



Women's Health West
Submission to the National Human Rights
Consultation

1. ABOUT WOMEN'S HEALTH WEST

1.1 Women's Health West is the women's health service for the western metropolitan subregion of Melbourne, Victoria. Established in 1988, our services include health promotion, research and development and advocacy around women's health, safety and wellbeing. Since 1994, the agency has also hosted the subregion's largest family and domestic violence support and prevention program.

1.2 Our work at Women's Health West is underpinned by a social model of health. We are committed to reducing inequities in health which arise from the social, economic and environmental determinants of health. These determinants are experienced differently by women and men. By incorporating a gendered approach to health promotion work that focuses on women, interventions to reduce inequality and improve health outcomes will be more effective and equitable.

1.3 Women's Health West welcomes the opportunity to respond to this important consultation. We share a vision for a society in which there is an accepted approach to health that is empowering and respectful of women and girls; one that recognises the importance of gender in determining health outcomes, and utilises a sound gender analysis in policy making and in health and community service design. Human rights are a crucial step towards reaching that goal.

2. ABOUT THIS SUBMISSION

After 21 years of operation as a women's health and family violence support service, we are clear that women's rights are human rights. To illustrate this, we have chosen to focus our submission on the ways in which women's experiences of family and domestic violence seriously curtail their ability to exercise their rights to freedom and equality. We have also chosen to focus on sexual and reproductive health rights as central to any National Human Rights Charter.

We also express our support for submissions by other organisations and individuals focussing on the myriad other ways that the human rights of Victorians are breached, including for example through dispossession of and racism against Indigenous peoples, mandatory detention of asylum seekers, discrimination on the basis of race and/or religious practices, homophobia, child abuse and exploitative employment practices.

We regard the development of instruments such as the proposed National Human Rights Charter as part of a collective struggle against all forms of inequality and oppression across and within nation states. In order to achieve justice and equality in Australia, a formal agreement between Indigenous and non- Indigenous Australians is as critical as a Charter of Human Rights.

Some may argue that Australian women have in the main achieved equal civil and political rights, such as the right to vote or enter public office. Yet inequalities of gender, and of class, 'race' and other factors in the economy and civil society 'prevent women, the working class and minority groups from exercising those rights'¹

A Charter, then, must address questions of status - the carrying of a set of rights - as well as of practice - the conditions under which rights can be realised. Further, **economic and social rights** are as important as civil and political rights to women in achieving freedom and equality, particularly with regard to family and domestic violence.

Human rights policies must be framed as a response to existing conditions and problems, not simply as a discourse within which we pretend that having a Charter means we have achieved equality. We encourage the development of policies and processes, and allocation of resources, in a manner that encourages the development of a just and equal society.

Australia's Charter should protect all our human rights, as expressed in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural rights, and all other international human rights instruments to which Australia is signatory. Human rights are indivisible: the right to vote, free speech and fair speech are no more important than the rights to work, health, housing, education and safety, even if the mechanisms for protecting different sorts of human rights may differ.

WHW has aimed to respond to the complexity of questions posed with practical suggestions, as well as consideration of the more difficult conceptual issues they raise. We fully support the enactment of a Human Rights Charter for Australia and would see this as a preliminary step in enshrining the Charter in our Constitution.

3. ARE HUMAN RIGHTS SUFFICIENTLY PROTECTED IN AUSTRALIA?

3.1 Human rights are the principles that enable us to live a dignified and rewarding life in which our freedoms are respected, protected and fulfilled. Violations of human rights occur in Australia every day and the current legislative protections are inadequate in protecting the rights of vulnerable and disadvantaged groups^{2,3}. Our human rights must therefore be comprehensively and consistently enshrined in law.

3.2 Australia remains the only liberal democracy in the world that does not have a bill of rights, charter or human rights act, despite repeated calls by the UN to entrench its commitment to international obligations in such a way^{4,5}. Even a cursory analysis suggests that Australia has a relatively poor record of sustaining access to human rights. Key indicators include our recent history of industrial relations, unabated levels of violence against women and children, lack of affordable housing and public housing waiting lists, attacks on and lack of reproductive freedom, the appalling state of Indigenous health and incarceration, myriad issues around mental health, public health and family and domestic violence service waiting lists and treatment of asylum seekers.

