



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

## **ALHR Submission to the National Human Rights Consultation**

**June 2005**

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## ***Introduction***

ALHR welcomed the Commonwealth Government decision to establish an independent consultation committee to conduct a national consultation about human rights protection in Australia.

As part of the Consultation, the Committee has the following terms of reference:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

ALHR believes that Australia's current protection of human rights is piecemeal and inadequate.

ALHR's view is that the central mechanism for improving human rights protection in Australia is through the enactment of a statutory national charter of rights. ALHR has similarly supported the enactment of a statutory national charter of rights in ACT, Victoria, Tasmania and Western Australia in submissions to the inquiries conducted in those jurisdictions. This action is only the first, but crucial step in building a human rights culture in Australia, moving from the welfare framework of government service delivery into an empowerment or 'full citizenship' model. As Peter Bailey writes, the human rights enterprise is concerned with 'having the dignity and equality of each person recognised in all aspects of their lives—as individuals, as members of their communities and members of the world community'.<sup>1</sup>

Other highlights of this submission are:

- Strong support for the inclusion of economic, social and cultural rights in any new national legislative instrument
- Recommendation that the rights of non-citizens/aliens be included in the new national instrument, not exclusively citizens
- That the human rights priorities for the Rudd Government should be linked to the concluding observations of the United Nations treaty monitoring bodies: the Human Rights Committee and the Committee on Economic Social and Cultural Rights on Australia's performance of the International Covenant on

Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) obligations

- That the full realisation of the human rights of Aboriginal and Torres Strait Islanders is of primary concern and that the government should move quickly to accept the recommendations of the Social Justice Report 2008,<sup>ii</sup> prepared by the Australian Human Rights Commission, and include rights contained in the Declaration on the Rights of Indigenous People in the national charter
- Analysis of the rights of particular groups such as people with disabilities, gays, lesbians, bisexual, transgender and intersex people, and homeless people, plus analysis of anti-discrimination clauses
- Reform suggestions for the Parliamentary and Executive architecture and processes to promote and protect human rights
- Reforms for the Australian legal profession to promote better understanding of human rights and improve access to justice.

ALHR is a signatory to the Australian Human Rights Group submission, and Womenspeak submission. We also support the submissions made by the Law Council of Australia, the Human Rights Legal Resource Centre and the Public Interest Advocacy Centre. The International section of ALHR convened a meeting in London in May which has also produced a submission to this consultation.

## *About ALHR*

Australian Lawyers for Human Rights Inc (ALHR) was established in 1993, and incorporated as an association in NSW in 1998 (ABN 76 329 114 323). ALHR is a network of Australian lawyers active in practising and promoting awareness of international human rights standards in Australia. ALHR has a national membership of over 1,500 people, with active National, State and Territory committees.

Through training, information, submissions and networking, ALHR promotes the practice of human rights law in Australia. ALHR has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia. ALHR has a sixteen year history of engaging in law reform. A complete list of submission activity can be found at on ALHR's website at <http://www.alhr.asn.au/activities.html?date=&subject=&type=4>.

ALHR is a member of the Australian Forum of Human Rights Organisations. It is a member of the Commonwealth Attorney General's NGO Forum on Human Rights, and the Department for Foreign Affairs Human Rights NGO Consultations.

Issues addressed by ALHR include anti-terrorism laws, refugee and asylum seeker issues, proposed reforms of the Human Rights and Equal Opportunity Commission, amendments to anti-discrimination laws, and Australia's National Human Rights Action Plan. To help lawyers use human rights remedies in their daily legal work, ALHR runs seminars on the use of international human rights standards in daily legal practice, in areas such as family law, tenancy, anti-discrimination, crime, corporations, land and environment, and employment.

***Which human rights (including corresponding responsibilities) should be protected and promoted?***

**International Human Rights Treaties Ratified by Australia**

Australia has signed and ratified the following international human rights treaties:

- International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- International Covenant on Civil and Political Rights (**ICCPR**);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. (**CAT**);
- Convention on the Rights of the Child (**CROC**);
- Convention on the Elimination of Racial Discrimination (**CERD**);
- Convention on the Elimination of all Forms of Discrimination Against Women (**CEDAW**); and
- Convention on the Rights of Persons with Disabilities (**CRPD**).

Accordingly, ALHR submits that all of the rights set out in those conventions should be protected and promoted under Australian domestic law. The Universal Declaration of Human Rights (UDHR) and the recently signed Declaration on the Rights of Indigenous Peoples (DRIP), while not treaties, are important human rights documents. The recent signature of the DRIP means that Australia has committed itself to the protection of the individual and collective rights of indigenous peoples.

ALHR submits that if the Commonwealth government decides to enact a national charter of rights that consideration should be given to whether these rights should be simply "cut and pasted" into a Commonwealth Act or whether the government should rewrite each right as it is appropriate in the Australian context (such as the New Matilda draft Human Rights Act, or the ACT and Victorian legislation). On the other hand, ALHR notes that the rights set out in the Conventions listed above have received considerable consideration by various UN Committees and a number of superior courts and care needs to be taken that the modernising of language does not inadvertently restrict the right concerned.

Consideration should also be given to allowing courts, in interpreting a national charter of rights to have regard to human rights jurisprudence from other jurisdictions such as the United Kingdom, New Zealand, Canada, South Africa, the Inter-American Commission on Human Rights and the European Court of Human Rights. Moreover, any national charter of rights adopted in Australia should contain a mechanism which allows for the recognition of internationally developing concepts, such as emerging ideas about the right to a healthy environment and the effect the environment has on people's enjoyment of their other fundamental human rights.<sup>iii</sup> Judicial interpretation of common law in Australia already contains principles dealing with human rights jurisprudence.<sup>iv</sup>

### ***Recommendation***

That Australia adopts a national charter of rights that expressly covers all of the human rights contained in the various treaties that Australia has already ratified.

### **Economic Social and Cultural Rights**

ALHR wants to draw particular attention to the importance of the rights set out in ICESCR, and argue for their inclusion in a national charter or bill of rights.

As the ACT Bill of Rights Consultation Committee observed in its 2003 report:

The distinction between [civil and political rights and economic, social and cultural rights] is in many ways an artificial one. If human rights are concerned with the conditions of a worthwhile human life, rights to health, housing and to education are as integral to human dignity as the right to vote. Many of the rights in the ICESCR and ICCPR are closely entwined. For example, the ICCPR protects the right to freedom of association, while the ICESCR protects the right to form trade unions.

Similarly, the right to life in the ICCPR is closely related to the ICESCR right to be free from hunger, and the rights in the ICCPR that protect against slavery and servitude are linked to the ICESCR right to work.<sup>v</sup>

The ACT Government is currently considering the inclusion of ESCR in the Human Rights Act. The WA consultation recommended that any bill incorporate ECSR.<sup>vi</sup>

In some ways, economic, social and cultural rights may be more relevant for many Australians because they impact on the quality of day-to-day life, rather than only “kicking in” in relation to criminal offences and court proceedings as many of the rights in ICCPR do. The ICESCR has been ratified by 156 countries – only 4 fewer than the ICCPR. The parity of ICESCR rights with ICCPR is recognised not only in the international treaties but in Australian law. This is indicative of an increasing recognition that economic, social and cultural rights are as fundamental and inherent to the dignity of all people as civil and political rights.

Human rights are interdependent, universal and indivisible. There are a number of precedents for the inclusion of economic, social and cultural rights in national legislative protection. The United Kingdom Human Rights Act includes the right to education whilst South Africa includes rights to education, housing, health care, trade, occupation and the right to a profession.

Australia should be one of the ten founding states to sign the Optional Protocol to the ICESCR when it is open for signature in September 2009.

### ***Recommendation***

That the national charter of rights expressly covers economic, social and cultural rights, and that Australia should sign the Optional Protocol to ICESCR.

