



# National Human Rights Consultation

## Submission from the Australian Human Rights Group

27 May 2009

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# 1 Background

## About the Australian Human Rights Group

1. The Australian Human Rights Group (“**AHRG**”) is a non-political “peak body” or network of organisations and individuals committed to enhancing legislative protection of human rights by:
  - (a) encouraging community consultation and the drafting of a human rights law; and
  - (b) providing resources and information to its members and the broader public.

## The Australian Human Rights Group’s Core Aims

2. The AHRG’s core aims and beliefs are as follows.
  - (a) That Australia needs better legislative protection of human rights.
  - (b) To enable the community to share their views on how best to protect human rights in Australian law.
  - (c) That the Australian Parliament should pass a comprehensive Human Rights Act.

## Australian Human Rights Group Members

3. 72 organisations are members of the AHRG. The membership spans religious groups, community legal centres, human rights organisations, disability groups, drug and alcohol and mental health service providers, Indigenous groups, women’s groups and gay, lesbian and transgender groups.
4. Given that many of these organisations are peak-bodies, together they represent approximately 25,000 further organisations and 574,000 individuals.
5. A full list of the AHRG’s membership can be found in **Annexure 1** of this submission.

## Overview of AHRG Submission

6. The overwhelming evidence suggests that the current mechanisms for human rights protection in Australia are inadequate.
7. The AHRG believes that the best mechanism to resolve the current inadequacies in the protection of human rights is through the Commonwealth Parliament enacting a Human Rights Act.
8. In determining which rights should be protected, the Consultation Committee should be guided by the views of Australians, as reflected in submissions to the Committee, opinions expressed at the community roundtables, the results of official opinion polling and Australia’s existing obligations under international human rights law.

## Recommendations

**Recommendation 1:** The current protections for human rights under Australian law are inadequate. The Commonwealth Parliament should enact a federal Human Rights Act.

**Recommendation 2:** In determining which rights should be protected and promoted in Australia, the Consultation Committee should be guided by:

- (a) the views and experience of the community;
- (b) the views expressed by the community in inquiries held in the ACT, Victoria, Tasmania and Western Australia, which all recommended a Human Rights Act for those jurisdictions and;
- (c) by Australia's obligations under international human rights law.

**Recommendation 3:** The Government should develop human rights education and training programs to promote human rights protection to all Australians. The Australian Human Rights Commission should be given adequate funding to carry out human rights education and training.

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

### International human rights law sets out the generally-agreed fundamental human rights that should be protected and promoted

9. The AHRG represents a large number of organisations, most of which will make submissions in their own right as to which specific rights they believe should be protected and promoted.
10. In determining which rights should be protected and promoted in Australia, the Consultation Committee should be guided by the views and experience of the community. It should also be guided by Australia's obligations under international human rights law not only because they represent international consensus identifying human rights but because they provide a constitutional basis under the external affairs power for the implementation of those rights into domestic law.
11. The Universal Declaration of Human Rights ("**UDHR**"), to which Australia gave its assent, sets out those human rights generally believed to be fundamental in a liberal democracy such as Australia. The UDHR is now also generally considered to be a part of customary international law, and thus applicable to all nations.
12. Australia has also ratified and accepted obligations under a number of international human rights treaties including:
  - (a) the International Covenant on Civil and Political Rights ("**ICCPR**");

- (b) the International Covenant on Economic Social and Cultural Rights (“**ICESR**”);
  - (c) the Convention for the Elimination of All Forms of Racial Discrimination (“**CERD**”);
  - (d) the Convention on the Rights of the Child (“**CROC**”);
  - (e) the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (“**CAT**”);
  - (f) the Convention on the Rights of Persons with Disabilities;
  - (g) the Convention on the Elimination of All Forms of Discrimination Against Women (“**CEDAW**”); and
  - (h) the Convention Relating to the Status of Refugees.
13. The Australian Government has also recently announced its support<sup>1</sup> for the Declaration on the Rights of Indigenous Peoples. This Convention sets out the collective rights of indigenous people.
14. The AHRG believes that the UDHR, the Declaration on the Rights of Indigenous Peoples and the above-mentioned international human rights instruments, to which Australia has acceded, should be the foundation for identifying the human rights that need to be protected and promoted in Australia.

### **Human rights and people in need of special protection**

15. Human rights are universal, in the sense that they are possessed by everyone irrespective of their ethnicity, religion or other status. A person’s human rights may be threatened or breached even though that person is not usually considered to be in a vulnerable position.
16. The AHRG’s membership has identified a number of groups that require special legal protection for their rights, due to their relative disadvantage. These include:
- (a) Aboriginal and Torres Strait Islander people;<sup>2</sup>
  - (b) people with a disability<sup>3</sup>;
  - (c) older people<sup>4</sup>;
  - (d) women<sup>5</sup>;
  - (e) gay, lesbian, bi-sexual and transgender people<sup>6</sup>;

<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 April 2009 (the Hon Jenny Macklin MP).

<sup>2</sup> For more information on the specific protections for indigenous people require go to the Human Rights Law Resource Centre Fact Sheet “Human rights and Aboriginal and Torres Strait islander people” <http://www.hrlrc.org.au/files/ahrc-factsheet-indigenous.doc>.

<sup>3</sup> For more information on the specific protections for people with a disability require go to the Human Rights Law Resource Centre Fact Sheet “Human Rights and people with disabilities” <http://www.hrlrc.org.au/files/ahrc-factsheet-disability.doc>.

<sup>4</sup> For more information on the specific protections for older people require go to the Human Rights Law Resource Centre Fact Sheet “Human Rights and older people” <http://www.hrlrc.org.au/files/ahrc-fact-sheet-older-people.doc>.

<sup>5</sup> For more information on the specific protections for women require go to the Human Rights Law Resource Centre Fact Sheet “Human rights and women” <http://www.hrlrc.org.au/files/factsheet-women.doc>.

- (f) homeless people and people in public housing<sup>7</sup>;
- (g) asylum seekers and refugees<sup>8</sup>; and
- (h) children and young people<sup>9</sup>.