The media, encouraged by the rhetoric of conservative governments, increasingly portrays inequality as the result of individual inadequacy (e.g. 'dole bludger', 'single mum') rather than of structural inequality. This shifts the responsibility for socioeconomic and political problems from the culture collectively to individuals alone.⁶ However, individuals alone do not possess the resources to address their oppression or take real control of their lives. An active state focused on supporting the 'common good', such as through the development of a Human Rights Charter, is a key element in the struggle for equality.

Over the past decade, freedom and autonomy have been increasingly conceptualised in individual terms, resulting in abstract rights in law. Consideration of the power relations within which rights are exercised has, in contrast, tended to be ignored in rights discourse.

However, as US women's rights activist Rosalind Petchesky points out, 'we can no longer afford to think of macroeconomic regimes (finance, trade, fiscal policy) and human rights regimes as entirely separate discourses'⁷. Rights are 'merely the codification of needs, reformulating them as ethical and/or legal norms and thus implying a duty on the part of those in power to provide all the means necessary to make sure those needs are met'.⁸

Take the example of reproductive choice: a woman's legal right to abortion means little if she cannot access services due to high costs, conservative attitudes, geographical isolation and limited funding. Yet looking at abortion in a broader rights context - for example, as one aspect of all women's right to equality, accessible health care - highlights the necessity to resource programs (from providing primary care to tackling community and service provider attitudes) to ensure that abortion is universally accessible.⁹

There is a fundamental need to shift from a model based on individual rights, to collective rights: the right of all women to health and safety, to live free of violence and discrimination. Shifting from an individual to a collective rights framework recognizes the necessity of establishing and resourcing policies and programs that redress inequality, and promote a shift in community attitudes to respect and promote human rights. A Human Rights Charter, under these circumstances, provides a framework for political and moral analysis. Women's Health West advocates a Charter that includes a well-resourced program for implementation across and within private and public sectors, at all levels of government and within communities.

3.5 In the absence of a federal charter, the widespread support for a human rights framework is clearly demonstrated by the number of state governments who have enacted or are in the process of enacting human rights legislation. Victoria and the ACT have a Charter and Human Rights Act respectively and consultation processes have begun in Western Australia and Tasmania.

3.6 Women's Health West welcomes the opportunity to create a charter at a federal level that is meaningful, progressive and that can have an impact on the lives and experiences of all Australians.

4 HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE OUR HUMAN RIGHTS?

RECOMMENDATION 1: Australia should now move to formally enshrine human rights in one document.

4.5 Women's Health West strongly supports the need for a charter of human rights at a federal level. A charter would:

1. Improve the quality and accountability of government.
2. Consolidate and strengthen human rights protections for all Australians.

3. Encourage social inclusion.
4. Improve Australia's reputation abroad.
5. Constitute one effective, legal and political response to human rights violations¹⁰.

4.6 Dialogue model of human rights

4.6.1 Women's Health West believes that a dialogue model of human rights should be adopted. A charter or human rights act for Australia should be an ordinary act of Parliament, in a style similar to the Victorian Charter of Human Rights and Responsibilities and the UK Human Rights Act. This is part of a trend away from constitutionally entrenched bills of rights to models that maintain the sovereignty of Parliament. A 'dialogue' between the three arms of government - the Executive (the Prime Minister and the ministry), Parliament and the courts - is created whereby:

- Parliament must ensure that new Bills are compatible with human rights.
- The courts hear any cases in which human rights are invoked and can recommend that the government re-examine a law in line with human rights.
- Parliament must then consider whether the law should be upheld but are under no obligation to change the law. The courts do not have the power to force Parliament to repeal the law¹¹.
- Public authorities must take human rights into account in their decision-making.

4.6.2 The focus of a dialogue model is on the prevention of breaches of human rights by improving how government and public authorities draft legislation, design policies and carry out their day to day work. Human rights are taken into account at the earliest stage of development. Enforcement by the courts on a case-to-case basis is not the primary means of redress¹².

RECOMMENDATION 2: A dialogue model of human rights should be adopted, in a style similar to the Victorian Charter of Human Rights and Responsibilities.

4.7 It is important to note that in other Westminster countries, the introduction of human rights legislation has not altered the relationship between Parliament, the Executive and the courts, but instead 'has increased awareness of human rights within government and observance of human rights by government'¹³.

