought, conscience and religion.

Some participants felt the disparity between section 7 of the Charter and Article 4 of the International Covenant on Civil and Political Rights presents a major issue when the rights in the Charter have been taken from those in the International Covenant on Civil and Political Rights, with the Charter allowing each right to be limited, even those long regarded as absolute rights (e.g. the right to freedom from torture), if it can be shown the limitation is reasonable, necessary, proportionate and justified.<sup>11</sup>

### Rights limited by the Charter

Section 7 allows rights under the Charter to be limited if it can be shown that the limitation is ‘reasonable’ and “can be demonstrably justified in a free and democratic society.”<sup>12</sup> Many participants were not aware of section 7 prior to the forum and found it very confusing. Participants raised the concern that where you have limitations and restrictions enshrined in law, people will try to manipulate the wording to justify any limitation on a right.

The majority of participants believed that section 7 was extremely broad and held great potential for abuse. Many participants felt that the wording of the section and the requirement of ‘reasonableness’ is too expansive. Participants felt it would be too easy for people to justify any restrictive action as a reasonable limitation of rights. There was significant concern that people who do not have an adequate

understanding of disabilities and those who do not have the best interests of a people with disabilities at heart may use section 7 to try and justify unnecessary limitations on their rights.

### Rights limited by other legislation

Rights enshrined in the Charter are also limited by other pieces of legislation. Two examples raised were the *Disability Act 2006* (Vic), which allows persons with disabilities to be subject to restrictive interventions,<sup>13</sup> and the Mental Health Act, which allows for involuntary psychiatric treatment<sup>14</sup> and the use of electroconvulsive therapy without consent.<sup>15</sup> Participants expressed concern that these limitations on the rights of persons with disabilities are seen as ‘reasonable’ and can apparently “be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”.<sup>16</sup>

*One participant believed that allowing for restrictive intervention under the Disability Act was ‘abhorrent’ and limited a person’s rights under the Charter far too much, particularly the right not to be subjected to medical experimentation or treatment without the full, free and informed consent of the person involved.*<sup>17</sup>

The Guardianship and Administration Act also limits the rights of persons with disabilities under Guardianship or Administration Orders. Participants were clear that guardians or administrators must take into account the wishes of clients under a Guardianship or Administration Order and respect their right to make their own decisions. Where an organisation such as State Trustees is managing a person’s finances, there should be ways to ensure they are doing this in the best interests of the client. Participants felt there was a conflict of interest when State Trustees take a commission for filling this role. Practical

concerns were also raised, such as State Trustees being able to pay debts when they become due but making no provision for the person to live on a day-to-day basis, including going to the shop, buying a paper and so on. Individuals who cannot make their own decisions have no avenue for redress.

The Commonwealth Disability Discrimination Act is another law considered to limit Charter rights, particularly through the 'unjustifiable hardship' exception.<sup>18</sup>

Under this exception, organisations and services providers are not obliged to make reasonable adjustments for persons with disabilities where the adjustment would amount to an 'unjustifiable hardship'. Many participants noted that due to inadequate funding, this exception is often used to prevent children with disabilities from receiving adequate support at school and to exclude young people from participating in excursions. This limits their ability to participate in social and cultural life, as well as their right to receive a good education.

Many participants also referred to occupational health and safety (OH&S) laws and the restrictions they place on the rights of persons with disabilities. There was a prevalent concern that 'insane' levels of OH&S compliance have resulted in risk management taking precedence over human dignity. Examples include carers being unable to open cans of food for people in their care and the requirement for a secondary carer to be present whilst the primary carer is attending to a person showering. This is emphasised by the lack of disability training and resources in a workplace compared to the plethora of OH&S training and resources available.

Many people also noted that OH&S laws prevent children and young adults with disabilities from participating in excursions or recreational activities at school or in

day programs, on the basis that ensuring their safety is too great a liability. It was stated that there is no consideration of how OH&S laws may impact more extensively on persons with disabilities or what rights may be limited by virtue of meeting certain regulations. Participants were concerned that OH&S compliance is being used as an excuse to sidestep the Charter. Participants recognised that a balance is required between the need to minimise risk and ensure a safe environment, and the requirement to allow persons with disabilities to enjoy their rights.

*One participant spoke of her frustration at not being authorised to open a can of food for a person in her care. The person in her care had a mobility disability and was unable to open the food, and thus unable to eat, without the assistance of a carer. She wanted to know what support workers are expected to do in situations where they have conflicting responsibilities.*

## **Rights limited by society**

The vast majority of participants identified society's attitude towards persons with disabilities as a major limitation on the exercise of their rights under the Charter. Many people spoke of the inherent social stigma attached to disabilities and the notable ignorance of many members of the community. There was a general sentiment amongst participants that unless there is systemic change in the attitude of society and the perceptions of individuals towards persons with disabilities, the rights and processes enshrined in the Charter will continue to be ineffective in promoting and protecting their rights and fundamental freedoms.

## Improving the promotion and protection of the rights of persons with disabilities

*As one participant said, “Let us face facts – we need a revolution in disability!”*

*The idea of persons with disabilities being ‘people with rights’ first and ‘people with disabilities’ second needs to underlie everything involved in promoting and protecting their rights.*

In addition to recognising various failings in the promotion and protection of rights, participants raised many proposals on how to improve the current standard of rights protection for persons with disabilities. Participants identified numerous steps that could be taken to ensure the standard of life for persons with disabilities is significantly improved. Many of these proposals relate directly to the Charter, while others address the situation of rights protection more generally.

### Education and training on the Charter

There was strong agreement from all participants that education and training on the Charter is pivotal for improving the promotion and protection of rights. Accordingly, persons with disabilities, their organisations, their advocates, service providers, government and the legal community need to have access to training and education on the rights and procedures enshrined in the Charter. Teachers in schools, service providers and the general public need to have their understanding of people with disabilities increased to alleviate cultural stigma and ignorance.

One suggestion offered was that in order for education to be both extensive and effective, it must occur simultaneously at the

level of service providers and advocates, and ‘trickle down’ to persons with disabilities themselves. A suggested approach was for the Commission to train senior advocates and regional managers from organisations, who would then take knowledge of the Charter back to their staff and continue the process of education. To assist this process, the Commission could devise online resources or toolkits for organisations to use to conduct their own staff training workshops on the Charter. This would create a uniform approach to a human rights dialogue and encourage community participation.

Another suggestion was for the Commission to hold various area-specific training workshops about the Charter and its application. For example, a workshop could be held for legal professionals aimed at broadening their understanding of the Charter and its possible use in discrimination and other cases. Another workshop could be tailored for persons with disabilities, focusing on educating them about their rights under the Charter and showing them how to use the Charter to advocate for these rights.

There were also calls for the Charter to be included within the school curriculum. Beginning education on the Charter from a young age would encourage a systemic change in community attitudes and foster a human rights dialogue in the area of disabilities and beyond. Familiarising children with the language of rights would contribute to members of the community being identified as “people with rights *first* and persons with disabilities *second*”.

Participants encouraged the inclusion of the Charter in the induction process for people who are employed as disability advocates or service providers. This would ensure the relevant people are aware of the Charter and its application to their jobs.

In addition to education on the Charter, participants asserted that rights promotion and protection would be greatly enhanced by increasing community understanding of persons with disabilities. Accordingly, it was suggested that teachers in disability-specific and integrated schools should receive greater training on how to accommodate children with disabilities. Further, children in schools should be familiarised with disabilities and helped to accept people with different needs to themselves from an early age.

### **Raising awareness of the Charter**

In addition to increased training on the Charter, participants strongly believed that the government needs to launch a major media campaign to raise the profile of the Charter. There were calls for a significant campaign similar to others that promote government initiatives, such as the 'Go for Your Life' campaign and those raising awareness of the federal health reforms. As part of the campaign, participants suggested the need for a high profile 'champion' to bring weight to the Charter and encourage respect for Charter rights. Participants also stated that at present, the only notable media coverage of the Charter occurs when it is used in a negative context: for example, by people accused of crimes. There is a prevalent need to make the Charter's beneficial contribution to society known and to publicise the positive outcomes achieved by the Charter.

### **Changes to the Charter**

It is clear that the Charter requires a complaints mechanism and a process for enforcing legal remedies when rights are violated. This is fundamental to ensure the rights enshrined in the Charter are respected, as well as to prevent breaches of the law.

Participants also believed that a mechanism is required to provide greater scrutiny when rights are limited under the Charter or in conjunction with any other Act. A process of checks and balances more stringent than those outlined in section 7 needs to be established for persons with disabilities, as they feel their rights are limited a lot more frequently than other members of society.