### Limitations on rights

17. While certain human rights are absolute and cannot be limited<sup>10</sup>, the AHRG recognises that most human rights are subject to limitations.
18. A limitation on a right does not in any way diminish the right or signify that the right is not valued and should not be protected, rather it is a recognition that rights can come into conflict with each other, or with other legitimate state interests. From time to time, a democratically-elected Parliament will legitimately restrict the exercise of a particular human right - either to accommodate a competing right, or in the pursuit of another state interest. It is crucial, therefore, to adopt appropriate mechanisms to allow Parliament to carry out this balancing process, such as through the application of the internationally-recognised principle of 'proportionality'.
19. Permitting a democratically-elected Parliament to limit rights proportionately encourages an appropriate balance between competing rights, and also is an acknowledgement of the responsibilities shared by all members of the community.

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

### Australia has committed at international law to respect and protect human rights

20. Australia is the only liberal democracy without a national human rights instrument.
21. Australia has ratified many international treaties setting out a number of human rights protections. These treaties, however, have no direct force unless they are given effect by statute.<sup>11</sup> When Australia ratified the international instruments referred to in 2.1(d) above, it agreed to make them part of our domestic law. While Australia has incorporated some of the rights identified in these treaties, such as freedom from discrimination on the basis of race<sup>12</sup>, none of the covenants has been

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<sup>6</sup> For more information on the specific protections for gay, lesbian, bi-sexual and transgender people require go to the Human Rights Law Resource Centre Fact Sheet "Human rights and gay, lesbian, bi sexual, transgender and intersex community" <http://www.hrlrc.org.au/files/factsheet-glbti-community.doc>.

<sup>7</sup> For more information on the specific protections for homeless people and people in public housing require go to the Australian Human Rights Commission Fact Sheet "Human rights and housing and homelessness" [http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA\\_homeless.pdf](http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_homeless.pdf).

<sup>8</sup> For more information on the specific protections for asylum seekers and refugees require go to the Human Rights Law Resource Centre Fact Sheet "Human rights and asylum seekers and refugees" <http://www.hrlrc.org.au/files/ahrc-factsheet-asylum-seekers.doc>.

<sup>9</sup> For more information on the specific protections for children and young people require go to the Human Rights Law Resource Centre "Guide for advocates of children and young people" <http://www.hrlrc.org.au/files/factsheet-young-people.doc>.

<sup>10</sup> Such as the right to be free from torture and other cruel, inhuman or degrading treatment, the right to be free from servitude and slavery.

<sup>11</sup> *Kioa v West* (1985) 159 CLR 550

<sup>12</sup> *Racial Discrimination Act 1975* (Cth)

fully incorporated into Australian domestic law.<sup>13</sup> Australia's failure fully to incorporate its undertakings in relation to human rights leaves Australia in breach of international law.

### Current protections of human rights in Australia

22. While the UDHR now forms part of customary international law and is seen as binding on all nations, it cannot be enforced by the courts in Australia as it has not been incorporated in its entirety into domestic law.<sup>14</sup>
23. There are in fact "very few legal protections of human rights" in Australia.<sup>15</sup> A small number of rights are given very limited protection in the Constitution, some laws exist at the federal and state and territory levels protecting certain specific rights, some common law principles foster the protection of some rights and the Australian Human Rights Commission has specific powers to investigate complaints and make recommendations for the protection of human rights.<sup>16</sup> The coverage is ad hoc and there are inevitably significant gaps in the protection of human rights as a result.

### Violations of human rights

24. The Australian Human Rights Commission has said "human rights matter to everyone. Even if we don't feel personally affected, we may prefer to live in an inclusive and fair society, where instances of human rights violations are prevented as much as possible"<sup>17</sup>. A robust and transparent national human rights framework is essential to the realisation of fundamental human rights for all people subject to Australia's jurisdiction.
25. The United Nations Human Rights Committee has, on a number of occasions, found that Australia has violated international human rights obligations. For example<sup>18</sup>:
  - (a) mandatory long-term indefinite detention of asylum seekers who cannot be returned to their country of origin<sup>19</sup>;
  - (b) unreasonable delay in criminal proceedings<sup>20</sup>;
  - (c) protection of the best interests of the child<sup>21</sup>;
  - (d) discrimination against same sex couples<sup>22</sup>;
  - (e) inhumane conditions and treatment in detention<sup>23</sup>;

<sup>13</sup> Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 15

<sup>14</sup> *Dietrich v R* (1992) 177 CLR 292

<sup>15</sup> Australian Human Rights Commission, *Let's Talk About Rights, A toolkit to help individuals and groups participate in the Australian Government's National Human Rights Consultation*, 2009 at 8.

<sup>16</sup> For details of these protections see Lynch P and Knowles P, *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 22-31.

<sup>17</sup> Australian Human Rights Commission, *Let's Talk About Rights, A toolkit to help individuals and groups participate in the Australian Government's National Human Rights Consultation*, 2009, at 7.

<sup>18</sup> Examples obtained from Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 31-34. Refer to this publication for further details on each example.

<sup>19</sup> *A v Australia* (560/1993) UN Human Rights Committee; *D&E v Australia* (1050/2002) UN Human Rights Committee.

<sup>20</sup> *Rogerson v Australia* (802/1998) UN Human Rights Committee.

<sup>21</sup> *Winata v Australia* (930/2000) UN Human Rights Committee.

<sup>22</sup> *Young v Australia* (941/2000) UN Human Rights Committee.

- (f) mandatory sentencing in the Northern Territory<sup>24</sup>; and
  - (g) detention of asylum seeker children<sup>25</sup>.
26. Some more current human rights concerns include<sup>26</sup>:
- (a) the indefinite detention of asylum seekers<sup>27</sup>;
  - (b) discriminatory refugee policy<sup>28</sup>;
  - (c) extended detention of asylum seeker children<sup>29</sup>;
  - (d) anti-terrorism laws and the right to a fair trial,<sup>30</sup>
  - (e) mandatory sentencing laws<sup>31</sup>;
  - (f) life expectancy for Indigenous Australians<sup>32</sup>;

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<sup>23</sup> *Cabel and Bertran v Australia* (1020/2001) UN Human Rights Committee.

<sup>24</sup> This led to an alarming rise in the imprisonment rates of Indigenous people. This law made headlines when a 15 year old Aboriginal boy committed suicide in gaol after serving 24 days out of a 28 day sentence for stealing textas and spray paint valued at less than \$50. A challenge was brought against this law on the basis that it was racist, but the law was upheld by the Supreme Court of the Northern Territory. Special leave to the high court was refused on the basis that it did not have sufficient prospects of success. The United Nations Committee on the Elimination of Racial Discrimination found that the mandatory sentencing law had a "racially discriminatory impact" and breached Australia's international treaty obligations to protect human rights.