4.8 The impact of a federal charter should be considered in light of the existing charters in Victoria and the ACT. A federal charter could contain a clause which states that it is

intended to act concurrently with state charters. An example of such a provision can be found in section 6A(1) of the Racial Discrimination Act 1975 (Cth) which states:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

4.9 How a federal charter is to operate in the states and territories should also be explored. Human rights protections that are consistent across all states and territories should be encouraged.

RECOMMENDATION 3: A federal charter must contain a clause that states that it is intended to act concurrently with state charters.

4.10 Women's Health West believes that a federal charter should extend to non-citizens of Australia as well as citizens. Non-citizens can be a vulnerable group who must be able to access their human rights when they are in Australia.

RECOMMENDATION 4: The rights of all people in Australia must be protected in any federal charter.

4.11 Any federal charter should allow for a process of conciliation and arbitration on human rights issues at an individual level. This should be conducted by the Human Rights Commission, who should also have the power to report on progress on human rights in Australia and conduct training and education to foster a human rights culture.

RECOMMENDATION 5: A Human Rights Commission should be set up to hear human rights complaints, report on the government's human rights progress and provide training and education.

4.12 Promoting a human rights culture

4.12.1 A federal charter could act as a foundation for a human rights culture by encouraging a society in which individuals are aware of and assert their rights and responsibilities. It would provide a framework for a rights-based approach, already used by many organisations, that analyses inequalities and redresses discriminatory practices¹⁴.

- 4.12.2 A charter could also be used as an advocacy tool for professionals and service users to obtain better, more just services from public authorities without recourse to the courts¹⁵.
- 4.12.3 The implementation of any federal charter must be coupled with an extensive awareness raising campaign and ongoing human rights education across all sectors of our community. These factors are crucial in ensuring that a human rights culture takes hold.
- 4.12.4 The Victorian Equal Opportunities and Human Rights Commission acknowledges that moving towards a human rights culture is a gradual process but significant steps are being made towards this goal. *Emerging Change: 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* provides evidence for the changes that have occurred since the implementation of the Victorian Charter:

Already we are seeing improvements in the responsiveness of state and local government services, in the quality of public sector decision making and in the protection of vulnerable people and groups¹⁶.

RECOMMENDATION 6: A human rights culture should be fostered and encouraged through awareness raising and ongoing human rights education.

5 WHICH HUMAN RIGHTS SHOULD BE PROTECTED?

- 5.5 International instruments such as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights should serve as the basis for any federal charter as they are well established, universally accepted and legally tested.

RECOMMENDATION 7: The rights set out in existing international instruments should be used as the basis for any federal charter.

5.6 Indivisibility of human rights

- 5.6.1 Since the drafting of the Universal Declaration of Human Rights in 1949, human rights have come to be categorised as civil and political rights or economic, social and cultural rights, reflecting the ideological blocs established in the Cold War. Western nations saw civil and political rights as a 'bulwark against communism' and these were given primacy. Economic, social and cultural rights, however, were regarded as a burden on taxpayers and the free market¹⁷.

- 5.6.2 The Universal Declaration of Human Rights does not distinguish between the two sets of rights. The UN consistently reaffirms the indivisibility of civil and political rights and economic, social and cultural rights¹⁸. The UN Committee for Economic, Social and Cultural Rights stated in 1993:

Violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights¹⁹.

Both sets of rights must be incorporated into any federal charter.

RECOMMENDATION 8: A federal charter must reflect the indivisibility and interdependence of civil and political rights and economic, social and cultural rights by including both sets of rights.

5.7 Civil and political rights

- 5.7.1 Civil and political rights concern the participation of individuals in civic life (such as the right to vote or free speech) and safeguard them from arbitrary state power (such as freedom from torture). They include rights that protect the rule of law (such as the right to a fair hearing) as well as the right to life, freedom of thought, religion and expression and freedom from discrimination.
- 5.7.2 Civil and political rights are fundamental rights that must be enshrined in any federal charter.

5.8 Economic, social and cultural rights

- 5.8.1 Economic, social and cultural rights are those rights that are necessary to meet basic human needs such as the right to food, water and shelter, the right to health, to education, to employment and to social insurance. They are a powerful way of redressing inequality and disadvantage and any national charter of human rights must incorporate these alongside civil and political rights.
- 5.8.2 Australia has ratified the International Covenant on Economic, Social and Cultural Rights and incorporating some if not all of these rights into a federal charter would be an important way of meeting our international obligations²⁰.