### **The Rights of Aliens and Non-citizens**

The terms of the ALP election platform commitment refers to a consultation to explore the human rights of Australian citizens. ALHR notes that this wording does not appear in the terms of reference but urges the Committee to ensure that the rights of as a matter of priority the protection of the rights of aliens and non-citizens on Australian territory or under Australia’s effective control, as is our obligation under the international human rights system. The aliens power under the Constitution has often been exercised by the executive without restraint or consideration of human rights concerns.

This has often been an area for concern for Australia’s human rights record as will be detailed below, and was the subject of a recent ALHR submission to the United Nations Human Rights Committee to inform their Consideration of Australia in

March 2009 about the extra-legal processing of boat arrivals in the excised territory of Christmas Island. These recommendations were directly reflected in the Draft Concluding Observations of the UN Human Rights Committee.<sup>vii</sup>

***Recommendation***

That Australia adopts a national charter of rights that expressly applies to all persons on Australian territory or under Australia's effective control regardless of their status as citizens or non-citizens

## ***Are these human rights currently sufficiently protected and promoted?***

### **Current Protections are Inadequate**

At a federal level, human rights are currently protected through an incomplete patchwork of limited Commonwealth Constitutional guarantees, Commonwealth legislative enactments and common law principles and presumptions.

Many of the rights set out in the various international human rights instruments to which Australia is a party are not clearly protected. This situation has been noted more generally in Australia, with the "Concluding Observations" of the UN Human Rights Committee on Australia's third and fourth reports under the ICCPR noting "concern...that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the [ICCPR], there remains lacunae in the protection of [ICCPR] rights in the Australian legal system."<sup>viii</sup>

An audit of the current state of human rights protection nationally against the international instruments would be a good first step. This has already been done in the most part by the Government and NGO Shadow Reports to the UN Human Rights Committee for its most recent consideration of Australia under the ICCPR and ICESCR. However, having national human rights legislation against which to regularly review Australia's compliance with international standards would not only enhance Australia's reputation internationally as a country that promotes human rights, but it would provide a relevant domestic standard for human rights audits.

In the ACT, the *Human Rights Act 2004* (ACT) has been the basis on which the ACT Human Rights Commission has conducted audits of government compliance with human rights in places of detention. Where people are deprived of their liberty they are extremely vulnerable to having further rights taken away. The first audit conducted in the ACT under the Human Rights Act was of a youth detention centre. This audit 'shone a light' on to practices that were far from optimal. For example, when being strip searched, young people were required to strip completely naked in front of staff – a practice that was potentially very degrading for both the young person and staff member. As a result of the ACT Human Rights Commission's audit, this practice of strip-searching was changed so that the young person was only

required to strip half naked at a time. In this way, the human rights audit identified an intrusive practice that could be done in a more proportionate and human rights consistent way. The Commission's subsequent audit of adult remand facilities also identified areas that needed to be addressed to make adult detention in the ACT human rights consistent. The recommendations from the audit of adult facilities fed into the physical design as well as policies, procedures and practices of the ACT's new prison the 'Alexander Machonochie Centre': the first prison to be built in Australia under human rights legislation.<sup>ix</sup>

There are still significant areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the ICCPR or ICESCR have been violated. The most obvious example is that of arbitrary immigration detention in the case of *Al-Khateb v Godwin*,<sup>x</sup> obvious because Justice McHugh drew public attention to the fact that his judgment could have been different if a national charter of rights had existed.<sup>xi</sup> But there are plenty of less conspicuous examples which can be drawn from the UK, ACT and Victorian jurisdictions where human rights legislation provided a remedy for human rights breaches.

In the ACT, for example, the *Human Rights Act 2004* (ACT) was used as an advocacy tool to protect a single mother's rights, without the need to go to court. A woman and her children were living with the woman's mother in mother's public housing accommodation. The woman's mother passed away, and as a result the woman and her children were faced with eviction, because the lease was not in her name. There was a risk that if the family were evicted, the children may have been removed from the mother because of lack of suitable accommodation. In submissions to the local housing authority, the woman raised the right to protection of family life to successfully negotiate for the lease to be transferred to her own name thus avoiding homelessness. In another example from the United Kingdom, an elderly husband and wife were nearly separated after 65 years together but used the *Human Rights Act 1998* (UK) to ensure their rights were respected. He fell ill and was transferred to a high care aged care facility that would not accept his wife. However, the couple successfully argued to authorities that the right to family life meant they should be allowed to stay together.<sup>xii</sup>

We **attach** for the Committee's consideration our submission to the 2020 Summit across all ten areas of consideration at the Summit. This submission outlines the

limits of human rights protection currently available across all areas of Australian public life.

## ***How could Australia better protect and promote human rights?***

### **A national charter of rights**

ALHR believes that a national charter of rights would improve the protection of rights and also provide an accessible statement of the rights that are fundamental to a life of dignity and value.

The development of a culture of human rights and adherence to the rule of law will be greatly assisted by national legislative protection of rights.

ALHR is devoted to the establishment of a national charter of rights at the Commonwealth level, which would complement legislative efforts already made in the ACT and Victoria.

A national charter of rights would constitute an historic leap forward for the protection of human rights in Australia. It will demonstrate Australia's commitment to improving social justice and fairness, particularly for the disadvantaged, and display a commitment to Australia's international human rights obligations. Australia is the only Western democracy without a national human rights instrument.

Introducing a national charter of rights will:

- enhance Australia's democracy;
- provide a yardstick by which to measure government, the courts and the community;
- assist disadvantaged people; and
- require government departments to consider the impact of their day-to-day operations on human rights.

Human rights are interdependent. Their recognition and protection should not be artificially separated. For example, realisation of the right to education (a social right) is essential for the meaningful exercise of the right to participate in public affairs (a political right). A national charter of rights should include all fundamental human rights – all civil and political rights as well as economic, social and cultural rights.

By building on the model provided for in Victoria and the ACT, a national charter of rights can retain parliamentary sovereignty and provide individuals with direct means of redress for overt breaches of civil and political rights. Respect, protection and fulfilment of economic, social and cultural rights can be pursued without exposing Government to liability for its allocation of scarce resources.

The introduction of a national charter of rights is an opportunity to breathe life into the realisation of Australia's international human rights obligations.

### **Constitutional entrenchment**

ALHR considers that constitutional entrenchment of human rights protections along the lines of the Canadian model is of enormous benefit and an ideal to be worked progressively towards. We agree with the analysis of the recent roundtable hosted by the Australian Human Rights Commission on 22 April 2009, which concluded that provided certain elements are included within the charter, there exist no impediments to drafting a national human rights act that is constitutionally valid.<sup>xiv</sup>

ALHR recognises that the intention and premise of a national charter of rights is to foster a 'conversation' between the three branches of government on one hand, and the Australian public on the other. One of the benefits of a model of human rights protection rooted in the constitution is that in the event of inconsistency with constitutionally entrenched human rights, the complainant's rights are vindicated and a clear message transmitted to the executive and legislature. In this way direct 'conversation' occurs between those who make laws, and those who are affected by them. ALHR submits that one of the negative by-products of failing to adopt a constitutional model is that communication—a declaration of invalidity and response by the government—becomes one conducted between the judiciary on one hand, and the executive and legislature on the other. The original complainant—the Australian member of society—becomes a spectator.

Nevertheless, in the short to medium term, the statutory model provides an acceptable means of enhancing human rights protections in Australia. It will allow for Australians to become conversant with rights issues and understand how the

democratic process may continue to effectively function without any real constraint.

### **Suggested model for change**

Subject to certain qualifications identified below, ALHR recommends that the Commonwealth government adopt a model for human rights protection similar to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the Victorian Charter”) and the *Human Rights Act 2004* (ACT).