<sup>25</sup> *Bakhtiyari v Australia* (1069/2002) UN Human Rights Committee

<sup>26</sup> See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 34 - 39 for more details and Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 19-34 for more details.

<sup>27</sup> For example, *Al-Kateb v Goodwin* (2004) 219 CLR 562. In this case a stateless asylum seeker was required to remain in immigration or detention until he was removed from Australia or his visa was granted. His visa was not approved and because he was stateless he remained in detention. He sought a declaration that his continued indefinite detention was unlawful. The High Court held that the unambiguous provisions of the *Migration Act 1958* (Cth) which required his continual detention was constitutionally valid and could not be read as subject to international human rights obligations.

<sup>28</sup> In October 2007, the Federal Government announced a moratorium on resettling African refugees in Australia, claiming that this group of refugees had difficulty integrating. This raised concerns that Australia's resettlement policy was discriminatory and in violation on Article 2 of the ICPPR. See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 35.

<sup>29</sup> Under the *Migration Act 1958* (Cth), children are required to remain in detention until granted a visa or returned home. Between 1999 to 2003, 2184 children were placed in immigration detention and a significant number of these children were detained for greater than 12 months. Extended detention of children is inconsistent with CROC, which provides that children should be detained as a last resort and for the shortest appropriate period of time. Australia has since began a slow release of children and families from detention and amendments to the *Migration Act 1958* (Cth) now require that a minor shall only be detained as a measure of last resort and the Minister is also able to remove a specified unlawful non-citizen from detention and place them in community detention or immigration residential housing. This is a discretion and the exemptions are made on an individual basis rather than as a group (i.e. children). See See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 35-36.

<sup>30</sup> See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 36. Specific human rights concerns include detainees being held incommunicado for 7 days or longer. Detainees can also be detained for extended periods without charge and secret court orders can be issued which do not give the person affected by the orders access to evidence against them making it difficult to challenge the orders. These provisions challenge the right to a fair trial, the presumption of innocence and the right to examine witnesses. The case of Dr Mohammed Haneef highlights these concerns. Dr Haneef, an Indian national, was detained for almost 4 weeks before his terrorism charges were dropped. For the first 12 days of his detention he was not charged and could not apply for bail. Dr Haneef's right to a fair trial and presumption of innocence were seriously compromised.

<sup>31</sup> Mandatory sentencing laws in the Northern Territory (now substantially repealed) and Western Australia had a severe and disproportionate impact on Aboriginal and Torres Strait Islander people. See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 37

- (g) gender inequality and discrimination<sup>33</sup>;
- (h) the stolen generation;
- (i) disproportionate imprisonment of Indigenous Australians and people with mental illness;
- (j) freedom of speech<sup>34</sup> ;
- (k) Australian citizens illegally detained<sup>35</sup>; and
- (l) the right to vote of persons in prison.<sup>36</sup>

### **Our conclusion is that the current legal protections are inadequate**

27. The current protections under federal and state legislation, the Constitution and the common law do not provide comprehensive and consistent legal protection for human rights. Basic human rights remain unprotected and those that are protected can be abrogated too easily, and without sufficient consideration to the consequences. Furthermore, such rights are often narrowly construed by the courts and other protections are not adequately enforceable, as is seen in relation to recommendations by bodies such as the Australian Human Rights Commission, the Ombudsman and international treaty-monitoring bodies such as the UN Human Rights Committee. Current Australian legislation, such as that relating to discrimination, does not fully meet Australia's international law obligations under the ICCPR and the ICESCR. For example, Australian anti-discrimination law does not properly cover discrimination on the ground of religion, sexuality, political belief and language.<sup>37</sup> Also, there are exemptions from the Acts, and these allow certain organisations to act discriminatorily.
28. Amnesty International commissioned an opinion poll in February 2009 of 1000 people in Australia across all states and territories. The poll showed that when asked to what extent they understood their human rights to be protected under the Australian Federal law, 38% of people said that their rights were completely protected. The survey showed that 54% of people thought their rights were

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<sup>32</sup> The life expectancy of many Indigenous Australian's is 17 years below the rest of the population. Indigenous Australian's do not enjoy the right to life on equal terms with other Australians, in violation of Article 6 of the ICCPR. See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 37.

<sup>33</sup> Breaches of equal rights for men and women in violation of Article 3 of the ICCPR. For example, women remain significantly under represented in many aspects of political and public life. See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 37.

<sup>34</sup> For example, the World Youth Day regulations enabling officers to order a person within the World Youth Day area to cease engaging in conduct causing annoyance or inconvenience to World Youth Day participants. These regulations were challenged in *Evans v New South Wales* [2008] FCAFC 130. The Federal Court held the regulations to be invalid on the basis that there is a legal presumption that parliament does not intend to impinge upon rights (such as the freedom of speech) unless it clearly states such an intention. In the case of the World Youth Day regulations, no such intention existed. The result of this case is that freedom of speech can be impinged in the future if Parliament makes it intention clear. See Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 38.

<sup>35</sup> For example, David Hicks was detained in Guantanamo Bay for more than 5 years and Cornelia Rau was wrongly detained for 10 months by the Department of Immigration and Ethnic Affairs (as it was then known).

<sup>36</sup> The law removes the right to vote from all full time prisoners serving a sentence or 3 years or more for a Commonwealth, state or territory offence.

<sup>37</sup> Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 44.



only partially protected and 2% feel their rights are not protected at all.<sup>38</sup> Furthermore, other research shows that many Australians believe that we already have a national bill or charter of rights and they have little understanding about the human rights protections the law provides.<sup>39</sup>

29. While many Australians may feel that their rights are adequately protected and/or do not feel at risk of violation, this is not the reality for many marginalised or disadvantaged people in Australia, including non-citizens, whose human rights are most at jeopardy. The examples in paragraphs 25 and 26 and **Annexure 2** and many more examples referred to in our members' submissions show that the legal system is failing adequately to protect people in Australia.

