

National Human Rights Consultation

# A Human Rights Act for All Australians

Submission on the protection  
and promotion of human rights in  
Australia

June 2009



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The Murray Mallee Community Legal Service is a community legal centre providing legal information, legal advice, advocacy, law reform and community legal education across the Northern and Southern Mallee regions of Victoria and the South West of New South Wales. The catchment area is a large one, approximately 80,000 square kilometres, and encompasses the local government areas of Wentworth, Mildura Rural City Council, Balranald and Swan Hill.

The Service provides face to face appointments in our Mildura office and regular outreach appointments in Swan Hill, Robinvale and Dareton. We provide a freecall telephone advice line for the entire catchment area and a catchment wide community legal education program. We have been providing these services to our community since 1996.

The majority of clients seen by the Service are seeking our assistance with a range of family law matters. We also deal with administrative law, credit and debt law, consumer law, criminal law and a wide variety of other civil law matters.

## **1. Which human rights should be protected and promoted?**

All of Australia's human rights obligations under international law should be protected. These are the rights deriving from the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup>, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>2</sup>, both of which Australia has signed and ratified.

Our service conducted a survey of people in our catchment area to canvass their views on human rights generally, and whether Australia needed to enact a special law to protect them<sup>3</sup>. The majority of respondents (93%) stated that a special law was needed to protect human rights. The majority of respondents also felt that all of the human rights set out in the ICCPR and the ICESCR were important.

## **2. Are these rights currently sufficiently protected and promoted?**

We do not believe that human rights in Australia are currently adequately protected. The protection that does exist, such as anti-discrimination legislation, is piecemeal and ad hoc. This lack of

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<sup>1</sup> International Covenant on Civil and Political Rights entered into force 23 March 1976.

<sup>2</sup> International Covenant on Economic, Social and Cultural Rights entered into force 3 January 1976.

<sup>3</sup> See Appendix: Human Rights Survey Responses

protection is felt acutely by our clients, who are among the most vulnerable and disadvantaged members of society. The problems our clients face include a lack of access to basic services such as health, education and legal services. These problems are compounded by the rural, regional and remote nature of our catchment area.

The following examples show some situations where people in our catchment area have experienced problems that involve breaches of their human rights. We believe that a national Human Rights Act would have assisted these people.

### **Case studies 1 and 2**

We see a number of clients who wish to relocate from one place to another, along with their children, but are unable to do so because of Family Law Act orders.

One client lives in an isolated country town in our catchment area. Since the breakdown of her marriage to her violent alcoholic husband the children have resided with her. The client made a court application to relocate to a larger centre so that our client and the children could be nearer to their extended family and the children could attend a better school. The children expressed their desire to relocate. The husband opposed their relocation. Due to both the client's ill health and a Family Report that failed to adequately acknowledge the impact of the husband's violence and alcoholism and the difficulties the client and her children faced in accessing education and other services in the isolated country town, the client agreed to adverse orders preventing her relocation.

Other clients have had similar experiences. After the breakdown of her violent marriage, another client's children resided with her. The husband successfully applied for orders to spend unsupervised time with the children and requiring the young children to travel significant distance to spend time with their father. Our client's ill health, due the stress of the marriage breakdown, was a limiting factor on her ability to put her own case.

These cases reflect the tension in the Family Law Act 1975 (Cth) between the benefit to children of having a meaningful relationship with both parents and their right to live free from violence and abuse.

They also indicate the effects of the Family Law Act's restrictions on the right to freedom of movement on residence parents (who are women in the vast majority of cases) and children who live in

isolated country towns and who want to relocate to be nearer to extended family supports and often somewhere with better opportunities for education and employment.

In addition they reflect the problem of accessing adequate health care, particularly mental health care, in an isolated rural community.

**Human rights affected: freedom of movement, right of woman and children to live free from violence, right to adequate health care**

### **Case study 3**

Our client was a child involved in child protection proceedings. The child was difficult to place due to their problem behaviour. Because there are only a limited number of carers in this isolated rural area and very little facility for crisis accommodation, the child was placed by child protection with a family member despite the household containing a convicted child sex offender.

### **Case study 4**

A child's welfare had been investigated by child protection. Our client, a relative of the child, had communicated her grave concerns for the child's safety and current living arrangements to child protection. However the child was not removed or protected and the child subsequently died as a result of horrific violence.

**Human rights affected: rights of children to live in safety**

### **Case study 5**

An indigenous man died after being struck by a truck on a highway about 12 km outside a country town in our catchment. Two police officers were transporting him from one house to another within the town. The man was well known to the police officers because of his alcoholism and his criminal and mental health history. They were aware that hours earlier on the same day he had learned of his brother's death. The police officers left him on the side of the highway in the middle of the night, in winter, and shortly afterwards he was struck by the truck.

**Human rights affected: right to health, right to life**

## **Case study 6**

A client received a number of infringement notices in relation to driving their vehicle. This client had been diagnosed as having a significant mental illness and was addicted to a drug of dependence. The client had been homeless and living in a car for some time. On this basis we made an application to have the infringement notices revoked on the basis of their special circumstances.

The special circumstances list of the Magistrates Court exists to deal with infringement matters where the accused is either homeless, has mental health issues or drug addiction. It is recognised that the principles of sentencing can't be, or shouldn't be, met in relation to people with these issues (for example punishment, rehabilitation, deterrent).

The difficulties that this client faced were exacerbated by the remoteness of their (and our) location from the capital city of this state. The regional, rural and remote nature of our catchment area meant that secure accommodation couldn't be found, because the services for supported and crisis accommodation either don't exist here or are so minimal as to be unable to meet demand. The remoteness and isolation also meant that it was difficult for us to have the evidence in support of the application accepted. The special circumstances list requires reports from the treating psychiatrist, but in this geographical area, our client didn't have a treating psychiatrist, much less one that was willing to write a report. We were able to obtain a report from the treating General Practitioner and from the treating Registered Psychiatric Nurse and after a great deal of argument on our part they were accepted by the infringements court but not by Victoria Police to whom the matters were remitted.