The essential features of that legislation are as follows:

- All legislation is required to be interpreted in a way that is compatible with the rights set out in the Charter
- Where there is inconsistency between a human right and a statute the validity of the legislation is not affected. The Courts may make a declaration of inconsistency but such a declaration does not affect the validity of the legislation. Rather, the relevant Minister must prepare a written statement in response to the declaration and lay it before both houses. The response to a declaration of inconsistency is thus left to Parliament.
- With respect to new legislation the Minister introducing the legislation must either make a “declaration of compatibility” with human rights and lay it before both houses of parliament or utilise the override provisions. Parliament may expressly declare that a provision has effect notwithstanding that it is incompatible with the rights contained in the Charter.
- A public authority is required to act in accordance with the human rights set out in the Charter, unless it could not have reasonably acted differently. The authority is also required to give human rights proper consideration in making a decision.

### ***Recommendation***

That the Committee adopt a national charter with these characteristics, based on the ACT and Victorian models

## **Application to any body that performs public functions**

ALHR submits that a national charter of rights should impose obligations on any person or body performing any public function, power or duty. There is an increasing trend towards the practice of contracting out government services that highlights the need for a national charter to apply to private organisations that are performing a public function. One example is privately operated prisons and detention centres, which whilst operated under the auspices of state and territory government, are in effect private institutions that serve a core public function. ALHR is of the view that these private bodies, when exercising public functions should also be within the scope of application of a national human rights charter.

The UK Human Rights Act applies by virtue of s 6 to the acts of “public authorities”. The term “public authority” is defined in that section to include “a court or tribunal and any person certain of whose functions are function of a public nature”.<sup>xv</sup> This does not include either House of Parliament, but includes state actors such as government departments, local authorities, police and prisons. The UK courts are still resolving the manner in which those public authorities that involve a mixed public/private function are to be included within the definition. It is clear though that insofar as any private organisation is operating in the furtherance of a goal for the benefit of society at large, it will be considered public in nature and subject to the requirements of the Human Rights Act. Examples given by the Lord Chancellor include a private company exercising the public function of rail safety regulator, a private security company managing a contracted-out prison, and doctors in general practice whilst undertaking National Health Service functions.<sup>xvi</sup>

Section 32 of the Canadian Charter of Rights and Freedoms provides that the Charter applies only to Canadian governments, and not to private individuals, businesses or other organizations. In the case of *McKinney v University of Guelph*<sup>xvii</sup> the Canadian Supreme Court developed the “effective control test”, which in essence, asks whether or not the agency or institution in question is under the statutory control of government in terms of everyday operations, policy-making and funding.

Section 3 of the New Zealand Act mandates that the Bill of Rights applies to all three branches of government and to “any person or body in the performance of any public

function, power or duty conferred or imposed on that person or body by or pursuant to law”. The New Zealand Court of Appeal has held that the wording of this provision ought to be given a "generous interpretation", and that ultimately a decision as to whether a particular act or omission can be considered to fall within this decision is heavily dependent on fact.

Such examples from other jurisdictions demonstrate that whilst it may be difficult to provide for a more precise scope of application than the traditional dichotomy between "public" and "private", there are numerous situations in which a more restrictive scope of application would have the highly undesirable consequence of excluding aggrieved members of the public from seeking a remedy, simply because the alleged violation of a human right occurred through the actions of an entity operating outside the technical limits of the branches of government.

In the Australian context, the Victorian Charter and the ACT Human Rights Act contain specific provisions that extend the application of the human rights instruments to entities that are exercising functions of a public nature on behalf of the State or a public authority (whether under contract or otherwise).<sup>xviii</sup> Both instruments also include provisions that seek to clarify and provide guidance as to whether a particular entity falls within that definition.

### ***Recommendation***

That a national charter embody similar or identical provisions to those within the Victorian Charter and the ACT Human Rights Act concerning the application of the charter to those exercising functions of a public nature in order to enable continuity of legal precedent between various state and federal jurisdictions.

### **Application to all persons present in Australian territory**

ALHR submits that a national charter ought to apply to all persons within Australia territory. By definition, human rights are those rights that are enjoyed by all human beings regardless of arbitrary distinctions. Citizenship is one such distinction that is ethically unjustifiable in the context of the protection of human rights. There are many aspects of the relationship between community and government in which

Australian citizens are appropriately distinguished from non-citizens. However any means by which members of the public can guard against the derogation of their core human rights must be extended to all persons who are subject to the exercise of power by the Australian government, a group that includes non-citizens.

The Canadian Charter of Rights and Freedoms applies to all persons physically present in Canada. Any legal person, with the exception of the rights to vote, to serve as a member of the legislature, and to enter and leave Canada, can exercise the rights and freedoms enumerated within the Charter. With several exceptions, the New Zealand Bill of Rights confers its benefits upon all natural persons, without distinction to citizenship. Similarly to the Canadian Charter, the conferral of electoral rights and the right to enter are limited to New Zealand citizens. In contradistinction to the Canadian Charter however, s 18(4) bestows upon any non-New Zealand citizens, lawfully in New Zealand, the right not to be required to leave the country except under a decision taken on grounds prescribed by law. Aside from these exceptions, numerous sections of the Act make reference to rights and freedoms conferred upon "everyone"; "every person" or that "no one" shall be subject to certain actions.

The Victorian Charter of Human Rights and Responsibilities and the ACT Human Rights Act, refer to the beneficiaries of human rights being 'human beings' and 'natural persons' respectively. As a matter of principle both of these terms are wide enough to include non-citizens, and there is no basis, either in law or in policy, for interpreting them otherwise.

### ***Recommendation***

That a construction of the terms “human being” and “natural person” that includes both citizens and non-citizens be mandated explicitly in the provisions of a national charter of rights.

### **Application to all Australian States**

State governments have a central role in the delivery of essential services to Australians which directly impact on people’s day to day lives including: education; health; policing and housing. The ALHR submits that a national charter should be

drafted so that it can apply to all Australian states as far as possible, to ensure that Australia complies with its international treaty obligations.

In making this submission, ALHR acknowledges that there may be some pragmatic and constitutional issues with trying to bind the states. For example, there is a question of whether a national charter should apply to the ACT or Victoria, which have already enacted human rights legislation. ALHR submits that consideration could be given to either an opt-in system or that the application of a national charter could be limited so that the interpretive powers did not apply to the states. Alternatively, consideration could be given to all states adopting model laws or introducing human rights legislation concurrently.

### ***Recommendation***

That consideration be given as to the best means, by which either a national charter can be made to apply within state jurisdiction, or a system of model laws can be adopted throughout the states and territories.

### **Application to all territories under Australian control**

ALHR submits that a national charter must apply to all territories under Australian control, including all mainland territories and offshore territories under Australian administration and control, including de facto control. This approach would reflect the jurisprudence of the Human Rights Committee under the ICCPR, which clearly states that the obligations assumed by parties to the Convention apply, to all acts for which those states, under international law, are legally responsible for, regardless of whether they occur within the legal boundaries of that state.<sup>xix</sup>

Article 1 of the European Convention on Human Rights binds all signatory countries to secure Convention rights within their jurisdiction. This may not necessarily be confined to a state's national territory, but may extend to territory over which the State party exercises effective control. This reflects the territorial scope of application of the Canadian Charter of Rights, s 32 of which extends the application of the Charter to "all matters within the authority of Parliament". According to the test of effective control established in *McKinney v University of Guelph*<sup>xx</sup> this includes all

institutions over which either the federal or a provincial government has control, regardless of where they may be located.