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

### A Human Rights Act for Australia

30. Australia is out of step with comparable nations in its protection of human rights. The United Kingdom, Canada and New Zealand all protect human rights through statute (and in Canada's case also constitutionally).
31. The AHRG's clear position is that the Commonwealth Parliament should enact a Human Rights Act. A legally-enforceable Act would go a considerable way to filling the current gaps and it would set out fundamental human rights on which there is a general community consensus.
32. The AHRG does not advocate any specific model for a Human Rights Act, but it notes that a number of comparable jurisdictions overseas, and Victoria and the Australian Capital Territory in Australia, have enacted human rights statutes.
33. The AHRG submits that a federal Human Rights Act would have a number of benefits:
- (a) *It would strengthen human rights protection in Australia* by enabling the consideration of how draft laws would impact on human rights and setting out the human rights a public authority is required to comply with. It would also require all legislation to be interpreted in accordance with human rights.
  - (b) *It would improve the quality and accountability of the government.* Reviews of human rights legislation in other jurisdictions have shown that human rights laws can improve government decision making, making government more transparent and accountable. A review of the *Human Rights Act 1998* (UK) has shown that "*the Human Rights Act has led to a shift away from inflexible or blanket policies towards those which recognise the circumstances and characteristics of individuals*".<sup>40</sup> This review also demonstrated a significant, beneficial impact on policy development within the government. This has been generated by the requirement of a positive statement that draft legislation is compatible with human rights

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<sup>38</sup> Amnesty International Media Release, 12 March 2009. See <http://www.amnesty.org.au/news/comments/20460/>.

<sup>39</sup> Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 67.

<sup>40</sup> UK Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, 2006.

statute when it is introduced and making it unlawful for a public authority to act in a manner that is incompatible with human rights recognised by the Act.<sup>41</sup>

- (c) *It would improve Australia's reputation as a responsible international citizen.* A Human Rights Act would demonstrate internationally Australia's commitment to improving social justice and fairness for all people in Australia, particularly for disadvantaged groups, and it would tangibly manifest Australia's commitment to its international human rights obligations. As Australia seeks to establish itself as a responsible international citizen, our authority and legitimacy on human rights issues require that our domestic law recognise and protect, at a minimum, those rights that Australia has pledged to uphold by ratifying the core human rights treaties.
- (d) *It would encourage social inclusion.* The Federal Government has made a clear commitment to the reduction of social exclusion across all sectors of society. Social exclusion is where individuals or groups are unable to participate in society due to external barriers or a lack of social or economic resources.<sup>42</sup> The Australian Government's Green Paper on homelessness signalled the Government's commitment to creating a more socially-inclusive society and recognized that all people should be treated with dignity and respect. The Attorney-General noted the link between social inclusion and the protection of human rights stating: "*The Government has also taken significant steps to enable greater participation in our society. ... Domestically, the Rudd Government will be undertaking a nationwide community consultation on how best to recognise and protect human rights and responsibilities in Australia*".<sup>43</sup> The Government will only achieve its social inclusion agenda if it takes steps to protect, fulfil and realise the human rights of Australians who are excluded from our society.<sup>44</sup> Human rights legislation picks up everyone's interests. It excludes no one and provides a contemporary set of values relevant to all communities.<sup>45</sup>
- (e) *It would contribute to a human rights culture.* A Human Rights Act, providing a clear statement of Australian values, would contribute to a culture of greater awareness of and respect for human rights. Over time, a Human Rights Act, through education, will contribute to increased respect and tolerance in the community, especially for minority groups.<sup>46</sup>
34. In a nation with a functioning democracy and the rule of law (such as Australia), a Human Rights Act will be useful in strengthening human rights protection. These laws become a crucial part of the democratic system of government based on the rule of law.<sup>47</sup> In nations that are unwilling or unable to protect human rights, a Human Rights Act is unlikely to have any real difference. The AHRG

<sup>41</sup> UK Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, 2006.

<sup>42</sup> Zifcak S and King A, *Rights, Wrongs and Remedies - An Australian Charter?*, 2009 at 43.

<sup>43</sup> Federal Attorney-General, the Hon Robert McClelland MP (speech delivered at the National Association of Community Legal Centres Conference, Darwin, 18 August 2008) (available at: <http://www.attorneygeneral.gov.au>).

<sup>44</sup> PILCH, Homeless Persons' Legal Clinic, *Submission to the Federal Government's Green Paper: 'Which Way Home?'*, at 1-2 (available at <http://www.pilch.org.au>).

<sup>45</sup> Zifcak S and King A, *Rights, Wrongs and Remedies - An Australian Charter?*, 2009 at 44.

<sup>46</sup> Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 94.

<sup>47</sup> Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 16.

believes that in Australia, there is large scope for a Human Rights Act to make a real difference in the protection of human rights.

### **Additional measures to protect and promote human rights in Australia**

35. Statutory protection of human rights, by way of a Human Rights Act, is the most important part of the human rights reform process. However, that reform process must involve other steps as well, including the following:
- (a) *Parliamentary scrutiny committees for new bills.* A Human Rights Act regime should include an enhanced and expanded parliamentary scrutiny process to enable committees to provide guidance to the Government, and Parliament more generally, on the human rights impact of draft legislation.
  - (b) *Greater powers for the Australian Human Rights Commission.* This has been suggested as a means of protecting and promoting human rights in Australia. These include:
    - (i) expanding the jurisdiction of the Australian Human Rights Commission to enable it to inquire into and conciliate a broader range of human rights complaints;
    - (ii) giving the Australian Human Rights Commission a greater role in scrutinising legislation for human rights compatibility;
    - (iii) requiring that the Australian Government respond to the Commission's recommendations, such as those contained in Commission reports that are tabled in Parliament; and
    - (iv) the Australian Human Rights Commission should play an important role in the community education of human rights. The AHRG advocates that the Australian Human Rights Commission be given sufficient resources to allow it to carry out these important tasks.
  - (c) *A non-binding statement on human rights.* This was a method that was considered by the Victorian consultation into human rights. The Consultation Committee rejected such an informal approach.<sup>48</sup> A non-binding aspirational statement, on its own, offers no additional protection of human rights. It can be ignored and in most cases when it matters most will not be referred to.
36. The AHRG also believes that education of the community is critical to building understanding of and respond for human rights. An Australian Human Rights Act could be used as an educative tool to promote human rights in Australia and foster a human rights culture. Furthermore, a Human Rights Act could be used to promote tolerance and respect of everyone in the community. The AHRG also advocates for greater emphasis of human rights education and promotion for school children and that such education be a core component of school syllabuses in every schools across state and territory of Australia.