5.8.3 The right to an adequate standard of living, the right to social security and the right to health have the power to make a tangible difference to the lives and experiences of Australian women. It is easy to see that violations occur across Australia every day, yet without these rights, other rights cannot be fully enjoyed.

5.8.4 Although economic, social and cultural rights have not been included in the charters and human rights acts in Victoria, the ACT, the UK, Canada and New Zealand, a number of countries and regions have included them. These include Quebec²¹, South Africa²², Finland²³, Norway and India²⁴. The Charter of Fundamental Rights of the European Union also contains economic, social and cultural rights²⁵.

5.9 Reasons for including economic, social and cultural rights

CASE EXAMPLE - The perpetual crisis of family and domestic violence

The stories and words of survivors of family and domestic violence quoted throughout this submission highlight the urgent need for change at a national level to promote, protect and address the human rights of women and children affected by family and domestic violence. While these are stories of Victorian women, their experience is reflective of that of women nationally, and globally.

During 2006-2007, the rate of reported family violence incidents per 1,000 head of population was 6.3 across the western metropolitan sub-region of Melbourne. The equivalent rate for Victoria was 5.8. Within the sub-region, there are local government areas with particularly high rates per 1,000 head of population - Brimbank (8.2) and Hobsons Bay (7.02).²⁶

Yet we know these figures represent the tip of the iceberg: there is longstanding evidence of the under-reporting of family and domestic violence and considerable barriers for women to seek support. If this level of harm - of death, trauma, ongoing mental and physical health problems - were caused by any other phenomenon, it would be widely condemned as a crisis. Family and domestic violence is a perpetual crisis, an endemic abuse of human rights, which is for the most part ignored by media, under-resourced by government, trivialised by the justice system and covered up within families and communities. As a result, women and children continue to suffer violence at an alarming rate, and under-funded support services struggle to keep up with overwhelming demand. It was not until VicHealth's 2004 study, *The Health Costs of Violence*, that intimate partner violence was measured within population health research. Yet this study found intimate partner violence to be the greatest risk to the lives and health of Victorian women under 45.²⁷

Violating women's and children's rights

Family and domestic violence violates women's and children's civil, political, economic, social and cultural rights. It is a manifestation of the impact of gender and power - of unequal power relations between men and women, boys and girls, adults and children.

Family and domestic violence breaches women's and children's basic human right to safety and security, and seriously impedes their capacity to exercise many other rights. This is occurring in every community, cultural and socio-economic group throughout the western metropolitan sub-region and around Victoria. Change is urgently needed.

Judith was married to a man who was extremely violent for 43 years. She describes living in fear every day. Judith was born in 1935 and was the twelfth of thirteen children. From the age of seven she was sexually molested by her brother. He was fourteen at the time. Judith didn't tell her mother because he threatened her

"My brother was mum's pet, I knew nobody would believe me, I didn't talk about it for 53 years", Judith said. The abuse would occur when her mother was out of the house shopping in the afternoon. When Judith wasn't in school, usually in school holidays, her brother would slip home from work. The abuse continued until she was 12. It stopped only when her brother, then 19, left home. "I hated my life at home. I was frightened of my brother. My mother didn't like me taking girlfriends home. My parents would argue and scream all night. My father was the sort of person who if he said black was white, you'd better believe him", she said.

(Women's Health West, 2004)

Women's and children's experiences of violence and their ability to receive adequate support and intervention are affected by a range of intersecting socio-cultural and economic factors. This means that women with a disability, Indigenous women, non-English-speaking women, asylum seekers, refugees and migrants, women who are in/have been in prison, women who are socially and geographically isolated, women on a low income and women who are carers are at relatively greater risk. Age is also a factor, with domestic violence identified as the greatest health risk to women under 45, with elder abuse a related issue.

Abuses by 'the system'

Unfortunately, rights violations against women and children who have experienced family and domestic violence do not always stop when they try to seek help to escape from the violence. Inappropriate and unhelpful responses by the police, government departments and service providers can lead to further denial of women's and children's rights.