In order to limit the operation of section 7, it was suggested that the Charter contain a provision asserting that its provisions be construed in accordance with the CRPD. The standing of the CRPD as a unique and comprehensive legal document outlining the rights of persons with disabilities, and the obligations of governments towards them, makes it a positive tool to be used when construing rights under the Charter as they apply to persons with disabilities. This would help to resolve ambiguity about the Charter's application to persons with disabilities.

Participants believed it to be of the utmost importance to amend the Charter to include economic, social and cultural rights. Arguably, these rights are the most important ones in practice for persons with disabilities, as the common themes and gaps in current rights protections discussed above show. In addition, the Charter needs to clearly protect the right of all persons, including those with disabilities, to have their human dignity respected.

### **Changes to other pieces of legislation**

There was a belief among participants that the private sector should be encouraged to provide more opportunities and support for persons with disabilities. Many participants stated that it would be beneficial for Australia to enact a similar employment scheme to that established in the United Kingdom. The government could establish a quota system, whereby employers would

be required to ensure a certain percentage of their staff are persons with disabilities. Rewards and funding could provide significant incentives for employers to abide by the scheme and fines could discourage non-compliance. Solidifying this affirmative action in legislation would greatly increase the number of persons with disabilities in the workforce, reducing the number of unemployed persons with disabilities who rely on government support and the pension.

There were also suggestions that teaching staff, doctors and service providers who work with persons with disabilities should be mandated to undertake a minimum amount of training each year on disability awareness. This would alleviate many of the problems with education and service provision and create a greater understanding of the issues facing persons with disabilities in the workforce, health, education and the general community.

## Government support

Participants felt that issues concerning persons with disabilities require bipartisan support from all political parties. Many participants asserted the need for a Victorian Minister who listens to the community and facilitates practical application of the slogan 'nothing about us without us'. Many participants supported the establishment of a national disability insurance scheme to create a significant and reliable source of funding to support the needs of persons with disabilities. Participants also suggested the government should create a dollar-for-dollar funding scheme to promote the benefit of businesses adopting disability-friendly policies.

There were suggestions for a making a government department or officer specifically responsible for the Charter –

someone to whom people can direct any complaints regarding a breach of their rights. Currently the Victorian Ombudsman is supposed to receive such complaints, but the discussions at the forum indicate this system is not working in practice. Participants suggested it made more sense for the Commission to handle such complaints as it does now under the Equal Opportunity Act. Participants were of the firm view that the Commission should play a leading role in the development of the Charter, especially in respect to the additional rights that should be included in the Charter and the need for a complaints mechanism and enforcement provision.

Finally, participants stressed that the government needs to continue its process of critically assessing the compatibility of legislation affecting persons with disabilities with human rights legislation such as the Charter and CRPD. Reviews are currently under way in respect to the Mental Health Act and the Guardianship and Administration Act, both of which have significant impacts on the rights of persons with disabilities.

## Considerations for the four-year review

Based on the views expressed in the Commission's forum, the following questions could be considered in the four-year review of the Charter, with the aim of strengthening the Charter to better protect the rights of persons with disabilities:

- Would the Charter's inclusion of economic, social and cultural rights, and a right to respect for their human dignity, better protect the human rights of persons with disabilities in Victoria?
- Should the Charter include a substantive complaints mechanism and procedures for obtaining remedies when human rights are breached?

- Should the Charter refer to the CRPD as a tool to be used when construing rights under the Charter as they apply to persons with disabilities?
- Does section 7 of the Charter need to be amended to allow for greater scrutiny when the rights of persons with disabilities are limited?
- What measures can be taken to increase awareness of the Charter and its use as an advocacy tool for persons with disabilities?
- How can the Charter be amended to:
  - address the common themes identified as particularly lacking in rights protection for persons with disabilities?
  - change the systemic attitudes of society and negative perceptions of persons with disabilities within the community? and
  - encourage consideration and support of disabilities within the public and private sectors?

# Options for amendments to the Charter

## Holistic approach

The forum raised a number of important questions for the four-year review to consider. This final section focuses more closely on the Charter and the rights protection framework it provides, with the aim of offering a number of suggestions for amendments that could be made to the Charter in order to better protect the rights of persons with disabilities in the light of Australia's ratification of the Convention on the Rights of Persons with Disabilities (CRPD).

In exploring options for amendment, it is immediately clear that it is not possible to consider the rights of persons with disabilities under the Charter in isolation from the rights of other vulnerable groups under the Charter: for example, children, women, older persons and Aboriginal persons. There are common issues with the Charter that impact upon each of these groups, not least of which is the absence of economic, social and cultural rights as highlighted at the forum. One simple way to expand the rights of all vulnerable persons, as well as everyone else, would be to add economic, social and cultural rights to the Charter.

The Charter is a single document compared to the numerous international treaties protecting specific vulnerable groups such as women (the Convention on the Elimination of All Forms of Discrimination against Women), children (the Convention on the Rights of the Child) and persons with disabilities (CRPD). Any review of the Charter should consider whether to include the rights of all vulnerable groups together in a holistic way rather than separately.

## Obligations on public authorities

The CRPD is the most detailed of any international human rights treaty obliging States Parties, including Australia, to take a long list of measures “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity” (Article 1). The CRPD acts as a model in this regard and provides the most guidance and help.

Detailing the measures governments need to take is very useful for public authorities in advocating and implementing policy because it provides them with clear guidance on how to meet the requirement on them to act compatibly with human rights. In contrast, the obligations placed on public authorities under section 38 of the Charter are very general and provide little help for public authorities in understanding what complying with these obligations means in practice. Consequently, the review could investigate expanding the obligations placed on public authorities under Division 4 of the Charter in the light of the CRPD, taking into account the CRPD's list of clearly defined measures for such authorities to take. Many of these measures could be generalised to apply to all vulnerable groups.

## Specific rights to protect

The Universal Declaration of Human Rights proclaimed a list of human rights that States should aspire to promote, respect and protect. These rights have been artificially split into civil and political rights protected under the International Covenant on Civil and Political Rights and economic, social and cultural rights protected under the International Covenant on Economic, Social and Cultural Rights.

Charter rights are largely based on the rights contained in the International Covenant on Civil and Political Rights and generally do not include economic, social and cultural rights. For vulnerable persons, including those with disabilities, the Charter provides inadequate protection for their civil and political rights and no protection for their economic and social rights.

In addition, the rights of vulnerable persons are not adequately protected through the patchwork of Commonwealth anti-discrimination laws and state equal opportunity laws. These laws deal with discrimination based on a person's attribute (age, race, sex or disability/impairment) rather their rights as a member of a vulnerable group. Whilst this approach may be correct in addressing discrimination at the domestic level, a human rights approach focuses more appropriately on vulnerable persons rather than attributes. Human rights are about the rights of individual persons in society, not whether they have a particular attribute.

Selectively including individual rights from the CRPD, or other international human rights treaties, in the Charter may not be the best way to strengthen the rights of vulnerable persons under the Charter. Instead, the Charter could be amended in a more general way to include explicit reference to the rights of vulnerable persons in existing rights provisions (see

examples below). Once this has been done, consideration can be given to the specific provisions in each human rights treaty to see if there are any that should be added to the Charter, especially those that can be made to cover all vulnerable groups. The CRPD has a couple of examples in the provisions on awareness-raising and accessibility, both of which could be rewritten in a way that covers all vulnerable persons for inclusion in the Charter.

## Possible amendments to the Charter

Based on the forum discussion and international practice, the following amendments could be considered. These are provided as examples, and are not intended to be an exhaustive list of options.

1. Add to the Charter the economic, social and cultural rights from the International Covenant on Economic, Social and Cultural Rights as they have been expanded upon in a number of international human rights treaties, most particularly the CRPD. As highlighted at the forum, at a minimum this should include the right to education, the right to health, the right to an adequate standard of living (food, clothing and housing) and the right to work. For persons with disabilities, it should also include the right to live independently and to be involved in the community.
2. Review section 7 of the Charter, the general limitations clause, which provides that all human rights in the Charter can be subject to limitations if the limitations are reasonable, necessary, proportionate and justified. This review should be done in the context of Article 4 of the International Covenant on Civil and Political Rights and the long-standing classification of certain rights as absolute rights allowing no limitation under any circumstances.

3. Add an extra paragraph to the Preamble to recognise the importance of human rights to particularly vulnerable or disadvantaged groups:

*Human rights have a special importance for persons that are especially vulnerable in society. This includes, but is not limited to, women, children, persons with disabilities, older persons and Aboriginal persons.*<sup>19</sup>

4. Clarify the application of human rights by amending section 6(1):

*Only persons have human rights. All persons have the human rights set out in Part 2. While all persons have these rights, it is recognised that some persons in society are particularly vulnerable and extra measures may be needed to ensure they can enjoy their rights on an equal basis to others. This includes, but is not limited to, persons with disabilities, children, women, older persons and Aboriginal persons.*

5. Clarify the obligation on public authorities by amending section 38(1):

*Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. When acting or making decisions, public authorities must give special consideration to the human rights of vulnerable persons including, but not limited to, persons with disabilities, children, women, older persons and Aboriginal persons to ensure they are able to enjoy their rights on an equal basis to others.*

6. Using the CRPD as a guide, expand the obligations on public authorities under section 38 of the Charter to include a list of measures they must take to ensure

and promote the full realisation of all human rights and fundamental freedoms by all persons without discrimination. Include measures specific to persons with disabilities, children, women, older persons and Aboriginal persons. The specific measures can be based on ones in the relevant international treaty or, preferably, adapted and modified from the very detailed measures outlined in the CRPD.