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<sup>48</sup> Victorian Human Rights Consultation Committee Report: *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee*, 2005 at 19.

## How will a Human Rights Act make a difference?

37. An Australian Human Rights Act is only worth considering if it is likely to prevent or diminish violations of human rights or remedy any such violation. The following case studies illustrate how such legislation in Victoria, the ACT and the United Kingdom has been used to remedy violations of human rights, promote dignity and address disadvantage.<sup>49</sup> Each case was resolved prior to the commencement of court proceedings.
38. In Victoria, the provisions for the right to privacy, the right to equality and the protection of families and children of the *Victorian Charter of Human Rights and Responsibilities* assisted a 13 year old boy with Asperger Syndrome to obtain disability support services. The Department of Human Services did not consider Asperger Syndrome and other Autism Spectrum Disorders to be a 'disability'. The child's mother applied to Victorian Civil and Administrative Tribunal for a review of the Department of Human Services decision and advocated for an inclusive and contextual interpretation of "disability", in light of the rights contained in the Victorian Charter. Before the application proceeded to hearing, the Victorian Government issued a media release advising that it had decided to acknowledge Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Act and thereby entitled Victorians with autism to disability assistance. The President of the Autistic Family Support Association commented that she did not think that the policy change would have occurred had the litigation not been initiated.<sup>50</sup>
39. In the ACT the provisions for the protection of family life in the *Human Rights Act 2004 (ACT)* were used to assist a mother who was homeless and temporarily living with one of her children in a caravan without electricity in NSW. The other child was living with her grandmother in the ACT in order to attend school. The client was not eligible for priority housing as she had outstanding debts to the public housing authority from a previous tenancy. The client's advocates invoked the right to protection of family life to advocate for flexibility in applying the allocation rules. Following this, the client was housed as a priority candidate prior to arranging repayments of debts.<sup>51</sup>
40. In the United Kingdom the *Human Rights Act 1998* was successfully used, as a tool in argument, by advocates who objected to the enforced separation of an elderly couple by a residential care home. The husband and wife had lived together for over 65 years. He was unable to walk unaided and relied on his wife to help him move around. She was blind and used her husband as her eyes. They were separated after he fell ill and was moved into a residential care home. She asked to come with him but was told by the local authority that she did not fit the criteria. The couple had never been separated and for it to happen when her husband was ill and when they needed each other for support was upsetting. The wife stated that she would be "lost with him – we were a partnership". A public campaign launched by the family, supported by the media and various human rights experts and older people's organisations, argued that the local authority had breached the couple's right to

<sup>49</sup> These stories have been collated by the Human Rights Resource Law Centre. For further details and more case studies go to: <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>.

<sup>50</sup> Case study published by the Human Rights Resource Law Centre. For further details and more case studies go to: <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>.

<sup>51</sup> Case study published by the Human Rights Resource Law Centre. For further details and more case studies go to: <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/>.

respect for family life (Article 8). The authority agreed to reverse its decision and offered the wife a subsidised place so that she could join her husband in the care home.<sup>52</sup>

41. There are of course, many examples of cases from the United Kingdom and New Zealand where court proceedings have commenced and a court has protected human rights.
42. **Annexure 2** of this submission sets out in more detail a number of case studies of human rights violations and how a Human Rights Act can have a positive impact to remedy the human rights breach.

### **Community support for a Human Rights Act**

43. Despite failures in the past to introduce human rights legislation in Australia<sup>53</sup>, the Amnesty International poll referred to in paragraph 28 revealed that 81% of people would support the introduction of a law to protect human rights in Australia. Also, 65% of these people believe that the introduction of human rights legislation should be a high priority for the Federal Government.<sup>54</sup>
44. An overwhelming majority of people who participated in the Victorian Consultation supported greater protection of human rights through human rights charter. The consultation committee for the Victorian Human Rights Consultation Committee consulted widely with the community. 55 community meetings were held around Victoria, 75 focus groups with government and peak organisations were also held and over 200 submissions from across the community were made by the community.<sup>55</sup>
45. Similarly, the ACT Bill of Rights Consultative Committee consulted widely with the people of the ACT. It sought submissions from the public and held town hall style meetings and other consultations with the community and expert groups. In total, 49 public forums were held. The Committee also commissioned a deliberative poll<sup>56</sup> of residents over a weekend where over 200 people had the chance to hear different side of the debate and discuss the issues. Both submissions to the committee and the deliberative poll showed the majority of people in the ACT supported a Human Rights Act. 61% of submissions supported an act and at the deliberative poll 59% supported the Act. The Committee recommended the enactment of a Human Rights Act, and it came into force in 2004.<sup>57</sup>

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<sup>52</sup> British Institute of Human Rights, *The Human Rights Act - Changing Lives*, 2nd Ed at 14.

<sup>53</sup> Such as the Statutory charter of rights in 1973 and the Australian Human Rights Bill 1985, referendum in 1988 and 1999. See Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 59-63 for further details.

<sup>54</sup> Amnesty International Media Release, 12 March 2009. See <http://www.amnesty.org.au/news/comments/20460/>.

<sup>55</sup> Victorian Human Rights Consultation Committee Report: *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee*, 2005; Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 77.

<sup>56</sup> A deliberative poll is a process developed by Issues Deliberation Australia (IDA). A deliberative poll gives participants an opportunity to meet and discuss their views and concerns with each other, and ask questions of experts so that they can develop an informed view of the issues. It combined qualitative and quantitative methodologies to investigate the knowledge and attitudes of Australians living in the Australian Capital Territory about a Bill of Rights for the ACT. The main goal for the ACT deliberative poll, was to facilitate the *informed* voice of ACT citizens on whether or not a Bill of Rights was appropriate for the ACT, and if so, what form it should take, and what rights should be included. See *The ACT Deliberates: An ACT Bill of Rights?: A Territory Deliberative Poll, Final Report* at, 11 December 2002 <http://www.ics.act.gov.au/prd/rights/index.html>.

<sup>57</sup> *Towards an ACT Human Rights Act - Report of the ACT Bill of Rights Consultation Committee*, May 2003; Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 73.