The application of a national charter to all territory under the effective control of the Australian government would further reflect the position of the US Supreme Court regarding the territorial application of the rights enumerated in the US Constitution. In the decision *Boumediene v Bush*,<sup>xxi</sup> the Supreme Court held that the Constitution applies to individuals held in circumstances of *de facto* sovereignty, even when the detainees are aliens, held as enemy combatants in a location that is not US territory. The effect of this decision was that the constitutional writ of *habeas corpus* was available to detainees at Guantanamo Bay in Cuba. Similar principles as these derived from other jurisdictions ought to apply in outlining the territorial scope of application of an Australian charter of rights.

### ***Recommendation***

That a national charter be explicitly provided to apply to all territories under Australian administration or control, whether legal or *de facto*.

### **Extra-territorial application**

ALHR submits that a National charter of rights should apply to Commonwealth or State Government officials, or Australian persons exercising a public function on behalf of the Commonwealth or State Government, when they are exercising such functions outside of Australia. The Canadian position with respect to extra-territorial application is that the guarantees contained within the Charter follow Canadian officials outside Canada, though only to the extent that upholding those guarantees does not lead to conflict with local law in a foreign country.<sup>xxii</sup> The New Zealand Bill of Rights is not limited in its application to acts committed in New Zealand. The limited guidance from the New Zealand courts on this question supports the approach adopted in respect of the Canadian Charter.<sup>xxiii</sup> Furthermore, the UK Human Rights Act has been held to have extra-territorial application to UK officials.<sup>xxiv</sup> Such principles of extra-territorial application ought to be explicitly provided for within an national charter. The overseas development, peacekeeping and immigration programmes should be based on human rights principles.

### ***Recommendation***

That a national charter be explicitly provided to apply extra-territorially to Commonwealth or State Government officials, or Australians exercising a public function on behalf of the Commonwealth or State Government.

### **Powers of Courts to grant remedies**

A right should be defined by reference to its remedy and the means by which it is enforced. It is well recognised in international human rights law that a State must make reparation to individuals whose human rights are violated. This is an essential element of providing an “effective remedy” for violations of human rights. An effective remedy may consist of include compensation, however in certain situations declaratory relief may be an appropriate additional or alternative form of relief. but not necessarily. It is ALHR’s view that compensatory and/or declaratory relief should be available where a public authority is found to have acted in a manner which is incompatible with a human right. This is in accordance with the position under s 8 the UK Human Rights Act, which allows a court to grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The court is empowered to award damages only in cases where the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made, and when other remedies are inappropriate. The UK experience is that Courts have used the power to award damages for a breach of human rights sparingly.

An additional matter to consider in relation to the courts role in a national charter of rights is the issue of costs in relation to any aspect of court proceedings involving a human rights question.

ALHR considers that, due to the public function of such legislation, an appropriate provision would be for a presumption that the usual situation is no costs are awarded against a party. The National charter of rights could use wording similar to that of the *Native Title Act 1993*(Cth):

*(1) Unless the Court orders otherwise, each party to a proceeding must bear their own costs.*

*(2) Without limiting the Court's power to make orders under subsection (1), if the Court is satisfied that a party to a proceeding has, by any unreasonable act or omission, caused another party to incur costs in connection with the institution or conduct of the proceeding, the Court may order the first-mentioned party to pay some or all of those costs.*

This section has received judicial consideration in various cases and has operated to ensure no costs order as the normal course, but has also seen the award of costs against applicants and respondents in cases where their position was unreasonably maintained.

### ***Recommendations***

That a national charter should include provision for the granting of compensatory and/or declaratory relief by a court in cases where an incompatibility has been found between an act of a public authority and a human right.

That a national charter adopt the language of the *Native Title Act 1993*(Cth) in relation to costs of judicial proceedings.

### **Inclusion of economic, social and cultural rights**

As noted above in Part 2 of this submission, ALHR strongly supports the inclusion of economic, social and cultural rights in a statutory national charter of rights for Australia.

While such rights were not included in the ACT or Victorian legislation, they were included in the South African Constitution. The South African experience demonstrates that the inclusion of such rights is workable in a practical sense. The South African Constitutional Court has emphasised the importance of restraint on the part of courts in adjudicating upon the reasonableness of measures taken to implement such rights. For example, in the context of the health budget, priorities lie with the political organs and the medical authorities. The UK HRA includes the right to education.

The national charter could also include economic, social and cultural rights to be included in the interpretative clause of the charter, or for the Federal Budget and

Departmental Annual Reports to be audited against economic, social and cultural rights.

***Recommendation***

That a national charter should include provision for the protection of economic, social and cultural rights, substantively, in the interpretation clause and also in relation to Federal Budgets and APS Annual Reports.

## ***Protection of the human rights of groups***

### **Indigenous rights**

In ALHR's view, the position of Australian Indigenous people requires a separate tailored human rights response, which recognises that those people currently suffer significant comparative disadvantage following dispossession and years of entrenched discrimination.

That need can be seen in the following statistics regarding the socioeconomic status of Indigenous people in Australia:

- in the 2001 Census, the average gross household income for Aboriginal and Torres Strait Islander peoples was \$364 per/week, or 62% of the rate for non-Indigenous peoples (\$585 per/ week);
- income levels decline with increased geographic remoteness. They fall from 70% of the corresponding income for non-Indigenous persons in major cities to 60% in remote areas, and just 40% in very remote areas.

It is also notable that the United Nations Committee on the Rights of the Child recently expressed concern at effects of that socio-economic inequality upon Aboriginal and Torres Strait Islander children, stating:

Despite the numerous measures taken by the State party's authorities, including the Indigenous Child Care Support Programme, the Committee remains concerned about the overall situation of Indigenous Australians, especially as to their health, education, housing, employment and standard of living.

That experience is not unique to Australia and has resulted in increasing calls for specific human rights protections for Indigenous people at an international level. Although slow to initially recognize that Indigenous people may require such protections, the United Nations Human Rights Council recently adopted the *Declaration on the Rights of Indigenous Peoples*. In particular, that instrument

recognises that the right to self determination is of central importance to Indigenous people.

ALHR submits that a national charter of rights should include recognition of cultural rights for Australian Indigenous peoples. Article 31(1) of the United Nations Declaration on the Rights of Indigenous Peoples states that Aboriginal peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

Article 18 states that Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

ALHR also commends to the Committee the recommendations of the Social Justice Report 2008, prepared by the Australian Human Rights Commission. This report represents a road map towards Indigenous empowerment.

### ***Recommendations***

That the national charter of rights should include the rights set out in Articles 18 and 31 of the Declaration on the Rights of Indigenous Peoples.

That the Australian Government move to accept the recommendations of the Social Justice Report 2008, prepared by the Australian Human Rights Commission,

### **Anti-discrimination clauses**

If all people are to have equal access to human rights then it is essential to prohibit discrimination. It was for this reason that the ICCPR and ICESCR expressly stated that human rights should be enjoyed free from discrimination:

ICCPR art 2(1)

without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICESCR art 2(2)

without discrimination of any kind as to race, colour, sex, language, religion, political opinion, national or social origin, property, birth or other status.

The two Australian charters have modified the non-discrimination clauses in the ICCPR and the ICESCR. The Human Rights Act 2004 (ACT) adopted all the rights protected in the ICCPR and the ICESCR and added the protection of other vulnerable groups. Article 8 provides:

Discrimination because of race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

This provides a far broader protection against discrimination than the protections in the *Discrimination Act 1991* (ACT), which limits protection to discrimination on the basis of an attribute specified in the Act. The Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic), article 3(1) provides that discrimination means discrimination within the meaning of the Equal Opportunity Act 1995) on the basis of an attribute set out in section 6. Section 6 includes age, breastfeeding, gender identity, impairment, industrial activity, employment activity, lawful sexual activity, marital status, parental status or status as a carer, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation or personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

ALHR submits that any national charter of rights must include a non-discrimination clause. Non-discrimination clauses appear in every national and international charter of rights currently in operation.