Failure to enforce those laws that exist, to consider women's behaviour within a framework of trauma and abuse, or to provide culturally-sensitive services, can leave women feeling that a violent home is 'safer' than an uncertain and hostile service system.

Often it is women who are most vulnerable to rights violations through family and domestic violence who are also most likely to have their rights denied in attempting to seek help. For example, women with a disability are particularly vulnerable to violence from family members and carers. Rates of family and domestic violence against women with a disability are approximately twice those of the broader community²⁸. Yet women with a disability are grossly underrepresented in family and domestic violence services such as refuges.

Information about family and domestic violence is generally unavailable in formats accessible for women with a disability - let alone women with a disability who are from Culturally and Linguistically Diverse (CALD) backgrounds - or is given to women via their carers, who may be the perpetrators of violence. Women have few economic resources, and may be afraid of leaving their home, which, while unsafe, may at least be accessible. Women who are mothers often express real fears of their children being removed should they seek assistance due to family and domestic violence. This is exacerbated for mothers who have a disability.

"Women in wheelchairs are scared to leave home because at least it is accessible. They have the basic everyday resources - they can get to the toilet and have a shower. The barriers to women leaving violence include fear of the unknown, inaccessibility of housing alternatives, and being cut off from existing resources and the community."
(Convenor of WHW social support group for women with a disability, 2005)

5.9.1 Economic, social and cultural rights can strengthen our democracy and ensure the participation and empowerment of Australians. They are not vague and aspirational as some argue²⁹.

5.9.2 It is a myth that economic, social and cultural rights are not as urgent or important as civil and political rights. As Victorian Attorney General Rob Hulls noted in 2005:

While those of us confident of shelter and a decent meal tonight may see civil and political rights as the priority, the right to freedom of expression is of very little interest to Victorians with no housing and little chance of food³⁰.

5.9.3 Economic, social and cultural rights have been argued to be matters of policy and not suitable issues for judges to decide on. The UN Committee on Economic, Social and Cultural Rights, however, has clearly stated that to prevent judges from deciding on these issues is to 'drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged groups in society'³¹.

5.9.4 Economic, social and cultural rights can be justiciable (that is, they give a right of action in the courts for individuals whose rights have been violated). Experience in other parts of the world, such as the Inter-American Court on Human Rights, demonstrates that the 'justiciability of rights is about reinstating rights'. Feria Tinta notes:

the reality of international law has shown that artificial separations of the two sets of rights do not occur in real cases...rights are intertwined and interwoven³².

5.9.5 Widespread public support for economic, social and cultural rights exists. Salvaris notes a number of Australian surveys in which respondents were asked to rank a selection of rights. Economic, social and cultural rights such as the right to education, health, work and a decent standard of living were consistently high on the list³³.

5.10 It is our view that the indivisibility of human rights should be respected. All economic, social and cultural rights are important, but Women's Health West believes that the following rights in particular should be included in a federal charter:

- the right to social security and social insurance (Article 9 ICESCR)
- the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions (Article 11 ICESCR)
- the enjoyment of the highest attainable standard of mental and physical health (Article 12 ICESCR)

RECOMMENDATION 9: A federal charter should include the right to health, the right to an adequate standard of living and the right to social insurance and social security as these rights would help to eradicate discrimination, poverty and violence against women.

6 THE RIGHT TO AN ADEQUATE STANDARD OF LIVING AND THE RIGHT TO SOCIAL SECURITY AND SOCIAL INSURANCE

6.5 These two rights are an important way of ensuring that inequality of economic participation, financial security, living standards and housing options for women are

addressed by governments. They would cover a wide range of issues for women, including violence against women, the gendered role of women as (unpaid) caregivers and parental leave.

6.6 A right to an adequate standard of living and the provision of appropriate social insurance mechanisms addresses how:

- (a) Economic inequality is a central factor of women's lives that affects their experiences of independence and disadvantage.
- (b) Poverty and a lack of housing options trap women in situations of violence.
- (c) Women's participation in the workforce is diminished by their gendered role as (unpaid) caregivers and a lack of childcare and parental leave options.
- (d) Changing policies around work mean that women are more likely to work in informal sectors with low wages and little job security and superannuation and other benefits and entitlements³⁴.