7. Based on Article 12 of the CRPD, add a subsection to section 8 of the Charter:

*All persons have the right to enjoy legal capacity on an equal basis with others in all aspects of life. This includes, but is not limited to, persons with disabilities, children, women, older persons and Aboriginal persons.*

8. Amend section 8(3) to make it clear that everyone is entitled to equal benefit from the law as well as equal protection (examples: Article 5(1) of the CRPD, section 15 of the Canadian Charter of Rights and Freedoms and Article 9 of the South African Constitution):

*Every person is equal before the law and is entitled to the equal protection and equal benefit of the law without discrimination...*

9. Based on Article 17 of the CRPD, add a new section on 'Protecting the integrity of the person' after the current section 10 on torture:

*Every person has a right to respect for his or her physical and mental integrity on an equal basis with others. This includes, but is not limited to, persons with disabilities, children, women, older persons and Aboriginal persons.*

10. Before section 9 of the Charter add a new section on 'Respect for human dignity':

*Every person has the right to respect for his or her inherent dignity on an equal basis to others. This includes, but is not limited to, persons with disabilities, children, women, older persons and Aboriginal persons.*

Alternatively, this could be included as part of a new section on 'General Principles' guiding the Charter (based on section 3 of the CRPD, and other international instruments).

11. Add an extra section to the Charter titled 'Enforcement of guaranteed rights under the Charter' (based on section 24(1) of the Canadian Charter of Rights and Freedoms) stating:

*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy, as the court considers appropriate and just in the circumstances.*

12. Schedule the CRPD, and the other human rights treaties to which Australia is a party, to the Charter (similar to the way in which the International Covenant on Civil and Political Rights is scheduled to the *Australian Human Rights Commission Act 1986*).<sup>20</sup> This would require changes to the Charter in order to apply the schedule, such as introducing a complaints mechanism (which would enable people to complain directly using one of the rights in the CRPD) or by an amendment to the obligations on public authorities, which would oblige public authorities to consider the rights in the CRPD when acting or making decisions.

# The human rights law context

In recent years, a number of international human rights instruments, including the Convention on the Rights of Persons with Disabilities (CRPD), and domestic laws have been introduced to promote and protect the rights of persons with disabilities in Australia and around the world.

## Human rights in the modern era

The modern era of human rights began when the United Nations (UN) was established in 1945, largely in response to the horrors of the recently ended Second World War. The stated purpose of the United Nations was to promote and encourage respect for human rights and fundamental freedoms.<sup>21</sup> These fundamental rights and freedoms were set out in the Universal Declaration of Human Rights on 10 December 1948.

The Universal Declaration of Human Rights is not a legally binding convention but rather a statement of the aspirations of the world community and “a common standard of achievement for all peoples and all nations”.<sup>22</sup> Importantly, the Universal Declaration of Human Rights makes no distinction as to the type of right. It remains important today as the foundation document of modern international human rights.

The original aim was to turn the aspirations outlined in the Universal Declaration of Human Rights into a single convention that would be legally binding on nations that agreed to it. This single convention would clarify and add substance to the rights and freedoms set out in the Universal Declaration of Human Rights. Unfortunately, due to disagreements during the drafting process,

this did not happen. Instead, the principles of the Universal Declaration of Human Rights relating to civil and political rights were set out in the International Covenant on Civil and Political Rights, while those relating to economic, social and cultural rights were set out in the International Covenant on Economic, Social and Cultural Rights. The Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights form the ‘International Bill of Rights’, the bedrock of universal human rights protection.

## Rights of persons with disabilities in international law

The human rights of persons with disabilities are protected equally with all other people under international law, although there is no specific mention of persons with disabilities in the foundational human rights treaties. For example, while the International Covenant on Economic, Social and Cultural Rights protects “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” (Article 12), the general nature of the right makes it uncertain as to what it means in practice for persons with disabilities and other vulnerable persons. This need for further clarity in respect to the general rights contained in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights led the UN to develop further specific treaties on either particular topics such as torture or race, or the rights of particular groups of vulnerable persons such as

women, children and migrants. Of these thematic treaties, only the Convention on the Rights of the Child specifically refers to disability in respect to children (Articles 2 and 23).

## Development of rights of persons with disabilities in international law

Prior to the development of a specific convention for persons with disabilities, several international human rights instruments and activities addressed the rights of persons with disabilities, although none has the status of a legally binding treaty. While non-binding and aspirational declarations (similar to the Universal Declaration of Human Rights), these instruments do provide guidance and aid on the principles and best practice to adopt in respect to the rights of persons with disabilities.

- Declaration on the Rights of Mentally Retarded Persons (1971), followed by the Declaration on the Rights of Disabled Persons in 1975. Both declarations recognised the equal rights of persons with disabilities:

*Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.*<sup>23</sup>

- International Year of Disabled Persons (1981) with the theme of ‘full participation’. Its major outcome was the adoption of the World Programme of Action Concerning Disabled Persons on 3 December 1982. The World Programme of Action had the purpose of promoting “effective measures for prevention of disability, rehabilitation and the realization

of the goals of ‘full participation’ of disabled persons in social life and development, and of ‘equality’”.<sup>24</sup> It emphasised a human rights approach to disability and used the social model of disability when defining ‘handicap’ as:

*a function of the relationship between disabled persons and their environment. It occurs when they encounter cultural, physical or social barriers which prevent their access to the various systems of society that are available to other citizens.*<sup>25</sup>

- The UN Decade of Disabled Persons (1983–1992). Major outcomes include:
  - the Tallinn Guidelines for Action on Human Resources Development in the Field of Disability (1989)
  - Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (1991)
  - review of the implementation of the World Programme of Action (1987). This recommended that the UN draft a convention on the elimination of all forms of discrimination against persons with disabilities. Some countries presented draft outlines for a proposed convention, but no consensus could be reached. Many countries expressed the opinion that existing human rights treaties and documents adequately guaranteed persons with disabilities the same rights as everyone else and there was no need for a separate convention.
- Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, adopted in 1993. Although not legally binding, the Standard Rules represent a strong moral and political commitment by States to take action to ensure that all persons with disabilities can participate fully in society through exercising the

same rights and freedoms as everyone else. The Standard Rules provide a framework for countries to implement policies to ensure the equalisation of opportunities for persons with disabilities. In order to monitor the implementation of the Standard Rules, a Special Rapporteur on Disability was appointed who reports annually to the UN Commission for Social Development.

- In 1994, the Committee on Economic, Social and Cultural Rights considered the rights of persons with disabilities under the International Covenant on Economic, Social and Cultural Rights in its General Comment No. 5.<sup>26</sup>

The patchwork nature of these international instruments, combined with their non-binding effect, eventually led the international community to recognise that the existing instruments were inadequate to protect the rights of persons with disabilities. These rights needed to be clarified and protected in a legally binding treaty focused on persons with disabilities.

## **Development and adoption of the Convention on the Rights of Persons with Disabilities**

In 2000, the process started anew when the World NGO Summit on Disability adopted the *Beijing Declaration on the Rights of People with Disabilities in the New Century*, calling for the adoption of a legally binding convention on the rights of persons with disabilities. In 2001, the UN General Assembly accepted a proposal by Mexico to establish an Ad Hoc Committee “to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities”.<sup>27</sup>

In establishing the Ad Hoc Committee, the General Assembly recognised that:

*despite different efforts made to increase cooperation and integration and increasing awareness of and sensitivity to disability issues since the adoption of the World Programme of Action by Governments, bodies and relevant organizations of the United Nations system and non-governmental organizations, these efforts have not been sufficient to promote full and effective participation by and opportunities for persons with disabilities in economic, social, cultural and political life.*<sup>28</sup>

At its First Session, the Ad Hoc Committee decided to allow non-governmental organisations to participate in the work of the committee. At its Second Session, the Ad Hoc Committee decided to establish a Working Group to prepare a draft text of the convention. The Working Group was composed of Member States of the UN, non-governmental organisations and national human rights institutions. Twelve of the 40 members of the Working Group were from Disabled Persons Organisations. Disability Australia Limited was one of the Asia-Pacific Disabled Persons Organisations registered with the Ad Hoc Committee.