ALHR submits that the rights which are protected under the Victorian Charter of Human Rights and Responsibilities Act should form the basis of an anti-discrimination clause in any national charter of rights. However, ALHR suggests that the approach of referring to anti-discrimination legislation be rejected. The attributes

should be expressly included in any national charter, similar to the approach in the ICCPR, ICESCR and the Human Rights Act 2004 (ACT).

### ***Recommendation***

That an antidiscrimination clause must be included, that expressly refers to attributes such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.

### **Rights for Persons with a Disability**

The Victorian Charter of Human Rights and Responsibilities refers to “impairment” as distinct from “disability”. ALHR argues that any Australian charter of rights should move towards consistency and adopt the term disability used by the Disability Discrimination Act 1992 (Cth) and by international conventions.

The international protection of people with disabilities has substantially increased over the last few decades and ALHR believes that any Australian charter of rights should expressly protect this group from discrimination.

Various labels have been attributed to people who have a physical or mental condition which causes them to be different from other people in society. Society is structured around the fully functional norm and therefore reduces the ability of people with disabilities from functioning in community.<sup>xxv</sup> As a result people with disabilities encounter discrimination in many everyday life activities: for example in exercising their right to privacy,<sup>xxvi</sup> obtaining an education,<sup>xxvii</sup> in obtaining and succeeding in work in the private labour market,<sup>xxviii</sup> in their access to justice and fair treatment by the legal system<sup>xxix</sup> or by receiving inadequate treatment by public services.<sup>xxx</sup> Disabilities are not homogenous and the barriers confronting each person will alter according to their physical or mental state. For example, a person in a wheel chair may confront barriers when a building has steps to enter where a person with a vision impairment may confront a barrier if the signage is small.

The protection afforded to people with disabilities under international law has progressively increased under both universal and regional human rights regimes.<sup>xxxi</sup> The United Nations has adopted various vehicles to promote the rights of persons

with disabilities. The decade including 1983 to 1992 was declared by the United Nations to be the ‘Decade for Disabled Persons’.<sup>xxxii</sup> During this period the United Nations Human Rights Commission appointed a special rapporteur to consider the rights of people with mental disabilities who were detained due to their condition.<sup>xxxiii</sup> Similarly the United Nations, Economic and Social Council also appointed a special rapporteur to analyse the rights of persons with disabilities.<sup>xxxiv</sup> The Vienna Declaration from the World Conference on Human Rights in 1993 recognised that people with disabilities were ‘unreservedly’ entitled to enjoy the same human rights as all other members of the community.<sup>xxxv</sup>

The United Nations has adopted non-binding declarations on the rights of people with disabilities including the *Declaration on the Rights of Mentally Retarded Persons*, the *Declaration on the Rights of Disabled Persons* and the *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*.<sup>xxxvi</sup>

The *Mental Illness Principles* constitute the most substantial step to protect to the rights of people with mental disabilities prior to the adoption of the *CRPD*. In the 1970s the United Nations commenced discussions on developing a statement on the rights of persons with mental disabilities.<sup>xxxvii</sup> These discussions culminated in a detailed non-binding statement on the rights of persons with mental disabilities in the United Nations Mental Illness Principles.<sup>xxxviii</sup> Principle 1 of the Mental Illness Principles provides that people with mental disabilities are entitled to all the rights and freedoms posited in the *Universal Declaration on Human Rights* including the right to be free from discrimination. Gostin and Gable have observed that the Mental Illness Principles had comprise the most ‘direct expression by the United Nations of human rights in the context of mental illness’ prior to the *CRPD*.

In 2001 the United Nations General Assembly established an Ad Hoc Committee to analyse whether a convention was required which specifically protected the human rights of people with disabilities.<sup>xxxix</sup> This process resulted in draft articles and finally a convention which was adopted by the United Nations General Assembly resolution A/RES/61/611 in 2006.<sup>xl</sup> The *CRPD* had sufficient signatures to enter into force on 3 May 2008. Following the accession of this convention, on 17 July 2008 Australia ratified the *CRPD*.<sup>xli</sup> Article 1 defines the scope of the convention broadly to incorporate physical and mental disabilities. The *CRPD* requires States to remove all barriers to people with disabilities enjoying ‘Full and effective participation in

society’.<sup>xlii</sup> Article 4 provides that ‘States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability.’ This obligation includes, inter alia, an obligation to ‘[t]o adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention’.<sup>xliii</sup>

### ***Recommendation***

That a national charter of rights move towards consistency and adopt the term disability used by the Disability Discrimination Act 1992 (Cth) and by international conventions.

### **Rights for People who are Homeless**

If an Australian charter of rights does not expressly include an anti-discrimination clause to ensure homeless people are not discriminated against then the introduction of an Australian charter of rights may be meaningless for thousands of Australians.

The homeless are perhaps the most marginalised of all Australian citizens. If a person does not have a home they may encounter problems exercising many civil and economic rights. Walsh and Klease have observed:

It is widely recognised that homeless people are among the most disadvantaged and vulnerable members of Australian society. But further to this, those who are homeless are excluded from participation in a wide variety of socio-political activities that other citizens take for granted. A survey of homeless people conducted in Brisbane in 2003 has confirmed that many homeless people do not identify as Australian citizens, and many believe that they do not enjoy the same citizenship rights as the remainder of the population.<sup>xliv</sup>

While the Victorian Charter of Human Rights and Responsibilities does not refer to property, the ICCPR, the ICESCR and the Human Rights Act 2004 (ACT) all prohibit discrimination on the attribute of property.

The right to dignity of the person is a well recognised human right. For a person who is sleeping rough there is a substantially higher chance of violence or detention by law enforcement agencies for vagrancy/public/nuisance offences.<sup>xlv</sup>

Homeless adults have had problems registering to vote in Australia since Federation. While they are permitted to exercise their right to vote significant barriers remain to registering to vote.

How can a homeless child exercise their right to education? If they have insufficient food, no way to clean clothes, no finances to purchase educational material and no home in which to do homework?

***Recommendation***

That a national charter of rights prohibit discrimination on the attribute of property ownership.

**Rights for Gays, Lesbians, Bisexuals , Transgender and Intersex People**

ALHR also wishes to draw attention to the need to provide specific additional legislative protections for gay, lesbian, bisexual, transgender and intersex people in Australia. ALHR submits that the government should introduce discrimination legislation that provides protection from discrimination on the grounds of sexuality, sex identity and gender identity. ALHR also supports the other recommendations made by the Australian Human Rights Commission in their Toolkit.<sup>1</sup>

***Recommendation***

ALHR submits that the national charter should provide protection from discrimination on the grounds of sexuality, sex identity and gender identity.

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<sup>1</sup> See Australian Human Rights Commission ‘gay, lesbian, transgender and intersex people’ information sheet available at [http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA\\_GLBTL.pdf](http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_GLBTL.pdf) (downloaded on 10 June 2009),

## *Parliamentary Reforms*

ALHR submits that there should be better mechanisms to ensure that as Australia commits to new international human rights treaties, these obligations are incorporated into domestic legislation. Further, there should be a more rigorous examination of policies and legislation in the Parliament to ensure they conform to existing obligations. In order to improve the protection of the rights and responsibilities of Australian citizens through Parliamentary processes, ALHR proposes the following reforms.

First, a national charter of rights should impose an obligation to prepare “statements of compatibility” or “human rights impact statements”. Such an obligation is a feature of many statutory bills of rights. By way of example, s28 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provides:

- (1) A member of Parliament who proposes to introduce a Bill into a House of Parliament must cause a statement of compatibility to be prepared in respect of that Bill.
- (2) A member of Parliament who introduces a Bill into a House of Parliament, or another member acting on his or her behalf, must cause the statement of compatibility prepared under subsection (1) to be laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

Note The obligation in subsections (1) and (2) applies to Ministers introducing government Bills and members of Parliament introducing non-government Bills.