46. In 2007, the Tasmanian Law Reform Institute conducted an inquiry as to whether Tasmania should adopt a charter of rights. 403 public submissions were received on this issue. 95% of the submissions expressed the view that human rights were not adequately protected in Tasmania and 94% of submissions indicated a preference for a statutory charter of rights.<sup>58</sup>
47. Western Australia also conducted an inquiry into human rights protection in 2007. It conducted independent polling on Western Australians attitudes to the adoption of a Human Rights Act. A random sample of 400 voters were chosen from urban and regional areas. 89% of people said that Western Australia should have human rights legislation. Western Australia went further in its public consultation. It held focus groups for disadvantaged people. 405 people took part via phone, internet and face to face interviews. The majority was of the view that human rights protection should be strengthened. Of the 160 face to face interviewees, 154 said that the human rights should be protected.<sup>59</sup>
48. The inquiries in Victoria, the ACT, Western Australia and Tasmania do not of course address whether there should be Federal human rights legislation. However there is no reason to suggest that the answer would differ if such people were asked about federal legislation.<sup>60</sup> The AHRG submits that Consultation Committee should be guided by the community consultations in Victoria, the ACT, Western Australia and Tasmania which show majority support for human rights legislation.

### **Myth busting**

49. Significant concerns have been raised in Australia in regard to a federal Human Rights Act. Some have argued that a federal Human Rights Act would:
  - (a) diminish democracy by transferring power from the parliament to the judiciary;
  - (b) encourage judicial activism; and
  - (c) result in a 'flood of litigation' or a 'lawyers' picnic'.
50. The AHRG submits that these concerns, each addressed in this section, are unfounded. An evaluation of the first five years of the *Human Rights Act 1998* (UK) found that the "purpose and effect of the *Human Rights Act* has been widely misrepresented and misunderstood"<sup>61</sup> and that myths and misperceptions had been "extremely damaging" and "eroded public confidence in the Act".

### ***Myth 1: A Human Rights Act will shift political power from the parliament to the judiciary***

51. It is argued by critics that a Human Rights Act will undermine parliamentary sovereignty. Critics fear that under a Human Rights Act the courts will bleed power from parliament. The argument is that when courts interpret the provisions of a Human Rights Act, which will express fundamental rights

<sup>58</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania, Report No 10*, October 2007; Zifcak S and King A, *Wrongs, Rights and Remedies - An Australian Charter*, 2009 at 62.

<sup>59</sup> *A WA Human Rights Act*, Report of the Consultation Committee for a proposed WA Human Rights Act, November 2007; Zifcak S and King A, *Wrongs, Rights and Remedies - An Australian Charter*, 2009 at 62.

<sup>60</sup> Zifcak S and King A, *Wrongs, Rights and Remedies - An Australian Charter*, 2009 at 63.

<sup>61</sup> Department for Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006) at 29.

and freedoms very generally, the courts will be making what amounts to a policy rather than a legal decision. Under our system of government, policy decisions should remain with democratically-elected parliament and not the judiciary.<sup>62</sup>

52. However, a Human Rights Act would itself be an expression of parliamentary supremacy. As an Act of Parliament it can be amended or repealed. Such a statute could not, as a matter of law, bind a future Parliament.
53. The AHRG believes that Australia should adopt a Human Rights Act that preserves parliamentary supremacy<sup>63</sup> and that a Human Rights Act can be drafted in a manner that does not usurp the proper role of Parliament, in favour of the courts.
54. Guidance can be taken from the human rights statutes in the United Kingdom, New Zealand, Victoria and the ACT, which all preserve parliamentary supremacy and prevent courts from being the final arbiters on the legitimacy of legislation.
55. Under the *Victorian Charter of Human Rights and Responsibilities 2006*, the courts are not given the power to strike down or invalidate legislation. Nor do courts have the power to award damages. Rather, the Supreme Court of Victoria has the power to declare that a law is incompatible with a right or rights in the *Victorian Charter of Human Rights and Responsibilities 2006*, but parliament retains an absolute discretion in how to respond to such declarations, and may leave the impugned law unamended.<sup>64</sup>

### ***Myth 2: A Human Rights Act will encourage judicial activism***

56. Similar to the fear that a Human Rights Act will undermine parliamentary supremacy is the concern that a Human Rights Act would allow judges to impose their personal opinions as law.
57. It is argued by critics that decisions about the meaning and scope of rights involve policy decisions with no single right answer and therefore should be made by the electorate and not the judiciary.<sup>65</sup>
58. This argument has no weight. Under our system, judges already interpret the law and in some cases are required to make decisions on controversial policy issues. The Human Rights Act will be no different. In fact, the decision of other courts on the large amount of human rights legislation already in operation in other jurisdictions and decisions on international treaties have resulted in a large pool of human rights jurisprudence from which Australia can take guidance. This is illustrated in the United Kingdom where decisions have closely mirrored decisions of the European Court of Human Rights. As suggested, this does not necessarily mean that the court will be right. Judges

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<sup>62</sup> John Hatzistergos "Legislation is not the key to human rights", *The Australian*, 12 December 2008; James Allan "Opposing bill of rights is not crazy", *The Australian*, 17 April 2009.

<sup>63</sup> Australian Human Rights Commission, Statement of constitutional validity of an Australian Human Rights Act. <http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html>

<sup>64</sup> *Victorian Charter of Human Rights and Responsibilities 2006* sections 31 and 37.

<sup>65</sup> Alan Anderson "The Wrongs of Pushing a Bill of Rights", *The Age*, 4 January 2006; Lynch P and Knowles P *The National Human Rights Consultation - Engaging in the Debate*, Human Rights Law Resource Centre at 34 - 39 for more details and Williams G, *A Charter of Rights in Australia*, UNSW Press, 2007 at 10.

make mistakes and where a right or freedom has been too broadly or narrowly interpreted, the ordinary appeal mechanisms will be available.<sup>66</sup>

59. Ultimately, Parliament has the final say, and it will retain the power to enact legislation which will overturn the effect of any judicial decision it considers strikes an inappropriate balance regarding human rights.