The Working Group met in 2004 and produced a draft text of the convention for presentation to the Ad Hoc Committee. The Ad Hoc Committee met a number of times over the next few years to work on the draft. At its eighth session in December 2006, the committee adopted the text of the convention and its Optional Protocol and forwarded them to the General Assembly. On 13 December 2006, the General Assembly adopted the CRPD and its Optional Protocol by consensus, with both entering into force on 3 May 2008.<sup>29</sup> As of December 2010, 96 countries have ‘ratified’ (signed up to) the CRPD.<sup>30</sup> Australia has ratified the convention and the Optional Protocol.

### ***The significance of the Convention on the Rights of Persons with Disabilities***

The CRPD is the first legally binding international document that specifically promotes and protects the rights of persons with disabilities. In comparison to other international human rights treaties, the CRPD is a lengthy and comprehensive document. It includes civil, political, economic, social and cultural rights without distinction and protects them all equally. The CRPD provides an authoritative reference point for governments, non-governmental organisations and others working in the field of disability.

Countries that have ratified the CRPD are obliged to introduce measures that promote the human rights of persons with a disability. This includes adopting laws and administrative practices to protect the rights recognised in the CRPD as well as eliminating laws, policies, customs and practices that discriminate against persons with disabilities. Governments are also obliged to actively involve persons with disabilities when developing and implementing new policies and legislation concerning the rights of persons with disabilities.

The CRPD is also significant as the first convention to include non-governmental organisations and various stakeholders in the drafting process alongside governments. For the first time, non-governmental organisations had a full and active role in the drafting of the convention. Most importantly, the CRPD was drafted with the full participation of those most affected by it, allowing persons with disabilities to help to create a relevant and effective treaty to protect and promote their rights.

Furthermore, the CRPD marks a major change in attitudes and approaches to persons with disabilities. In particular, the CRPD represents a paradigm shift from the outdated 'medical model' and 'welfare based' approach to disability, to a 'social

model' and 'rights-based' approach to the advancement and protection of the rights of persons with disabilities. This approach is clearly shown in the CRPD's description of people with disabilities in Article 1 as including:

*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

Traditionally, the 'medical model' approach emphasises the mental or physical *deficit* of a person and causes disability to become narrowly equated with a person's health status, limited capacity and need for the protection offered by social welfare services. The CRPD transforms this perspective and ensures that disability is treated as a rights-based issue. In a rights-based approach, persons with disabilities are entitled to rights rather than 'graced with charity'; it means treating people with respect rather than pity.

The social model shifts the emphasis from the 'disability' to the barriers and prejudices inherent in societies that prevent persons with disabilities from fully enjoying their rights. The CRPD takes into account not only physical challenges, such as accessibility, but also the various social obstacles and stereotypes that lead to the exclusion of persons with disabilities and the denial of their rights. Removing these obstacles is necessary in order for persons with disabilities to exercise their rights on an equal basis with others.

### ***Rights and obligations under the Convention on the Rights of Persons with Disabilities***

The purpose of the CRPD is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity" (Article 1).

While not creating any new rights, the CRPD expands on and clarifies how existing rights apply to persons with disabilities. It does this by identifying the rights of persons with disabilities in extensive detail, as well as outlining procedures for the realisation of these rights.

In addition to listing rights, the CRPD also places obligations and responsibilities on countries, and outlines the steps they must take in order to realise the rights in the CRPD. For instance, countries have general obligations under Article 4 to:

- “adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention” – that is, they must create laws and policies to protect the rights in the CRPD
- “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities” – that is, they must change or remove all discriminatory laws, policies or practices
- “take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes”, and
- “take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise” – that is, they must do whatever they can to stop discrimination by other people or private businesses.

In language that is remarkably similar to section 38(1) of the Charter, countries must also:

*refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention.*

Countries must also protect and advance the rights of women and girls with

disabilities, recognising their vulnerability to multiple discrimination (Article 6), and act in the best interests of children with disabilities, ensuring they enjoy rights and freedoms on an equal basis with other children (Article 7). These articles recognise the particular hurdles women and children with disabilities have to overcome in order to enjoy equally their human rights and fundamental freedoms.

Articles 10 to 30 of the CRPD define the specific rights of persons with disabilities (see list below). Most of these rights reflect those under existing international human rights treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, but with specific obligations on countries to take the steps necessary to ensure they can be fully enjoyed by persons with disabilities. The provisions in the CRPD provide much more detail and clarity than in earlier human rights treaties.

A number of provisions in the CRPD expand upon existing rights in innovative ways. These include access to justice (Article 13), freedom from exploitation, violence and abuse (Article 16), protecting the integrity of the person (Article 17), living independently and being in the community (Article 19), personal mobility (Article 20) and habilitation and rehabilitation (Article 26). These provisions do not create new rights but add additional aspects to existing rights.

For instance, the right of access to justice (Article 13) builds upon the right of persons with disabilities to recognition as persons before the law (Article 12), which is one of the fundamental rights recognised in the International Covenant on Civil and Political Rights (Article 16). The right to personal mobility (Article 20) builds upon the right of persons with disabilities to liberty of movement (Article 18), also one of the fundamental human rights recognised in the

International Covenant on Civil and Political Rights (Article 12). The right to habilitation and rehabilitation (Article 26) builds upon the rights of persons with disabilities to education (Article 24), health (Article 25) and work and employment (Article 27), each of which is a fundamental human right recognised in the International Covenant

on Economic, Social and Cultural Rights (Articles 6, 12 and 13). The other provisions mentioned expand on existing rights in similar ways.

Two new elements included in the CRPD that are innovative and important for promoting the rights of persons with disabilities are

<b>Rights protected under the Convention on the Rights of Persons with Disabilities</b>	
Article 5	Equality and non-discrimination
Article 6	Women with disabilities
Article 7	Children with disabilities
Article 8	Awareness-raising
Article 9	Accessibility
Article 10	Right to life
Article 11	Situations of risk and humanitarian emergencies
Article 12	Equal recognition before the law
Article 13	Access to justice
Article 14	Liberty and security of person
Article 15	Freedom from torture or cruel, inhuman or degrading treatment or punishment
Article 16	Freedom from exploitation, violence and abuse
Article 17	Protecting the integrity of the person
Article 18	Liberty of movement and nationality
Article 19	Living independently and being included in the community
Article 20	Personal mobility
Article 21	Freedom of expression and opinion, and access to information
Article 22	Respect for privacy
Article 23	Respect for home and family
Article 24	Education
Article 25	Health
Article 26	Habilitation and rehabilitation
Article 27	Work and employment
Article 28	Adequate standard of living and social protection
Article 29	Participation in political and public life
Article 30	Participation in cultural life, recreation, leisure and sport

the provisions on awareness-raising (Article 8) and the right to accessibility (Article 9). Under Article 8, countries have obligations to take positive action to raise visibility and awareness of the rights of persons with disabilities. Under Article 9, States Parties are obliged to take appropriate measures to ensure persons with disabilities have access, on the same basis as everyone else, to the physical environment, information and communications, transportation and other facilities open or provided to the public including buildings, roads, schools, housing, medical facilities, workplaces, electronic services, communications and information.

### ***Enforcement of the rights under the Convention on the Rights of Persons with Disabilities***

The CRPD is a vital instrument for upholding the rights of persons with disabilities; however, its real effectiveness is dependent upon how it is implemented. Once a country ratifies the CRPD, it accepts the obligations imposed on it by the convention in respect to the measures it must take to protect and promote the rights of persons with disabilities. Existing laws that protect the rights of persons with disabilities should consider CRPD rights.

In some countries, the provisions of the CRPD will automatically become part of that country's law when they 'ratify' it. Other countries, like Australia, must introduce laws specifically to include the CRPD as part of the local law. However, even before this is done, the courts of countries like Australia are still able to use the provisions of the CRPD to help interpret laws affecting the rights of persons with disabilities.

At the national level, the CRPD requires countries to establish a framework to "promote, protect and monitor implementation" of the CRPD (Article 33). At the international level, the Committee on the Rights of Persons with Disabilities

monitors the implementation of the CRPD by each country (Article 34). A Conference of States Parties also meets regularly to look at issues surrounding the implementation of the CRPD (Article 40). The current chair of the Committee on the Rights of Persons with Disabilities is Australian law Professor Ronald McCallum.

The Optional Protocol allows individuals or groups of individuals to bring complaints to the Committee on the Rights of Persons with Disabilities as long as they have tried all the options in their own countries first. The Optional Protocol also allows the Committee on the Rights of Persons with Disabilities to conduct inquiries into grave or systematic violations of rights under the CRPD (Optional Protocol, Article 6). The Optional Protocol will not apply to a country unless they have specifically ratified it: it will not apply to countries that have only ratified the CRPD. Even so, when signing the Optional Protocol countries can declare that they do not recognise the authority of the Committee to conduct inquiries into allegations of grave or systematic violations of CRPD rights (Optional Protocol, Article 8).