- (3) A statement of compatibility must state-
  - (a) whether, in the member's opinion, the Bill is compatible with human rights and, if so, how it is compatible; and
  - (b) if, in the member's opinion, any part of the Bill is incompatible with human rights, the nature and extent of the incompatibility.
- (4) A statement of compatibility made under this section is not binding on any court or tribunal.

Two important features of that provision should be reflected in a national charter:

- (a) First, the obligation should apply to all bills (compare the position in the UK where the obligation applies only to government bills);
- (b) Second, the statement should be required to be a substantive statement (see the requirement in s28(3)), rather than a one line assertion that the bill is compatible with human rights. ALHR considers that the requirement should be expressed as a requirement to state “whether, in the member's opinion, the Bill is compatible with human rights and, if so, the reasons why the member considers it to be compatible”

Second, the statement of compatibility mechanism should be accompanied by a requirement that new bills be scrutinised by a Parliamentary Committee to ensure that they are compatible with human rights. Such a mechanism was discussed by the Victorian Consultative Committee in the following terms:

The Committee received many submissions that stated that once new legislation is introduced into Parliament, a parliamentary committee should scrutinise the legislation and report on its compatibility with the Charter. It was recognised that such a committee can facilitate a more robust debate by providing a clear statement to Parliament about a Bill’s consistency with the Charter. The Australian Human Rights Centre said that such a committee could contribute to a deeper and more considered form of deliberation on the rights implications of all Bills (Report of the Human Rights Consultation Committee on the proposed Victorian Charter, p76).

ALHR considers that those comments apply with equal force to the Commonwealth Parliament.

***Recommendation***

That a national charter of rights should impose an obligation to prepare “statements of compatibility” or “human rights impact statements”, on the above terms.

***Machinery***

Unlike Victoria, there are no existing Committees that might readily fill such a role. It therefore seems desirable to constitute a new Committee for that purpose. Given the important role of such a Committee, ALHR considers that:

- (a) It should be established by legislation to ensure its ongoing role;
- (b) It should be a joint Committee of both houses of Parliament (modeled on the Joint Standing Committee on Human Rights of the UK Parliament);
- (c) there should be an obligation upon a member introducing a bill to ensure that the Committee has adequate time to consider and report upon the bill prior to any vote being taken;
- (d) the Committee should be required to at least consider whether to seek submissions from the public and conduct public hearings. ALHR recognizes that such a procedure will not be appropriate for every bill reviewed by the Committee. However, for bills which stand to have a significant effect upon human rights, public participation in the Committee process is an important means of ensuring proper scrutiny of the relevant provisions and for identifying unforeseen consequences which could violate Australia's human rights obligations;
- (e) it should also be provided that the Committee may (via the public inquiry process or otherwise) seek assistance from relevant government departments and other sources of specialised knowledge (eg human rights NGOS and the Australian Human Rights Commission).

***Recommendation***

That a new Parliamentary committee be established, on the above terms.

ALHR also submits that the following reforms to Parliamentary processes would assist in ensuring that Australia meets its human rights obligations:

***Recommendations***

(1) The role of JSCOT could be enhanced in the area of human rights actions by changing the terms of reference for DFAT National Interest Analysis and JSCOT's terms of reference. Alternatively, Australia could bypass JSCOT and adopt the automatic incorporation of international instruments - once a human rights treaty is ratified by the executive it automatically becomes justiciable domestically. (This could be done by a blanket provision similar to ss.2 and 3 of the *European Communities Act 1972* (UK) which incorporates and gives priority to directly

effective community law.)

(2) Delegated legislation has a significant impact upon people's lives, and yet is insufficiently scrutinised. The Senate Committee on Regulations and Ordinances should be acknowledged as a powerful accountability mechanism and its resources significantly increased. It should be specifically required to consider whether delegated legislation is consistent with human rights.

(3) An Indigenous Audit Committee should be created. It should be comprised of Indigenous Australians and empowered to examine relevant portfolio estimates from the point of view of impact on Indigenous people. That process might be combined with inclusion of a requirement to consider Indigenous impact in Cabinet Submission process

(4) A Women's Audit Committee or a Standing Committee on Women's Affairs should be created. Australia lacks the kind of parliamentary committees that have responsibility for gender equality matters in European and many other parliaments. In 2008 the Inter-Parliamentary Union (IPU) reported on 80 countries with 93 such parliamentary committees.<sup>xlvi</sup>

(5) The Joint Parliamentary Committee on Human Rights referred to above should be required to consider UN treaty body decisions in relation to human rights and determine how those decisions might be best implemented.

## ***The Legal Profession***

ALHR believes the legal profession in Australia will have to adapt to the challenge of building a human rights culture. Access to justice is a fundamental component of making human rights a reality for the community. We **attach** for the Committee's consideration ALHR's recent submission to a Parliamentary inquiry into access to justice, the recommendations of which are also commended to your attention.

### ***Recommendations***

1. That the Committee note in its report that the UN Human Rights Committee recently expressed concern over 'the lack of adequate access to justice for marginalized and disadvantaged groups, including indigenous peoples and aliens.
2. That the Committee should take further evidence from the National Council on Violence against Women and the Office for Women on how to improve access to justice for women dealing with intimate violence, especially Indigenous women, refugee and migrant women, and women with disabilities.
3. That the Committee should call upon the Australian Government to remove the legislative and practical restrictions which prevent individuals held under counter-terrorism laws and asylum seekers held in detention or 'processing' facilities and ensure that these groups have adequate and meaningful access to legal representation.
4. That the Committee encourages the Government to consider implementing tax and other financial incentives to encourage lawyers to train or establish a practice in rural and remote areas.
5. That the Committee supports the current Commonwealth Community Legal Services Program and the government's commitment to continued funding of the community legal sector, but asks the Commonwealth to double its commitment, in light of the fact that limited funding continues to reduce the ability of community legal centres to provide adequate legal services to Australia's marginalised groups.
6. That the Committee recommend the Government must review the current CLC funding structure with a view to ensuring that the Commonwealth's funding

contribution adequately supports that of the States and responds to needs of communities regardless of jurisdiction.

7. That the Committee makes a strong recommendation to the government to remove the fees to access the jurisdiction of the Refugee Review Tribunal, and to review the fees of all other courts and tribunals.
8. That the Committee note the "Yes We Can Work Together" resolutions from the National Access to Justice and Pro Bono Conference held on 10 December 2008, and encourage the Commonwealth to adopt the same tender rules as the Victorian government.
9. That the Committee recommend that the Australian Government pay special attention to the need to resource and support human rights legal work.
10. That the Committee in its report and recommendations pay particular attention to Indigenous access to justice, and recommend the following measures:
  - a. Address the inadequacy of ATSILS funding by providing a level of funding comparable to that provided to the Legal Aid Commission as assessed relative to caseloads and added expenses inherent in providing complex services to remote areas. This increased funding should serve to:
  - b. Increase salaries to ATSILS solicitors to provide remuneration at least commensurate with LAC levels and reduce staff turnover and to make possible the employment of experienced practitioners.
  - c. Increase funding directed to civil and family law matters.
  - d. Increase funding directed towards community outreach and education.
  - e. Ensure that the needs of ATSILS practitioners in performing their roles, such as interpreters, transport, training and supervision, are sufficiently available and budgeted for.
  - f. Ensure that all ATSILS staff are adequately trained to deal with language and cross-cultural differences.
  - g. Ensure that adequate support services are available to assist ATSILS practitioners in dealing with both the high volume of work and the

emotional commitment required. This may include the provision of locums and the services of psychologists.

- h. Recognise that no attempts to address Indigenous access to justice can be effective without simultaneously addressing the over-representation of Indigenous people in the justice system and the social disadvantages that underpin this reality.