CASE EXAMPLE - Focus on family and domestic violence

Family and domestic violence also highlights the need to protect and promote social and economic rights. Family and domestic violence goes far beyond physical violence and sexual assault. It encompasses emotional and psychological abuse - threats, namecalling, controlling behaviours and public humiliation - stalking and financial abuse - using money as a tool for control, including withholding money so that a woman cannot afford to meet her or her children's basic needs.

VicHealth's 2004 publication, *The health costs of violence: Measuring the burden of disease caused by intimate partner violence*, provides direct evidence that intimate partner violence is 'a common problem with serious health, social and economic consequences for women, their families and communities', and that it is 'responsible for more ill health and premature death in Victorian women under the age of 45 than any other factor'.³⁵

"I know a woman who has experienced sexual, emotional and financial abuse from her partner for almost a decade. So many times she's decided to leave him and take her two young children, but there's one thing that holds her back - money. He controls the family finances, spends all his wages on things for himself, then comes and demands her parenting payments - the money she needs to buy food, or clothes for herself and the kids

*.
What chance does she have to save the money she'd need to set up rental housing for herself and the children? It's only a couple of thousand - enough for bond, rent, some basic furniture.*

But want of it has kept her trapped for years. And she's concerned about supporting the kids once she's out - the pension is so low, and she doesn't trust him to pay child support."

(WHW Worker, 2005)

6.7 All this affects the capacity of women to access and enjoy all the human rights available to them. A federal charter could be used to challenge discrimination, acknowledge the role of women as unpaid carers and comprehensively tackle violence against women by ensuring that housing options and economic independence are strengthened and maintained.

7 THE RIGHT TO HEALTH

7.5 The World Health Organisation Commission on Social Determinants of Health recommends an approach to health that addresses the social determinants of health, including poverty, gender, race, early life experiences, social exclusion and conditions of work³⁶. This is reiterated by the UN Special Rapporteur on the Right to Health from 2002 to 2008, Paul Hunt, who stated that the right to health encompasses not only access to healthcare, but also the underlying determinants of health. Thus the rights to health concerns disadvantaged groups, participation and accountability³⁷. It is the 'right to have opportunities to be healthy'³⁸.

7.6 This understanding of the right to health would ensure the development of policies that address the structural and social determinants of health. A range of issues that impact on the health of Australian women could be considered including violence against women, discrimination, economic participation and social exclusion.

7.7 A charter that requires governments to take the right to health into account when drafting legislation and policy would be a powerful and transformative document as it would provide a framework that acknowledges and addresses the intersection between health, inequality and injustice³⁹.

7.8 Sexual and reproductive health

Citizenship and reproductive rights

Much of the research that considers women's rights as citizens assumes citizenship on the basis of the right to vote and seek public office. Yet women's suffrage easily co-exists with other inequalities between men and women including inequalities in wealth, income and access to social, economic and political power. Control over reproductive choice - the right to choose abortion or motherhood - strikes directly at the foundation of many of those inequalities.

Protecting women's reproductive rights is one way that governments can work to ensure women's social and economic rights are upheld. Rosalind Petchesky argues:

*Without the ability and means to control their fertility and to be self-determined, experience pleasure, and be free from abuse in their sexual lives, women and girls cannot function as responsible, fully participating members of their families and communities - they cannot exercise citizenship.*⁴⁰

The right to reproductive choice is intrinsic to the citizenship status of women and is a key indicator of autonomy and freedom.⁴¹ Women's lack of control over a 'private' reproductive choice limits their ability to control their private lives and their ability to participate in the public domain. Further, the meaning of who controls decision making reflects women's status and the limitations imposed on them as citizens.⁴²

Control over reproductive decision-making remains contested and is not derivative of rights originally extended to men. It is thus in relation to access to reproductive rights that it is possible to judge the state of equality between men and women.⁴³ For women to attain reproductive freedom they require political, economic and sexual self-determination, through access to education, employment, health, and reproductive choice. The struggle for reproductive rights is thus part of a broader struggle to develop a 'just society'.⁴⁴

A Charter must protect women's reproductive freedom as a basic human right, resisting any attempt to restrict women's human rights by those who would seek to use this process to establish the 'rights of the foetus'. Control over decision-making, over one's body, is a

political, civil, economic and social right. Unless women have control over reproductive decision-making - not simply access to abortion, contraception or reproduction-aiding technologies - it is possible for such technologies to be woman-controlling, rather than woman-emancipating, used, for example, by governments or other interests keen to control populations.