In order to make a complaint to the Committee on the Rights of Persons with Disabilities, a named individual must be sure that their country has ratified the Optional Protocol.<sup>31</sup> The person must ensure that they have tried to solve the matter in their own country through all possible avenues and show that the matter is not being examined under any other process. Finally, they must be able to point to the specific right under the CRPD that they allege has been breached. If all these requirements are met, the complaint will be accepted as 'admissible' by the Committee.

In practice, the vast majority of complaints to any of the Committees monitoring human rights treaties are found to be inadmissible. This is usually for simple reasons such as the person not checking that their country

has actually ratified the Optional Protocol or, if they have, complaining about matters that occurred before ratification. Complaints can only be accepted for alleged breaches after the formal ratification date.

Once a complaint is accepted, the Committee will look at the merits of the case. The Committee has to give the country concerned an opportunity to respond. This is a long and time-consuming process. In the event the Committee finds in favour of the person complaining, they will issue a 'view'. The view is sent to the government concerned for response and can contain a number of recommendations for the government to adopt. The recommendations are optional and not enforceable. Governments can simply respond by saying they disagree with the view of the Committee. However, views can be used by advocacy groups to raise disability rights issues and put pressure on governments to adopt the recommendations in the view.

### **Rights of persons with disabilities under domestic law in other countries**

There are currently 96 States Parties to the CRPD (countries that have ratified the CRPD) and 60 States Parties to the Optional Protocol. As noted above, Australia is a party to both. Different countries adopt different approaches in using the CRPD to inform the measures they are taking to ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities.

The United Kingdom, New Zealand, Canada, the United States of America and South Africa take a similar approach to the protection of the rights of persons with disabilities. They each have a legal framework involving some form of general human rights protection either in a Constitution or through some form of human rights law. These general rights are then

built upon in specific anti-discrimination laws. Victoria adopts the same approach with the Charter and *Equal Opportunity Act 1995* (in 2011, the *Equal Opportunity Act 2010* comes into operation). Other rights of persons with disabilities are then scattered amongst a range of laws dealing with housing, health, education and so on. Australia is different in that the Australian Constitution protects very few individual human rights and there is no separate Bill of Rights or a national human rights Act.

The main issue with the approach of the United Kingdom, New Zealand, Canada, the United States of America and South Africa, as well as Australia, in not directly incorporating the CRPD into domestic law, is the difficulty this leaves in enforcing individual rights under the CRPD.

There is no doubt that, at the strategic and policy level, the CRPD is an important and powerful tool for disabled persons' organisations and other organisations in holding governments to account on what measures they are taking to implement the provisions of the CRPD. These measures can include adopting, modifying or abolishing legislation and developing policies and programs to ensure the rights of persons with disabilities are promoted and protected.

However, it is much more difficult for individuals who believe one of their rights under the CRPD has been breached to obtain justice. They cannot take action in a domestic court claiming a breach of their rights under the CRPD. Instead, they have to try to work out which existing law is supposedly protecting the same right and see if they can take action in court under that law. Only if they can work out a domestic law under which to bring their claim in court, can they then raise the CRPD as one tool for the court to use in interpreting the particular statute.

In certain countries, an individual may be able to bring issues under the CRPD to a national human rights commission or similar body but outcomes from this process, normally resulting from mediation or conciliation, are generally not enforceable in domestic courts. For instance in the United Kingdom, the Equality and Human Rights Commission can hold inquiries into any issue of human rights including those under the CRPD.<sup>32</sup> In Australia, complaints can be made to the Australian Human Rights Commission in certain circumstances (see ‘Protection of the rights of persons with disabilities in Australian law’ below).

Once they have tried all of these options, individuals can complain directly to the Committee on the Rights of Persons with Disabilities if their country has ratified the Optional Protocol. Even then, a successful outcome before the Committee does not result in a legally enforceable outcome, but only a recommendation from the Committee back to the country concerned, which the country can choose to ignore.

## Legal cases involving the rights of persons with disabilities

### Australian cases

When countries such as Australia ratify an international treaty, they are signalling to the global community their intention to respect the rights it contains and to make sure these rights are protected locally. In this way, Australian courts, while unable to apply the CRPD’s provisions directly, can use the convention to help interpret cases that come before them concerning the rights of persons with disabilities.

The approach in Australia is summed up in the 2009 case of *Jane Devers v Kindilan Society*<sup>33</sup> in the Federal Court of Australia in which the applicant relied on the CRPD

amongst other things in a case of disability discrimination. Justice Marshall stated:

*Australia is a State Party to the Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, [2008] ATS 12 (entered into force 3 May 2008)... It is well settled that the mere fact of ratification does not import any rights or obligations into domestic law ... A convention may aid in interpretation of an Act where there is ambiguity but the Convention cannot be relied on to reach the conclusion that the requirement or condition was not reasonable.*<sup>34</sup>

While the Attorney-General has made a declaration that the CRPD is, for the purposes of the *Australian Human Rights Commission Act 1986* (Cth), “an international instrument relating to human rights and freedoms”, this does not change its status in domestic law. As Justice Flick said in the Federal Court in relation to the International Covenant on Civil and Political Rights, which applies equally to the CRPD:

*The International Covenant on Civil and Political Rights does not attract any different conclusion by reason of its inclusion as Schedule 2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). Its inclusion as Schedule 2 has not had the consequence that it has thereby been incorporated into Australian domestic law.*<sup>35</sup>

Section 32(2) of the Charter provides that “international law ... relevant to a human right may be considered in interpreting a statutory provision”. Therefore, judges in Victoria may consider the CRPD when interpreting a law that engages the rights of persons with disabilities.

In the Victorian case of *Nicholson & Ors v Knaggs and Ors*<sup>36</sup> which looked at whether an elderly person with disabilities was legally capable of making a will, Justice Vickery used the CRPD to help interpret whether the person had been unduly

influenced. He also recognised the shift the CRPD had made in the approach to persons with disabilities:

*Growing concern for the rights of persons with disabilities, including the elderly, has been reflected in the United Nations sponsored Convention on the Rights of Persons with Disabilities 2006 (the 'CRPD'). The CRPD marks a paradigm shift in approaches to persons with disabilities. It reflects a movement from treating persons with disabilities as objects of social protection towards treating them as subjects with rights, who are capable of claiming and exercising those rights and making decisions based on free and informed consent as active members of society.*<sup>37</sup>

In this case, the judge decided that Article 12 of the CRPD was relevant. Article 12 recognises “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life” and that governments should take appropriate measures to ensure persons with disabilities can exercise these rights. This includes making a will.

The judge found that the rights under the Charter provided no assistance for the elderly person with a disability. In respect to the Charter, Justice Vickery simply stated:

*While the right to freedom of testamentary disposition [making a will] is not expressly recognised in the Charter of Human Rights and Responsibilities Act 2006, the Charter does not detract from rights and freedoms recognised under international law or the common law.*<sup>38</sup>

The judge then discussed the legal principles behind Article 12 of the CRPD in detail,<sup>39</sup> concluding that:

*The effect of Article 12(2) in the present context is to provide for an obligation on Australia to recognise that persons with disabilities enjoy the exercise of the right to freedom of testamentary disposition*

*on an equal basis with all other persons. Undue influence in the will making process may impose a significant barrier to the free expression of the testator's preferences. Persons with disabilities, including the elderly who suffer from disabilities, are uniquely vulnerable to the exercise of undue influence on the part of others. Accordingly, the common law protection provided by the concept of undue influence, as it has developed in this country, may legitimately be engaged by the CRPD.*<sup>40</sup>

A significant issue for discussion by Justice Vickery was around the concept of 'legal capacity' provided for in Article 12 of the CRPD. Justice Vickery found that legal capacity under Article 12 is a broader concept than the right of a person to equal recognition before the law in that it also “entails the capacity to exercise rights and undertake duties in the course of individual conduct”.<sup>41</sup> He stated:

*The Concept of 'Legal Capacity', as it is employed in Article 12 of the CRPD has a particular meaning which is distinct from the commonly used concept which endows a person with recognition in the legal order.*<sup>42</sup>

Justice Vickery, in his reasoning, did not refer to section 8 of the Charter concerning 'recognition and equality before the law'.