## ***Community Education and Awareness***

In addition to enacting a Charter of rights, ALHR submits that the government should initiate a national human rights educational programme. One example of such a programme is the work done in Victoria by the Victorian Human Rights and Equal Opportunity Commission.

The Victorian Human Rights and Equal Opportunity Commission have recognised three strategies for promoting education on the human rights issues raised by the charter:

- 1.) Education and training for their staff so that they can enhance their human rights knowledge and utilise this on a day-to-day basis.
- 2.) Giving support to entities providing public functions on behalf of government.
- 3.) Communication and general awareness- for public authorities and members of the public.

The Commission run a number of workshops tailored to different sectors of society to inform people of the development of the Charter and their rights and responsibilities under it, including:

- 1.) Workshops for advocates, school and communities (e.g.-implementing human rights approached in community organisations)
- 2.) Workshops for the private sector and local government (e.g.- gay and lesbian rights at the workplace)

The 2008 Report on the operation of the Charter commended the different initiatives of government departments to educate their staff (such as training sessions) and to stakeholders (such as implementing new sections on their websites giving detailed information).

### **South Africa**

The Department of Justice and Constitutional Development is responsible for community awareness promotion.

South Africa conducted initiatives to explain the Constitution in the country's 11 official languages and distributed 7 million copies of the Constitution during a National Constitution Week.

The South African Department of Justice has recently launched a 3-tiered program to educate and enforce rights on a grass-roots level:

- 1.) Access to Justice activities including opening community advice offices and support for certain groups such as women and children.
- 2.) Awareness and Knowledge of Rights (using a multimedia strategy and service level agreements with the community service offices). Also they have highlighted the need to monitor judicial and legislative precedents which may impact the provision of rights.
- 3.) Enhanced participatory democracy (including measures to hold forums between community service offices and government and continuously building the capabilities of community service office staff).

They have also clearly targeted certain groups as being the most vulnerable, and therefore in the most need of assistance. These groups include women, children, HIV/AIDS patients and youth. It may be useful to suggest that the same be done here in Australia, so that education is provided to the groups here that would be most affected and who could benefit greatly from the changes.

Furthermore, it is essential that human right training be provided at all different levels of the Australian community. ALHR refers to the Australian Human Rights Commission existing training and education modules for school children. This kind of training should be adjusted and modified and provided at all levels of primary, secondary and tertiary education. It should also be provided in other forums such as via community workshops and training.

### ***Recommendations***

- 1.) That a national charter of rights contain mechanisms which place a positive duty on government institutions to educate and actively promote the Rights stipulated therein.

- 2.) That the role of the Australian Human Rights Commission be expanded so as to include primary responsibility for tackling the issue of human rights issues at a Federal level, including education and awareness.
- 3.) That the Australian Human Rights Commission have at least the following duties and be adequately resourced to perform them, including a Canberra presence:
  - a. To provide continuous training to their staff and all civil servants
  - b. To provide continuous training to all three arms of government
  - c. Establishment of specific offices/units within various departments which deal solely with human rights issues and the public
  - d. Ongoing communication with the public via workshops, seminars, websites, information packages, brochures, campaigns which must be reviewed and tailored
  - e. Distribution of information packages and copies of the national charter of rights
  - f. Responsibilities to continually educate non-governmental organisations and community organisations in their work with the national charter of rights issues
  - g. Ongoing discussions with non-governmental organisations and community organisations on how to address the issues of public awareness
  - h. Integrating human rights education into schools
- 4.) Specific measures should be put in place to educate those groups highlighted in the national charter of rights (e.g, Indigenous groups, refugees and asylum seekers). These measures should include:
  - a. Establishment of specific offices/units to solely deal with human rights issues with these groups
  - b. Provision of materials in different languages or access to interpreters
  - c. Training community organisations and non-governmental organisations which already work with these groups

## ***Conclusion***

ALHR congratulates the government for initiating the important human rights consultation, and strongly encourages the government to seize the moment and take strong, positive action to improve human rights protection in this country. As the only western democratic country in the world without comprehensive national human rights legislative protection, it is now time for Australia to again be a leader in human rights protection on the international stage by bringing rights home through national human rights legislation. Whatever the government decides to do, that decision will in many ways act as a larger symbol for what Australia stands for in the eyes of an international audience, especially in our region. We urge the government to be bold and display statesmanship on this issue.

## ***Summary of Recommendations***

- That the Commonwealth government adopt a model for human rights protection similar to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the Victorian Charter”) and the *Human Rights Act 2004* (ACT).
- That a national charter expressly covers all of the human rights contained in the various treaties that Australia has already ratified.
- That a national charter of rights expressly covers economic, social and cultural rights, and that Australia should sign the Optional Protocol to ICESCR.
- That a national charter embody similar or identical provisions to those within the Victorian Charter and the ACT Human Rights Act concerning the application of the charter to those exercising functions of a public nature.
- That a construction of the terms “human being” and “natural person” that includes both citizens and non-citizens be mandated explicitly in the provisions of a national charter of rights.
- That consideration be given as to the best means, by which either a national charter can be made to apply within state jurisdiction, or a system of model laws can be adopted throughout the states and territories.
- That a national charter be explicitly provided to apply to all territories under Australian administration or control, whether legal or de facto.
- That a national charter be explicitly provided to apply extra-territorially to Commonwealth or State Government officials, or Australians exercising a public function on behalf of the Commonwealth or State Government.
- That a national charter include provision for the granting of compensatory and/or declaratory relief by a court in cases where an incompatibility has been found between an act of a public authority and a human right.

- That a national charter adopt the language of the *Native Title Act 1993*(Cth) in relation to costs of judicial proceedings.
- That a national charter include provision for the protection of economic, social and cultural rights.
- That the national charter of rights should include the rights set out in Articles 18 and 31 of the Declaration on the Rights of Indigenous Peoples. That the Australian Government move to accept the recommendations of the Social Justice Report 2008, prepared by the Australian Human Rights Commission,
- That an antidiscrimination clause must be included, that expressly refers to attributes such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status.
- That a national charter of rights move towards consistency and adopt the term disability used by the Disability Discrimination Act 1992 (Cth) and by international conventions.
- That a national charter of rights prohibit discrimination on the basis of property ownership.
- That reforms be implemented in Parliamentary Processes in order to improve the protection of human rights through Parliamentary examination and scrutiny of policy and legislation.
- That reforms be implemented in order to improve access to justice.
- That a national charter impose duties upon governments to actively promote human rights.
- That the role of the Australian Human Rights Commission be expanded so as to include primary responsibility for addressing human rights issues.

- That specific measure be taken to greater educate specific vulnerable groups within the community.

## ***Appendix A: ALHR Submission to the 2020 Summit***

Available online at <http://www.alhr.asn.au/activities/2008/04/19/alhr-presents-submissions-at-australia-2020-summit.html>.