7.8.1 Sexual and reproductive health form part of the right to health. The UN Committee on Economic, Social and Cultural Rights has stated in its General Comments on the Right to the Highest Attainable Standard of Health that women's health must be promoted throughout their lifespan in an effort to eliminate discrimination against women. Sexual and reproductive health forms part of that goal⁴⁵. The UN Factsheet on the Right to Health asserts that:

States should enable women to have control over and decide freely and responsibly on matters related to their sexuality, including their sexual and reproductive health, free from coercion, lack of information, discrimination and violence⁴⁶.

7.8.2 Women must be free to make decisions regarding their fertility, including decisions about when and whether to have children, based on their own life situations, personal views and beliefs.

7.8.3 The Beijing Declaration, which stemmed from the Fourth UN Conference on Women in 1995, unequivocally affirms that 'the right of all women to control all aspects of their health, including their own fertility, is basic to their empowerment'⁴⁷. This is echoed by the Public Health Association of Australia, which states that control of fertility is crucial to a woman's ability to maintain her health⁴⁸.

7.8.4 Australia also has an obligation to implement the principles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 12 requires that measures be taken to ensure 'on a basis of equality of men and women, access to health care services, including those related to family planning'⁴⁹.

7.8.5 Access to accurate, timely and unbiased information about sexual and reproductive health, sexual relationships and contraception is critical in supporting both women and men to make informed decisions. Evidence demonstrates that comprehensive sexual and reproductive health education and access to a variety of effective contraceptive choices help lower the rate of unplanned pregnancies⁵⁰.

7.9 Abortion

- 7.9.1 Women should have equity in access to a range of reproductive health services including safe, legal abortion. All women have a right to:
- obtain accurate information about abortion
 - make their own decision about abortion free from coercion or pressure
 - access safe, legal and affordable abortion services
- 7.9.2 Access to safe abortion services is a necessary part of any comprehensive system of reproductive health services⁵¹. To deny these services is to breach a woman's right to health.
- 7.9.3 Termination of pregnancy should be regulated in the same way as all health services and should be part of health services planning, service delivery and health workforce training.
- 7.9.4 Women should be able to 'make their own reproductive decisions with dignity and freedom from stereotypes and stigma'⁵². The decision to continue or terminate an unplanned pregnancy or a pregnancy where the foetus has been diagnosed with abnormalities can be difficult for many women and the provision of abortion services and information about abortion should be accessible, affordable and equitable⁵³.
- 7.9.5 Equity in access to abortion services is also an issue, particularly for women from rural and regional areas where services are limited or non-existent. Even where a service exists, women in rural and regional areas may travel elsewhere to ensure privacy and confidentiality. Traveling to metropolitan areas to access services can place further emotional and financial strain on women already making the difficult and often challenging decision to terminate a pregnancy. Financial barriers can also limit a woman's access to abortion, with varying rates charged by private clinics⁵⁴.
- 7.9.6 A right to be treated equally and with dignity and respect requires the rethinking of pregnancy from the perspective of the woman affected, by removing barriers to services and by recognising the inherent dignity that exists in controlling and making decisions about her own body⁵⁵. A woman's right to be treated equally and with dignity and respect cannot be infringed by restrictions placed on abortion services.

RECOMMENDATION 10: Comprehensive, equitable and accessible sexual and reproductive health services, including termination of pregnancy services, are a human right and must be ensured by a federal charter.

7.10 Abortion and the Victorian Charter

7.10.1 The Victorian Charter of Human Rights and Responsibilities contains a ‘savings provision’ that states that ‘nothing in this Charter affects any law applicable to abortion or child destruction’ (section 48)⁵⁶. This means that Parliament, the courts and public authorities are not required to take into account the rights listed in the Charter when making decisions based on laws relating to abortion. The issue of abortion is explicitly avoided.

7.10.2 To expressly exclude abortion using a savings provision violates a woman’s ability to access her rights. If women’s rights are considered to be equal to those of men and other groups in our society, then specifically excluding abortion from the remit of a national charter is to breach those rights, despite Australia’s international obligations and recent signing of the Optional Protocol to CEDAW. Abortion is the only issue that is excluded by the Victorian Charter and in doing so, Parliament has effectively discriminated against women by denying them the capacity to access their human rights in this area. This must not occur in any proposed national Charter.