Australia has had cases brought before the UN Human Rights Committee. In the same way, it could now have cases against it brought before the Committee on the Rights of Persons with Disabilities. In the 2006 case of *Brough v Australia*,<sup>43</sup> the UN Human Rights Committee investigated Australia for inhumane and discriminatory treatment of an Aboriginal juvenile prisoner with a mental disability in breach of Articles 10 and 24(1) of the International Covenant on Civil and Political Rights. The Committee concluded that:

*the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to*

*inflict self-harm and his suicide attempts. The Committee therefore concludes that the author's treatment violated article 10, paragraphs 1 and 3, of the Covenant.*<sup>44</sup>

The Committee found that the complainant was "entitled to an effective remedy including adequate compensation".<sup>45</sup> The Committee also found that Australia was "under an obligation to ensure that similar violations do not occur in the future".<sup>46</sup> These findings are not enforceable against Australia. In its official response, Australia did not accept the view of the Committee that it had violated Articles 10 or 24 and, consequently, did not accept that the complainant was entitled to any compensation.<sup>47</sup> Findings by the Committee on the Rights of Persons with Disabilities would similarly not be enforceable.

## International cases

The CRPD has been referred to in a number of cases in India.<sup>48</sup> An Indian court used the obligation on governments to "[e]nsure that reasonable accommodation is provided to persons with disabilities in the workplace" (taken directly from Article 27 (1)(i) of the CRPD) in a case concerning an employee who had been denied employment because of a renal transplant. The court stated in respect to Article 21 of the Constitution of India (including the right to work and earn a livelihood):

*The law is now well settled that though United Nation Convention may not have been enacted into the Municipal Law, as long as the convention is not in conflict with the Municipal Law and can be read into Article 21 it is enforceable. Therefore, in the absence of any conflict it is possible to read the test of reasonable accommodation in employment contracts.*<sup>49</sup>

Consequently, the court read the test of reasonable accommodation from Article 27 of the CRPD into Article 21 of the

Constitution to find in favour of the person and ordered the organisation to find him employment within 60 days.

In another case, the High Court of Delhi referred to the CRPD as follows:

*In the context of the inviolable human rights of the disabled, it is necessary to take note of the binding and mandatory provisions of ... the Convention on the Rights of Persons with Disabilities (CRPD) which has been ratified by India. In particular, Article 7 which set out the obligations of the States towards children with disabilities, Article 9 which obliges the States to take appropriate measures to ensure access to 'schools, housing, medical facilities', and Article 24 which deals with the right to education are relevant. In the context of the present case, reference may be made to Article 24(2) CRPD...*<sup>50</sup>

Finally, in a case concerning a woman with 'mild mental retardation' who had been raped and was pregnant, a Division Bench of the High Court of Punjab and Haryana had ordered a termination of the pregnancy without the woman's consent. The woman was looking forward to having a baby. The Appeal Court, finding that termination was not in the best interests of the woman and could not proceed without her consent, overturned the order of the Division Bench, thereby allowing the pregnancy to continue. In deciding this, the Appeal Court stated:

*We must also bear in mind that India has ratified the Convention on the Rights of Persons with Disabilities (CRPD) on October 1, 2007 and the contents of the same are binding on our legal system.*<sup>51</sup>

The CRPD was raised in a Hong Kong case concerning a child with Down syndrome who attended a special school.<sup>52</sup> The child had reached 18 years of age and the end of the normal schooling period but wanted to continue for another year. The school agreed the child would be able to reach a higher potential but an age rule of the government

concerning children attending special schools prevented an extension. This age rule did not apply in mainstream schools.

This was primarily a case of discrimination under the Disability Discrimination Ordinance (Cap 487) but an argument based on 'legitimate expectation' and the right to education under Article 24 of the CRPD was raised due to China having ratified the CRPD. In the absence of implementing legislation, the CRPD did not provide legally binding obligations on governments. Hon A Cheung J referred to this argument in his summing up even though counsel had dropped it during the case:

*In any event, as all parties agree, the relevant Convention obligations are merely aspirational in nature, and there are built-in qualifications to the commitments of the Government. It is difficult to see how one can found a case of substantive legitimate expectation on the Convention obligations.*<sup>53</sup>

The rights of persons with disabilities are also protected under more general human rights treaties and there have been numerous cases looking at these, many of which concern breaches of the rights of persons with disabilities under the European Convention on Human Rights and litigated in the European Court of Human Rights.<sup>54</sup>

The Victorian Civil and Administrative Council, in the case of *Kracke v Mental Health Review Board & Ors*,<sup>55</sup> discussed a number of international cases involving the rights of persons with disabilities not involving the CRPD. In one of these, *Megyeri v Germany*,<sup>56</sup> a person was placed in criminal detention in a psychiatric hospital. In challenging the detention, the person was not provided with a public lawyer. He claimed breach of the right to access a court under Article 5(4) of the European Convention on Human Rights. In finding for Megyeri, the European Court of Human Rights found:

*the detained person must have a right to be heard in person or, where necessary, by some form of representation, and special procedures may be called for to protect the interests of people with mental disabilities who cannot fully represent themselves. Last, persons detained for being of unsound mind should not have to take the initiative to obtain legal representation.*<sup>57</sup>

## **Protection of the rights of persons with disabilities in Australian law**

Australia has a federal system of government in which powers are divided between the Commonwealth Government and six state governments, including Victoria. In some areas, including human rights and anti-discrimination, both levels of government have authority to pass laws. As a result, the rights of persons with disabilities are protected by legislation at both the Commonwealth and state levels.

## **Protection of the rights of persons with disabilities nationally**

Australia has no human rights Act or equivalent legislation to provide human rights protection, with the result that there are no comprehensive human rights protections in place federally. This is in stark contrast to other countries such as Canada, the United Kingdom, New Zealand and the United States of America.

Australia's Constitution, laid out in the *Commonwealth of Australia Constitution Act 1900*, provides very little in the way of individual human rights protection. The only rights the Australian Constitution explicitly protects are the right to vote (section 41),<sup>58</sup> protection against acquisition of property on unjust terms (section 51 (xxi)), the right to a trial by jury (section 80), a limited right to freedom of religion (section 116) and prohibition of discrimination on the

basis of state of residency (section 117). The High Court has also found that the language and structure of the Constitution necessarily implies other rights, but these are limited and controversial. The common law of Australia does provide some rights protection but these instances are limited and difficult to identify with precision and Parliament can modify or abolish them.<sup>59</sup>

The rights of persons with disabilities are protected at the national level mainly through a range of Commonwealth anti-discrimination laws, the most important being the *Disability Discrimination Act 1992*. People can bring claims under multiple anti-discrimination laws at the same time if applicable. For instance, a woman with disabilities might bring a claim under the Disability Discrimination Act as well as the *Sex Discrimination Act 1984* (Cth). Other Commonwealth laws relevant to persons with disabilities include the *Disability Services Act 1986* (Cth) discussed below.

The Federal Parliament introduced the Disability Discrimination Act in 1992 with the aim of eliminating discrimination on the ground of disability in various areas of public life including work, accommodation, education, access to premises, clubs, sport and the provision of goods, facilities, services and land.<sup>60</sup> The Disability Discrimination Act seeks to ensure that persons with disabilities “have the same rights to equality before the law as the rest of the community”.<sup>61</sup> The Disability Discrimination Act also has the object of promoting “recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community”.<sup>62</sup> The Disability Discrimination Act creates obligations on states to work towards compliance with disability standards in education and transport to increase access of people with disabilities to these services.

While the Disability Discrimination Act offers protection for all Australians with disabilities, section 13(3) states that this “Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act.” In other words, the Disability Discrimination Act is not intended to ‘cover the field’ and exists alongside relevant Victorian legislation.

The Disability Services Act regulates Federal Government funding of states and eligible organisations in relation to the provision of disability employment services, rehabilitation programs and other eligible services including in the areas of accommodation, advocacy, information, recreation and independent living. This Act is important in relation to the implementation of Australia’s obligations under the CRPD because of its positive aims outlined in section 3, including to “assist persons with disabilities to receive services necessary to enable them to work towards full participation as members of the community”.<sup>63</sup>

The Australian Human Rights Commission (AHRC) also has functions in respect to the rights of persons with disabilities separate to its role under the Disability Discrimination Act. These functions are found in the Australian Human Rights Commission Act. Under this Act, the Commission can inquire into complaints about breaches of human rights by the Commonwealth Government or one of its agencies as well as agents of the Commonwealth. For example, the majority of these complaints concern immigration detention centres and are made against the Commonwealth Government and the security company running the centre on their behalf. Complaints are allowed against the security company because they are acting as ‘agents’ of the Commonwealth.

Complaints cannot generally be brought to the AHRC against state governments or their agencies or private bodies. To do so, a link has to be found with the Commonwealth.

A funding agreement in place between the federal and state governments, as in the case of public housing, is not enough in itself to bring the state agency under the authority of the AHRC. Individual funding agreements need to be looked at in detail to determine the role of the Federal Government and whether this provides the appropriate link.

The human rights that may be breached are those found in the international instruments listed in the Schedules to the Australian Human Rights Commission Act, along with those declared by the Attorney-General for the purpose of the AHRC to be “an international instrument relating to human rights and freedoms”. In terms of persons with disabilities, this includes the rights recognised under the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons (listed in Schedule 2) and the CRPD.