**Myth 3: A Human Rights Act will be a “Lawyers’ Picnic”**

60. Critics of a Human Rights Act argue that an Act will be a “bonanza for lawyers” and it will spark costly and time consuming litigation.<sup>67</sup> The former New South Wales Premier, Bob Carr, also argues that “a bill of rights, or a charter, will lay out abstractions like the right to life, or privacy, or property, and thus enable judges to determine - after deliciously drawn-out litigation - what these mean.”<sup>68</sup> Other critics are concerned that the only people to benefit from human rights are well-resourced organisations who can afford litigation, and not individuals.<sup>69</sup>
61. A recent review of the *Human Rights Act 2004* (ACT) noted that there has been no “flood of litigation”.<sup>70</sup>
62. A review of the *Victorian Charter of Human Rights and Responsibilities* came to a similar conclusion, revealing that the courts have demonstrated their skill in identifying which cases are meritorious and raise human rights concerns, and which do not.<sup>71</sup> In the 2008 Report on the Operation of the Charter of Human Rights and Responsibilities, the Victorian Equal Opportunity & Human Rights Commission reported that there was a relatively small number of matters before the courts and tribunals involving consideration of the Charter. This is explained simply by the court or tribunal not being presented with submissions and arguments based on the Charter.<sup>72</sup> Only 46 cases in Victoria in 2008 mentioned the Charter. Of these cases, 25 cases did not consider the Charter substantively.<sup>73</sup> This cannot be described as a flood of litigation.
63. Even in the UK, where (unlike in Victoria or the ACT) the *Human Rights Act* does create a freestanding cause of action and entitlement to damages, there is no evidence of any meaningful increase in the volume, length or costs of litigation.<sup>74</sup> The five year review of the *Human Rights Act* in the United Kingdom concluded that a substantive body of case law that had been generated, but this represented no more than 2% of all cases determined in the courts”.<sup>75</sup>

<sup>66</sup> Zifcak S and King A, *Rights, Wrongs and Remedies - An Australian Charter?*, 2009 at 53-55.

<sup>67</sup> George Brandis “Bill of Rights Could Just Mean a Bigger Bill”, *Australian Financial Review*, 1 February 2008 at 74.

<sup>68</sup> Bob Carr, “Lawyers are already Drunk With Power”, *The Australian*, 24 August 2008.

<sup>69</sup> John Hatzistergos, “A Charter or Rights or Wrongs?” (Speech delivered at Sydney Institute, Sydney, 10 April 2008).

<sup>70</sup> ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review*.

<sup>71</sup> P. Lynch, 'Victorian Charter on the Right Path - An Assessment of the First 18 Months' (available at [www.hrlrc.org.au](http://www.hrlrc.org.au)).

<sup>72</sup> The Victorian Equal Opportunity & Human Rights Commission “2008 Report on the Operation of the Charter of Human Rights and Responsibilities” at 102.

<sup>73</sup> Zifcak S and King A, *Wrongs, Rights and Remedies - An Australian Charter?*, 2009 at 60.

<sup>74</sup> Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002*.

<sup>75</sup> Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act* (2006), at 10-11.



## **On behalf of the Steering Committee of the Australian Human Rights Group**

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## Annexure 1 - AHRG Members

[Action for Community Living](#)

[ACT Disability Aged and Carer Advocacy Service \(ADACAS\)](#)

[ACT Human Rights Act Research Project, ANU](#)

[Amnesty International Australia](#)

[ANTaR National](#)

Anti-Slavery Project

[Asylum Seeker Resource Centre](#)

[Australian Coalition for Equality](#)

[Australian Collaboration](#)

[Australian Council of Social Service \(ACOSS\)](#)

[Australian Federation of Islamic Councils Inc.](#)

[Australian Lawyers Alliance](#)

[Australian Lawyers for Human Rights](#)

[Australian Marriage Equality \(AME\)](#)

[Australian Network for Art and Technology](#)

[Australian Performing Arts Centres Association](#)

[Combined Community Legal Centres Group \(CCLCG\)](#)

[Council of Social Service of NSW \(NCOSS\)](#)

[Darebin Community Legal Centre](#)

[Disability Discrimination Legal Centre NSW](#)

Domestic Violence Legal Worker's Network

[Eastern Community Legal Centre Inc.](#)

[Edmund Rice Centre](#)

Family Advocacy

[Federation of Community Legal Centres \(Vic\) Inc](#)

[Flemington & Kensington Community Legal Centre Inc. \(FKCLC\)](#)

[GetUp!](#)

[Human Rights Act for Australia campaign Inc.](#)

[Human Rights Arts and Film Festival](#)

[Human Rights Coalition Inc.](#)

[Human Rights Council of Australia](#)

[Human Rights Law Resource Centre](#)

Illawarra Legal Centre

[Indigenous Family Violence Legal Outreach Unit, Queensland](#)

[Jumbunna Indigenous House of Learning Research Unit](#)

[Just Rights Queensland](#)

[Kingsford Legal Centre](#)

[Liberty Victoria](#)

[Melbourne Unitarian Peace Memorial Church](#)

[Mental Health Law Centre](#)

Mornington Peninsular Human Rights Group

[National Association for the Visual Arts \(NAVA\)](#)

[National Association of Community Legal Centres](#)

[National Children's and Youth Law Centre](#)

[NSW Council for Civil Liberties](#)

[NSW Young Lawyers Human Rights Committee](#)

[Our Community](#)

[People with Disability Australia \(PWD\)](#)

[PILCH](#)

[PILCH Homeless Persons' Legal Clinic](#)

[Preston Reservoir Progress Association](#)

[Queensland Advocacy Inc. Systems Advocacy for People with Disability](#)

Queensland Charter Group

[Queensland Council for Civil Liberties](#)

[Reconciliation Victoria](#)

[Refugee Advice & Casework Service \(RACS\)](#)

[Save the Children](#)

[SCALES](#)

[Tasmanian Gay and Lesbian Rights Group](#)

[Taylor Street Community Legal Service](#)

[Townsville Community Legal Service Inc.](#)

[Uniting Church in Australia](#)

[Victorian Aboriginal Child Care Agency Co-operative Limited](#)

Victorian Aboriginal Legal Service Co-operative Limited

[Victorian Alcohol & Drug Association](#)

[Victorian Council of Social Service \(VCOSS\)](#)

[Villamanta Disability Rights Legal Service Inc.](#)

[Women's Electoral Lobby](#)

[Women's International League for Peace and Freedom \(Australian Section\) Inc](#)

[Women's Legal Services Australia](#)

[Women's Legal Services NSW](#)

[YWCA Australia](#)

## Annexure 2 - Case studies of human rights violations & how a Human Rights Act can remedy such violations<sup>76</sup>

### 1.1 Case study of the positive impact of a Human Rights Act for children and young people

Concern has been raised about the protection of children in Australia, including within the juvenile justice system (such as mandatory sentencing laws and holding children in adult facilities), immigration detention practices, protection of children in the workplace, exposure to domestic violence and access to education (in particular for Indigenous and disabled children and those from rural and low-income families).<sup>77</sup>