7.11 Access to abortion intersects with a number of different human rights for women including the right to life and the right to freedom of thought, conscience, religion and belief, which are examined below.

RECOMMENDATION 11: Abortion must not be expressly excluded in the proposed charter as occurred in Victoria as to do so is to ignore women’s rights.

8 RIGHT TO LIFE AND WHEN LIFE BEGINS

8.5 The central issue when considering the right to life as it relates to the termination of pregnancy is ascertaining when life begins – at birth, at the moment of conception or somewhere in between. When drafting any potential national charter of human rights, the implications of any decision on when life begins must be taken into account.

8.6 Women’s Health West is clear that life begins at the moment of birth. There is much jurisprudence to support this view and the Law of Abortion: Final Report published by

the Victorian Law Reform Commission in 2008 provides an exploration of the key issues⁵⁷.

8.7 In international law there is no precedent for interpreting the word 'human being' as including the foetus^{58,59}. The Universal Declaration of Human Rights states that 'everyone' has a right to life and, following debate during the drafting process, chose not to include specific reference to the foetus⁶⁰. In the International Covenant on Civil and Political Rights, the right to life has been consistently interpreted as beginning at birth. The preamble to the Convention on the Rights of the Child, which is not legally binding, states that the rights of the child 'before as well as after birth' should be protected, however there is no consensus as to whether this includes the foetus. Elsewhere, the Committee on the Convention on the Rights of the Child has referred to the need for States to take measures against unsafe abortion practices⁶¹. The Human Rights Commission has also made consistent calls for states to decriminalise abortion laws⁶².

8.8 The right to life is not specifically conferred by CEDAW, however the CEDAW Committee has framed the issue of maternal mortality as a result of unsafe abortions as a violation of a woman's right to life⁶³. In addition to these conventions, the Victorian Law Reform Commission has also cited examples of case law in Australia, as well as the UK, Canada, South Africa and France, in which the foetus does not have legally enforceable rights until they are born⁶⁴.

8.9 This extensive body of law should influence any decision about the point at which life begins. The Australian Capital Territory in the Human Rights Act (ACT) 2004 explicitly qualifies the right to life in section 9(2) by stating 'this section applies from a person from the time of birth' and Women's Health West recommends that a similar approach be taken in relation to any national human rights charter for Australia⁶⁵.

RECOMMENDATION 12: Life begins at birth and this must be reflected in any right to life clause in the charter.

9 FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF

9.5 Individuals should not be discriminated against because they hold, or do not hold, particular religious beliefs. Australia is a secular democracy and religious rights should not be given primacy over other rights. They should be recognised as one of many, as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights stipulate.

9.6 The religious beliefs or conscientious objection of a health professional must be balanced against a woman's right to access accurate and timely health information and make informed choices about her body. A health professional who holds a particular religious belief or conscientious objection should not be discriminated against, but nor should their beliefs affect the ability of their patients to access healthcare and human rights⁶⁶.

9.7 The sexual and reproductive rights of women are often compromised by these rights and a national charter of human rights provides an opportunity to change this⁶⁷. The balancing of rights is a process and one that should be proactively acknowledged in any charter. A clause should be included in any proposed charter that acknowledges that competing rights must be carefully weighed up and balanced, and that certain rights, such as freedom of religion, should not be privileged over other rights. Section 7(2) of the Victorian Charter contains a provision outlining when human rights may be limited and this could be replicated in any federal charter. It states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

RECOMMENDATION 13: Religious rights and conscientious objections should not be privileged and an express provision that outlines the process by which human rights are balanced should be included.

10 FREEDOM OF EXPRESSION

10.5 The Victorian Charter allows for the right to freedom of expression to be limited 'for the protection of national security, public order, public health or public morality' (section 15(3)(b)). Women's Health West believes that the term 'public morality' should not be used in any federal a charter as it is too unclear and ambiguous. The South African Charter frames the limitation on this freedom differently and its format could be used as an example when drafting a similar provision:

The right to subsection (1) does not extend to:

- (a) propaganda for war;
- (b) incitement of imminent violence; and
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm⁶⁸.

RECOMMENDATION 14: A limitation to freedom of expression on the grounds of 'public morality' should not be included.

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