This allows complaints to be made to the AHRC for breaches of rights under the CRPD in areas such as immigration, federal public service, Commonwealth funded employment programs, voting in Federal elections and universities.<sup>64</sup>

This does not mean the provisions of the CRPD have been incorporated into Australian law. These complaints cannot be taken to a federal court if they fail to reach conciliation, unlike in cases of unlawful discrimination under the Disability Discrimination Act and other Commonwealth anti-discrimination laws.

The AHRC can conciliate in the case of complaints alleging breaches of human rights in the same way as unlawful discrimination cases and, in the majority of cases, this will result in a solution. The difference lies when no resolution is found. In the case of unlawful discrimination, the AHRC can terminate the complaint leaving the affected person with the option of pursuing the case in the Federal Court or

Federal Magistrates Court. With breaches of human rights, there is no such option. Instead, it falls upon the President of the Commission to determine whether a breach of human rights has occurred. This may include holding a public hearing into the matter. If the President decides a breach has occurred, they will prepare a report on the matter for the Attorney-General. The report must be tabled in both Houses of Parliament.

The report may contain recommendations on how to prevent the breach occurring again and what actions the Commonwealth or one of its agencies can take to reduce the damage suffered by the complainant, including the payment of compensation. However, these recommendations are not enforceable in a court of law and the Commonwealth or its agency can ignore them if it so chooses.<sup>65</sup>

## **Protection of the rights of persons with disabilities in Victoria**

The rights of persons with disabilities in Victoria are protected under the Charter equally with all other Victorians. There is no specific mention of disabilities in the Charter, although the Charter does say that discrimination has the same meaning as it does in the Equal Opportunity Act, which includes ‘impairment’ as a protected attribute.

Alongside the Charter, the two main pieces of Victorian legislation that protect the rights of persons with disabilities in Victoria are the Equal Opportunity Act and the *Disability Act 2006*.

There are other Acts that govern the rights of persons with disabilities in Victoria, including the *Mental Health Act 1986* and the *Guardianship and Administration Act 1986*. These two Acts are currently under review to ensure they protect human rights appropriately in the light of the Charter.<sup>66</sup> The terms of reference for the review of

the Guardianship and Administration Act include specific reference to the CRPD along with the Charter.

Currently, if a person with a disability believes one of their rights under the Charter has been breached they can raise the matter directly with the public authority concerned, which should have procedures in place to handle such complaints, or with the Victorian Ombudsman. The Victorian Ombudsman has the power in respect to government departments, public statutory bodies and members of staff of municipal councils “to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter of Human Rights and Responsibilities”.<sup>67</sup> A person cannot make a complaint to the Victorian Equal Opportunity and Human Rights Commission or start a case in court based on a breach of their Charter rights alone. However, the Charter does enable them to raise human rights breaches before a court or tribunal where they have an existing case.

The objectives of the Equal Opportunity Act are in line with those of the Disability Discrimination Act. The Equal Opportunity Act prohibits discrimination on a number of grounds, including ‘impairment’.<sup>68</sup> The Equal Opportunity Act has the objective of promoting “the recognition and acceptance of everyone’s right to equality of opportunity” and to “eliminate, as far as possible, discrimination against people”.<sup>69</sup>

Under the Equal Opportunity Act, the prohibition against discrimination because of a person’s impairment is limited to the areas of employment, education, goods and services, the disposal of land, accommodation, clubs and sport. The Act also includes various exceptions. In 2011, the *Equal Opportunity Act 2010* will come into force. The new Equal Opportunity Act includes a positive duty to prevent discrimination and promote equality.<sup>70</sup> The new Equal Opportunity Act also clarifies

some important protections for people with disability including the provision of reasonable adjustments and definition of assistance animals.

The Disability Act was enacted with the purpose of establishing a new legislative scheme which “reaffirms and strengthens” the rights and responsibilities of persons with disabilities, and is based on the recognition that the realisation of these rights requires support from both government and the community.<sup>71</sup>

The Act aims to advance the participation of people with disabilities in the community and to promote and protect the rights of those accessing disability services.<sup>72</sup> These aims are based on the principle that “persons with a disability have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities”.<sup>73</sup> Additionally, the Act affirms that people with disabilities be afforded respect for their inherent human worth and dignity, have the right to live free from abuse and neglect, and be empowered to exercise control over their own lives.<sup>74</sup>

The Act protects the rights of persons with disabilities by regulating the use of restrictive practices (such as restrictive interventions and compulsory treatments) and placing obligations on disability service providers. It establishes the office of the Senior Practitioner to be “generally responsible for ensuring that the rights of persons who are subject to restrictive interventions and compulsory treatment are protected and that appropriate standards... are complied with”.<sup>75</sup> The Act also creates the Disability Services Commissioner to work independently with disability service providers in order to resolve complaints. The Victorian Government also works to further the rights of people with disability to live independently and participate in the community through the State Disability Plan 2002–2012.

The definition of 'impairment' found in the Equal Opportunity Act and the definition of 'disability' under the Disability Discrimination Act are essentially the same. Both definitions include reduced physical and intellectual capacities, mental or psychological diseases or disorders as well as the presence of in the body of organisms that may cause disease.<sup>76</sup>

Since Australia acceded to the Optional Protocol to the CRPD in 2009, a person has the option of making a complaint to the Committee on the Rights of Persons with Disabilities if they have exhausted all the above domestic remedies available to them.

This only applies to matters occurring after 20 September 2009. The process for making a complaint is outlined above (see 'Enforcement of the rights under the Convention on the Rights of Persons with Disabilities').

## **What does this mean for the protection of the rights of persons with disabilities in Victoria?**

Before the CRPD, the rights of persons with disabilities were protected at the international level in existing international conventions such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. With the exception of the latter, none of these conventions made specific reference to disability. Eventually the international community recognised that these conventions did not adequately guarantee persons with disabilities the same rights as everyone else. Neither did they ensure the full and effective participation of persons with disabilities in the economic, social, cultural and political life of a country.

The result of this was the development of the CRPD, a treaty that focuses on and clarifies the specific rights of persons with disabilities.

The human rights of persons with disabilities in Victoria are currently protected through a piecemeal range of legislative instruments, though the most important is clearly the Charter. State and federal anti-discrimination laws are limited in their application and, in respect of disability/impairment, continue to use the outdated medical model of disability rather than the more progressive social model of disability used by the CRPD.

While the Charter protects the rights of persons with disabilities in the same way as it protects the rights of everyone in Victoria, it makes no specific reference to disability. Therefore, in a similar way to the situation internationally prior to the CRPD, the Charter currently provides inadequate protection for the civil and political rights of persons with disabilities in Victoria (see 'What Victorians with a disability have to say').

In addition, the Charter provides no protection for the economic and social rights of anyone in Victoria, including persons with disabilities.

## **Next steps**

The human rights law context demonstrates the limited options available to enforce the rights of persons with disabilities, or for a person with a disability to make a claim when their rights are violated. State and federal anti-discrimination laws are limited in their application and continue to use the outdated medical model of disability rather than the more progressive social model used by the CRPD.

While the Charter protects the rights of persons with disabilities in the same way as it protects the rights of everyone in Victoria, it makes no specific reference to disability.

It does not provide any direct complaints mechanism, other than making a complaint to the Ombudsman. The complaints mechanism of the CRPD can be used if all available options in Australia have been tried first, but the Australian government is not obliged to adopt the recommendations that result from this.

The four-year review of the Charter is due to take place in 2011. The Commission welcomes the review and looks forward to a robust consideration of the rights of persons with disabilities in this discussion and beyond.