Relevant human rights include the right to protection of family life, the entitlement of children to special protection, equality before the law (and non-discrimination), privacy, freedom of thought, conscience and religion and minority rights.<sup>78</sup>

**Example.** In the United Kingdom, the *Human Rights Act* was used to assist a young girl with a learning disability who was denied school transport ordinarily offered to children with special educational needs, even though she was unable to travel independently. This decision was made on the basis that she lived 2.8 miles, rather than the prescribed 'more than 3 miles', from school. The mother argued that this inflexible application of policy disproportionately interfered with her daughter's right to respect for private life, and failed to consider her specific circumstances. The local authority reversed its decision.<sup>79</sup>

### 1.2 Case study of the positive impact of a Human Rights Act for elderly people

Elderly people are particularly reliant on government decision making and public services. Whereas previously elderly relatives were often cared for within their family units, older people are now more likely to be placed in government care or to have to fund their own care in retirement facilities or nursing homes. This particularly affects those elderly persons who possess inadequate retirement funds, are on their own or suffer physical disabilities or mental illness. As a result of the current global financial crisis, larger numbers of elderly people rely on government pensions and public services due to losses in their retirement savings. Relevant human rights

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<sup>76</sup> These case studies have been extracted from the National Human Rights Consultation submission of the Gilbert +Tobin Centre of Public Law which was prepared by Edward Santow.

<sup>77</sup> See Human Rights Law Resource Centre Ltd et al, *Freedom Respect Equality Dignity: Action*, NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008) at 212-228, and Addendum at 33-35 and *Fact Sheet on Australia's compliance with the ICCPR: Protection of Children*, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>78</sup> See Human Rights Law Resource Centre, *Fact Sheet on Charter of Human Rights and Responsibilities: Human Rights and Children and Young People in Care*, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>79</sup> See The British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2<sup>nd</sup> ed, 2008), Case study 20, at 15.

includes the right not to be treated in an inhuman or degrading way, the right to privacy (including bodily privacy) and the right to life.<sup>80</sup>

**Example.** In a United Kingdom residential care home, a large woman had not been bathed for many weeks, against her wishes, instead being 'strip' washed so staff did not have to lift her. An advocate for the woman notified the local authority that this was inhumane and degrading treatment, quickly resulting in the advice of an occupational therapist being sought, who recommended the use of a hoist.<sup>81</sup>

### 1.3 Case study of the positive impact of a Human Rights Act for persons with a physical or mental disability or with a mental illness

Concern has been raised about discrimination and disadvantage of disabled persons in Australia, including a lack of protection from vilification, inadequacy of services, an inability to challenge involuntary detention in a timely manner and access to public transport.<sup>82</sup>

Relevant human rights include: equality before the law; privacy; protection of family; freedom from cruel, inhuman or degrading treatment; freedom from arbitrary detention; freedom of movement.<sup>83</sup>

**Example.** A rehabilitation centre attached to a public hospital in Victoria sought to discharge several young persons with acquired brain injuries to aged cared facilities, which were the only alternative care facilities available. However, these facilities did not provide the social environment or support services needed for the young people to continue their recovery. On an advocate raising the Victorian Charter, the rehabilitation centre agreed to consider its obligations under the charter before moving the young people.<sup>84</sup>

### 1.4 Case study of the positive impact of a Human Rights Act for persons who are homeless or on a low income

According to the Australian Bureau of Statistics, at least 105,000 people across Australia are homeless every night, for complex and varied reasons, including severe financial hardship, lack of affordable housing, domestic violence, lack of access to health care and drug and alcohol disorders.<sup>85</sup> An NGO review has found that discrimination against homeless persons is

<sup>80</sup> See Human Rights Law Resource Centre, *Fact Sheet on Charter of Human Rights and Responsibilities: Human Rights and Older People*, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>81</sup> See The British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2<sup>nd</sup> ed, 2008), Case study 22, at 17.

<sup>82</sup> See Human Rights Law Resource Centre Ltd et al, *Freedom Respect Equality Dignity: Action*, NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008) at 55-56, 108-109, 134, 143, 167 and Addendum at 10, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>83</sup> See Human Rights Law Resource Centre Ltd et al, *Freedom Respect Equality Dignity: Action*, NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008); See also Human Rights Law Resource, *Fact Sheet Charter of Human Rights and Responsibilities: Human Rights and Disability Services*, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>84</sup> See webpage: *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, Human Rights Law Resource Centre, <[www.hrlrc.org.au](http://www.hrlrc.org.au)>, section 1.2, at 1 April 2009.

<sup>85</sup> See Human Rights Law Resource, *Fact Sheet on Australia's compliance with the ICCPR: Homelessness in Australia*.

widespread in all Australian jurisdictions.<sup>86</sup> Relevant human rights include: the right to equality before the law (and non-discrimination); the right to protection of the family and children; privacy; freedom from inhuman and degrading treatment and to participate and vote.<sup>87</sup>

**Example.** A homeless mother was temporarily living in NSW with one of her children in a caravan without electricity, while her other child was living in the ACT with her grandmother in order to attend school. She was unable to apply for priority housing due to outstanding debts to the public housing authority from a previous tenancy. Advocates invoked the right to protection of family life pursuant to the *Human Rights Act* to advocate for flexibility in these allocation rules, resulting in the mother being housed as a priority candidate prior to her repayment of debts.<sup>88</sup>

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<sup>86</sup> See Human Rights Law Resource, *Fact Sheet on Australia's compliance with the ICCPR: Homelessness in Australia*. Also see Human Rights Law Resource Centre Ltd et al, *Freedom Respect Equality Dignity: Action*, NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008) at 56-57, 82-83, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>87</sup> See Human Rights Law Resource, *Fact Sheet on Australia's compliance with the ICCPR: Homelessness in Australia*. Also see Human Rights Law Resource Centre Ltd et al, *Freedom Respect Equality Dignity: Action*, NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights (2008) at 56-57, 82-82, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>.

<sup>88</sup> See Human Rights Law Resource Centre, *Case Studies: How a Human Rights Act can Promote Dignity and Address Disadvantage*, section 2.3, available at <[www.hrlrc.org.au](http://www.hrlrc.org.au)>, at 1 April 2009.