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- <sup>i</sup> Peter Bailey, *The Human Rights Enterprise in Australia and Internationally*, Sydney: LexisNexis Butterworths, 2009.
- <sup>ii</sup> [http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport08/index.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/index.html)
- <sup>iii</sup> See for example, Constitution of South Africa, and the 1981 African Charter on Human Rights and Peoples Rights.
- <sup>iv</sup> See further Wendy Lacey, *Implementing Human Rights Norms: Judicial Discretion and Use of Unincorporated Conventions*, Presidian Legal Publications, 2008.
- <sup>v</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003),95, para 5.29.
- <sup>vi</sup> See page 76 Consultation Committee for a Proposed Human Rights Act - Final Report, November 2007
- <sup>vii</sup> Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee – Australia* [Advanced Unedited Version] CCPR/C/AUS/CO/5 (2 April 2009) 7, para. [23].
- <sup>viii</sup> Concluding observations of the Human Rights Committee: Australia, 24 July 2000 A/55/40, paras 498 -528.
- <sup>ix</sup> <http://www.hrc.act.gov.au/assets/docs/Corrections%20Audit%202007.pdf>
- <sup>x</sup> (2004) 219 CLR 562.
- <sup>xi</sup> *McHugh J in Al-Khateb v Godwin* (2004) 219 CLR 562 at 589.
- <sup>xii</sup> Example courtesy of the British Institute of Human Rights, ‘The Human Rights Act: Changing Lives’ (2008). Available online at: [www.bih.org.uk](http://www.bih.org.uk).
- <sup>xiii</sup> <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>
- <sup>xiv</sup> *Human Rights Act 1998* (UK), section 6(3).
- <sup>xv</sup> 583 HL 811 (24 Nov. 1997)
- <sup>xvi</sup> [1990] 3 SCR 229
- <sup>xvii</sup> For example, s 4 of Victorian Charter
- <sup>xviii</sup> See, for example, *Lopez Burgos v Uruguay* Comm No 52/1979, 29 July 1981 (HRC)
- <sup>xix</sup> [1990] 3 SCR 229
- <sup>xx</sup> 553 U.S. \_\_\_ (2008)
- <sup>xxi</sup> *R v Cook* [1998] 2 SCR 597
- <sup>xxii</sup> *R v Matthews* (1994) 11 CRNZ 564 (HC)
- <sup>xxiii</sup> *R (B) v Foreign Secretary* [2005] QB 643 (EWCA)
- <sup>xxiv</sup> Barbara Wacker, Barbara Jean, ‘Community Integration Issues Facing Adults with Mental Disabilities’ (MSW, California State University, Long Beach, 2005)
- <sup>xxv</sup> Frederic White, ‘Outing the Madman: Fair Housing for the Mentally Handicapped and Their Right to Privacy versus the Landlord’s Duty to Warn and Protect’ (2001) 28 *Fordham Urban Law Journal*, 783.
- <sup>xxvi</sup> Caroline Brackette, ‘Exploring the Relationship Between Having a Mental and Other Disabilities and Student Satisfaction With College: Findings And Challenges’ (PhD Thesis, The University of Toledo, 2007); Suzanne Kitchen, ‘Perception of Students With Disabilities: An Assessment of Attitudes Held by Pre-Service Teachers’ (EdD, West Virginia University, 2007); Adam J. Shapiro, ‘Defining the Rights of Law Students with Mental Disabilities’ (2004) 58 *University of Miami Law Review* 923; Barry Sharrock, ‘A Comparison of the Attitudes of South Carolina Special Education and Chorus Teachers Toward Mainstreaming Students with Mild and Moderate Mental Disabilities’ (PhD, University of South Carolina, 2007).
- <sup>xxvii</sup> Carol Owen, ‘To Tell or Not to Tell: Disclosure of a Psychiatric Condition in the Workplace’ (PhD Thesis, Boston University, 2004); *Belinda Smith*, ‘From *Wardley* to *Purvis* – How Far has Australian Anti-Discrimination Law Come in 30 Years?’ (2008) 21 *Australian Journal of Labour Law*;

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Terry Smoley, 'Performance Appraisal Ratings of Disabled Employees: An Examination of Disability Type and Cause' (MS, Emporia State University, 2007); Michael Ashley Stein, 'The Law and Economics of Disability Accommodations' (2003) 53 *Duke Law Review*, 79.

<sup>xxix</sup> Patrick Geary, 'Juvenile Mental Health Courts and Therapeutic Jurisprudence: Facing the Challenges Posed by Youth with Mental Disabilities in the Juvenile Justice System' (2005) 5 *Yale Journal of Health Policy, Law and Ethics*, 671; Ronald j. Tabak, 'Mental Capacity and the Death Penalty: Article: Executing People with Mental Disabilities: How we can Mitigate an Aggravating Situation' (2006) 25 *Saint Louis University Public Law Review*, 283.

<sup>xxx</sup> Ann Marie Rakowski, 'Just who do You Think You're Talking To? The Mandate for Effective Notice to Food Stamp Recipients with Mental Disabilities' (2004) 37 *Columbia Journal of Law and Social Problems* 485;

Janet E. Lord, Michael E. Waterstone, & Michael Ashley Stein, 'Natural Disasters and People With Disabilities' in Paul Malloy (Ed.), *Post Disaster Recovery and Redevelopment: Hurricane Katrina and Beyond* (2007).

<sup>xxxI</sup> Alison A. Hillman, 'Protecting Mental Disability Rights: A Success Story in the Inter-American Human Rights System' (2005) 12 *Human Rights Brief*, 25.

<sup>xxxii</sup> Implementation of the World Programme of Action Concerning Disabled Persons, [1982] 36 U.N.Y.B. 983, U.N. Doc. A/37/632.

<sup>xxxiii</sup> Erica-Irene A. Daes, Principles, Guidelines and Guarantees for the Protection of Persons Detained on Grounds of Mental Ill-Health or Suffering from Mental Disorder, U.N. ESCOR, U.N. Doc E/CN.4/Sub.2/17 (1986).

<sup>xxxiv</sup> United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Disability, U.N. Doc. E/CN.4/Sub.2/31 (1991).

<sup>xxxv</sup> *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, June 25, 1993, para. 63, U.N. Doc. A/CONF.157/23 .

<sup>xxxvi</sup> *Declaration on the Rights of Mentally Retarded Persons*, G.A. Res. 2856, U.N. GAOR, 26th Sess., at 93, U.N. Doc. A/8429 (1971); *Declaration on the Rights of Disabled Persons*, G.A. Res. 3447, U.N. GAOR, 30th Sess., at 88, U.N. Doc. A/10034 (1975); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, G.A. Res. 96, 48th Sess., at 202, U.N. Doc. A/48/627 (1993).

<sup>xxxvii</sup> *Human Rights and Scientific and Technological Developments*, G.A. Res. 53, U.N.

<sup>xxxviii</sup> *Mental Illness Principles*, G.A. Res. 119, U.N. GAOR, 46th Sess., 3d Comm., 75th plen. Mtg., reprinted in [1991] 45 U.N.Y.B. 620, U.N. Sales No. E.92.I.1.

<sup>xxxix</sup> *Protect the Rights and Dignity of Persons with Disabilities*, G.A. Res. 56/168, U.N. GAOR, 56th Sess., Supp. No. 168, U.N. Doc. A/RES/56/168 (Dec. 19, 2001).

<sup>xl</sup> For a discussion see: Michael Ashley Stein, 'Disability Human Rights' (2007) 95 *California Law Review*, 75, 83.

<sup>xli</sup> United Nations, 'Convention & Optional Protocol Signatories & Ratification' :

<<http://www.un.org/disabilities/countries.asp?navid=12&pid=166>> at 20 July 2008; A useful reference for this convention will be: Michael Stein, Gerard Quinn et al, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: A COMMENTARY* (2009).

<sup>xlii</sup> Sub-art 3(c).

<sup>xliiii</sup> Art 4(1)(a) of the *CRPD*.

<sup>xliv</sup> Tamara Walsh and Carla Klease, 'Down and Out? Homelessness and Citizenship' [2004] *Australian Journal of Human Rights* 5.

<sup>xlv</sup> Tamara Walsh, 'Dealing with nuisance behaviour: Logical alternatives to traditional sentences': <http://www.isrcl.org/Papers/2006/Walsh.pdf> 30 April 2009.

<sup>xlvi</sup> IPU, *Equality in Politics: A Survey of Women and Men in Parliaments*, Geneva, IPU, 2008, p 65; IPU, *The Role of Parliamentary Committees in Mainstreaming Gender and Promoting the Status of Women*, Geneva, IPU, 2007.