## Endnotes

1. UN Enable Factsheet on Persons with Disabilities available online at <http://www.un.org/disabilities/> (last visited 26 November 2010).
2. 2009 Australian Bureau of Statistics Survey of Disability, Ageing and Carers (SDAC). For the purposes of SDAC, disability is defined as any limitation, restriction or impairment which restricts everyday activities and has lasted or is likely to last for at least six months.
3. 2003 Australian Bureau of Statistics Survey of Disability, Ageing and Carers (SDAC). The 2009 SADC does not include state tables at present. These will become available in 2011.
4. In August 2011, this will be replaced by the *Equal Opportunity Act 2010* (Vic).
5. For information on the review of the *Mental Health Act 1986* see <http://www.health.vic.gov.au/mentalhealth/mhactreview/> (last visited 8 December 2010). For information on the review of the *Guardianship and Administration Act 1986* see <http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Guardianship/> (last visited 8 December 2010).
6. According to the 2003 Surveys of Disability, Ageing, and Carers conducted by the Australian Bureau of Statistics, 53.2 per cent of persons with disabilities participated in the labour force, as opposed to 80.6 per cent of people without a disability.
7. On 29 April 2010, the Australian Human Rights Commission refused an application by the major cinema chains for a temporary exemption in their requirement to provide cinema captioning and audio description. In their submission, the applicants proposed to continue to screen one captioned film, three times a week – 0.3 per cent of the 40,000 films screened. Full details at [www.hreoc.gov.au/disability\\_rights/exemptions/cinema/decision\\_full.html](http://www.hreoc.gov.au/disability_rights/exemptions/cinema/decision_full.html) (last visited 12 December 2010).
8. See also *The Age*, 15 August 2010: article titled 'Anger as disabled pupils spend up to four hours a day on bus' at [www.theage.com.au/victoria/anger-as-disabled-pupils-spend-up-to-four-hours-a-day-on-bus-20100814-1248a.html](http://www.theage.com.au/victoria/anger-as-disabled-pupils-spend-up-to-four-hours-a-day-on-bus-20100814-1248a.html) (last visited 3 December 2010).
9. Jill Stark, 'Sharp Rise in the Use of Shock Treatment Sparks Old Debate' (23 May 2003) *The Age*.
10. *Mental Health Act 1986* (Vic) Review, Terms of Reference, available online at [www.health.vic.gov.au/mentalhealth/mhactreview/termsofref.pdf](http://www.health.vic.gov.au/mentalhealth/mhactreview/termsofref.pdf) (last visited 8 December 2010).
11. Care must be taken not to conflate absolute rights and non-derogable rights. Absolute rights cannot be limited in any way, at any time, for any reason. Non-derogable rights are ones that cannot be suspended or restricted even in extraordinary circumstances such as a state of emergency. Non-derogable rights may be absolute or non-absolute.
12. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.
13. *Disability Act 2006* (Vic), Part 7. A restrictive intervention is "any intervention that is used to restrict the rights or freedom of movement of a person with a disability including chemical restraint, mechanical restraint and seclusion".
14. *Mental Health Act 1986* (Vic), s 8.
15. *Ibid* s 73.
16. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7.
17. *Ibid* s 10(c).
18. *Disability Discrimination Act 1992* (Cth) ss 11, 29A.
19. This list of vulnerable groups is an example and not intended to be exhaustive. For instance, it could also include people from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual and transgender people as well any

other vulnerable group.

20. The CRPD is not scheduled to the *Australian Human Rights Commission Act 1986*, but has been declared by the Attorney-General to be “an international instrument relating to human rights and freedoms” under section 47 of the Act. This process effectively adds new human rights instruments to those under which people can make complaints to the Australian Human Rights Commission without having to amend the Schedule to the Act. The Charter could include a similar section so that any new human rights treaties Australia ratifies can be brought within a Charter complaints process. This is appropriate because the Commonwealth Attorney-General only makes a declaration under section 47 of the Australian Human Rights Commission Act after he or she has consulted the appropriate Minister from each state.
21. Charter of the United Nations, Article 1(3).
22. Universal Declaration of Human Rights, Preamble [8].
23. Declaration on the Rights of Disabled Persons GA Res. 3447 (XXX) of 9 December 1975 [3].
24. World Programme of Action Concerning Disabled Persons, Objectives.
25. World Programme of Action Concerning Disabled Persons, Definition.
26. CESCR, general comment No. 5 (1994): Persons with Disabilities. All CESCR general comments are compiled in UN Doc. HRI/GEN/1/Rev.9 (Vol.I). Available at [www2.ohchr.org/english/bodies/cescr/comments.htm](http://www2.ohchr.org/english/bodies/cescr/comments.htm) (last visited 12 December 2010).
27. GA Res. 56/168 of 19 December 2001 [1].
28. Ibid Preamble.
29. Resolution 61/106 of 13 December 2006. The Optional Protocol allows people to take a complaint directly to the United Nations if they think their rights have been breached as long as they have tried all avenues in their country to find a remedy.
30. For the most up to date information on the status of the CRPD and its Optional Protocol, as well as the other human rights treaties, visit the United Nations treaties database at <http://treaties.un.org> (last visited 25 November 2010).
31. Committee on the Rights of Persons with Disabilities Rules of Procedure, Rules 55 to 77.
32. See [www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers](http://www.equalityhumanrights.com/legal-and-policy/human-rights-legal-powers) (last visited 20 December 2010).
33. [2009] FCA 1392.
34. Ibid [78].
35. *Sales v Minister for Immigration & Citizenship* [2007] FCA 2094, [21].
36. [2009] VSC 64.
37. Ibid [13].
38. Ibid [22].
39. Ibid [58] to [75].
40. Ibid [75].
41. [2009] VSC 64, [64] – [68].
42. Ibid [64].
43. See United Nations Doc. CCPR/C/86/D/1184/2003, 27 April 2006.
44. Ibid [9.4]. Article 10(1) requires prisoners to be treated humanely and Article 10(3) requires that juveniles be separated from adults in prison. The Committee also found violations of Article 24(1), the requirement of a State to protect children.
45. Ibid [11].
46. Ibid.
47. The Attorney-General's Department keeps an online record of its communications with each of the treaty monitoring bodies, including in respect to the *Brough* case. See [www.ag.gov.au/www/agd/agd.nsf/Page/RWPA16C04CA2741102FCA2571F7007A90E4](http://www.ag.gov.au/www/agd/agd.nsf/Page/RWPA16C04CA2741102FCA2571F7007A90E4) (last visited 20 December 2010).
48. The Indian cases are available online through the Legal Information Institute of India (LIIofIndia) at [www.liiofindia.org](http://www.liiofindia.org) (last visited 20 December 2010).
49. *Ranjit Kumar Rajak v State Bank of India*, High Court of Judicature at Bombay, Writ Petition No. 576 of 2008 (8 May 2009) [217].
50. *Lalit & Ors v Govt of NCT & ANR*, CW 3444/2008

- [2010] INDLHC 2485 (7 May 2010) [14].
51. *Suchita Srivastava & Anr. v Chandigarh Administration* [2009] INSC 1510 (28 August 2009) [26].
  52. *Tong Wai Ting v Secretary for Education and Permanent Secretary for Education*, Court of First Instance of Hong Kong, HCAL 73/2009, 24 August 2009. The case is available online through the Asian Legal Information Institute (AsianLII) at [www.asianlii.org](http://www.asianlii.org) (last visited 20 December 2010).
  53. *Tong Wai Ting v Secretary for Education and Permanent Secretary for Education*, Court of First Instance of Hong Kong, HCAL 73/2009, 24 August 2009, [115].
  54. See the International Centre for the Legal Protection of Human Rights website at [www.interights.org](http://www.interights.org) (last visited 28 November 2010).
  55. [2009] VCAT 646.
  56. [1992] ECHR 49; (1993) 15 EHRR 584.
  57. *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, [641]-[642].
  58. There is doubt whether this constitutional protection still applies - see *R v Pearson*; ex parte Sipka (1983) 152 CLR 254. The right to vote may now be found in the requirements of ss7 and 24 of the Constitution that the Houses of Parliament comprise of members 'directly chosen by the people' - see *Rowe v Electoral Commissioner* [2010] HCA 46 and *Roach v The Commonwealth* [2007] HCA 43.
  59. Corrin J, "Australia: Country report on human rights", (2009) Victoria University of Wellington Law Review, 37 at 41-43.
  60. *Disability Discrimination Act 1992* (Cth) s 3(a).
  61. Ibid s 3(b).
  62. Ibid s 3(c).
  63. *Disability Services Act 1986* (Cth), s 3(1)(b).
  64. The Act could also be used creatively in areas such as access to media. The Commonwealth Government monitors the importation of DVDs so it falls within their responsibility to ensure DVDs are properly captioned for people who are deaf or have a hearing impairment and include audio description for people who are blind or have a vision impairment.
  65. Another way in which the Federal Government works towards meeting its obligations is through the National Disability Strategy, which was released as a draft in 2010.
  66. For information on the review of the *Mental Health Act 1986* (Vic) see [www.health.vic.gov.au/mentalhealth/mhactreview](http://www.health.vic.gov.au/mentalhealth/mhactreview) (last visited 8 December 2010). For information on the review of the *Guardianship and Administration Act 1986* (Vic) see [www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Guardianship](http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Current+Projects/Guardianship) (last visited 8 December 2010).
  67. *Ombudsman Act 1973* (Vic) s13(1A).
  68. *Equal Opportunity Act 1995* (Vic) s 6(b).
  69. Ibid s 3(a)(b).
  70. *Equal Opportunity Act 2010* (Vic), ss 14, 15.
  71. *Disability Act 2006* (Vic) s (1).
  72. Ibid s 4(a)(d).
  73. Ibid s 5(1).
  74. Ibid s 5(2).
  75. Ibid s 23(2)(a).
  76. *Disability Discrimination Act 1992* (Cth) s 4. *Equal Opportunity Act 1995* (Vic) s 4.



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