As a result the matters were listed in open court in a forum designed to address the issues faced by people with homelessness, drug addiction and/ or mental health issues. However it only sits in Melbourne, necessitating our client attending the hearing there.

**Human rights affected: right to adequate health services, right to housing, right to a fair hearing**

## **Case study 7**

Access to legal services is a problem in our regional, remote and rural area.

In one case, our clients have cared for several children for some time, following intervention by the Department of Human Services. The clients came to us for help obtaining financial support from the Department. In addition, another family member has indicated an intention to commence proceedings to get the children back. Our clients found it very difficult to access legal assistance and participate in the legal process at all. This was due to a combination of the isolated location they live in, their age, and their ill health. This is compounded by their lack of knowledge of the legal system and negligible to basic levels of spoken and written English. The extreme isolation of their location has resulted in most instructions having to be provided over the telephone, documents posted back and forth, and so on.

Our Service is often only able to provide legal advice and does not have the capacity to provide assistance with issuing court proceedings or to provide court representation. This is a particularly acute problem in the family law area where legal aid for some types of matters is not available. Vulnerable people are left unable to access our legal system.

### **Human rights affected: right to legal advice and representation**

#### **Case study 9**

A school in our catchment area repeatedly refused to enrol our client's foster child because our client could not provide the documentation requested. Consequently, the child did not attend school for a period of time. In this case, the child's right to education was eventually met, as we were able to convince the school to enrol the child.

### **Human rights affected: right to education**

#### **Case study 10**

A client was summarily dismissed by their employer, after several months of employment in a government funded organisation, when it was revealed that they had a minor criminal record. Our client was an exemplary employee and the employer acknowledged that the employment was terminated solely on the basis of the minor and in our view irrelevant criminal record. There is no Victorian state law protection and ineffective Commonwealth anti-discrimination law. Although the Human Rights and Equal Opportunity Commission Act (Cth) 1986 includes discrimination on the basis of a person's criminal record within its definition of

discrimination, the only outcome of a finding of discrimination is recommendations and a possible report to parliament. In this regard, we note that an amendment to the Act is necessary in order to protect rights, enabling the Australian Human Rights Commission to order appropriate remedies when it finds that discrimination has occurred.

### **Human rights affected: right not to be unfairly discriminated against on the basis of criminal record**

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

A Human Rights Act should be enacted by the Commonwealth Government, protecting the human rights of all people in Australia in law. Ideally, our Service believes that Australia could best protect and promote human rights by amending our Constitution to include them. However, given that the Terms of Reference for the National Human Rights Consultation state that this is not a matter for consideration, we believe that that the Act should be in the form of a dialogue model such as that advocated by the Human Rights Legal Rights Legal Resource Centre (HRLRC) in its Submission to the National Human Rights Consultation<sup>4</sup>.

That is, the Act would be constructed so as to engage the three arms of government (parliament, the executive and the courts) in a dialogue about human rights. Parliamentary sovereignty would be preserved, with Parliament required to prepare a statement considering new legislation's compatibility with human rights when preparing and tabling it. Courts would be required to interpret all Commonwealth legislation compatibly with human rights where possible, and make a finding of incompatibility where this is not possible. If a finding of incompatibility is made, the matter would then be referred back to Parliament for consideration. In this way Parliament would have the final say on the issue.

Public authorities would be bound to act compatibly with human rights at all times. This would include government departments, statutory authorities, police and local government. In addition, organisations performing public functions on behalf of the Commonwealth would be bound when they are performing those public functions. We believe that a major benefit of a Human Rights Act will be that it will form a tool for people to use for themselves in

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<sup>4</sup> 'A Human Rights Act for all Australians: National Human Rights Consultation Submission on the protection and promotion of human rights in Australia', Human Rights Legal Resource Centre, May 2009.

direct negotiation to have government policies or decisions changed, where those policies or decisions breach their human rights.

This would appear to be born out by the Victorian experience since the Charter of Human Rights came into force on 1 January 2008. Since then, only a few cases involving the Charter have come before the Commission<sup>5</sup>. Rather, anecdotal evidence suggests that people are using the Charter as a planning and negotiating tool.

A Human Rights Act should contain an independent cause of action (except where a finding of inconsistency is sought) in order to best protect human rights, and appropriate, enforceable remedies for breaches of human rights. This would be important in situations such as case study 10 above, where the specific anti-discrimination legislation itself offered no remedy. As noted above, we believe the Human Rights and Equal Opportunity Commission Act (Cth) 1986 should be strengthened, including to provide adequate and enforceable remedies.

As well as being a resource that people can access to assert their human rights, enacting a Human Rights Act is a great opportunity to engage people in Australia in debate about the concept of human rights and responsibilities. This should be supported by well resourced human rights education targeting government, schools, community groups etc, workshops, advertising, and with other measures designed to increase people's knowledge and understanding of human rights and responsibilities in Australia.

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<sup>5</sup> 'Emerging Change: the 2008 Report on the operation of the Charter of Human Rights and Responsibilities', Victorian Equal Opportunity and Human Rights Commission, 2009.

## Appendix Human Rights Survey Responses

1. What human rights are important to you?	Number of positive responses	% of positive responses	Notes
Making my own decisions – not other people making them for me.	39	91%	
Housing when I need somewhere to stay	35	81%	
The freedom to spend time with whoever I like	33	77%	
Health care when I'm sick	39	91%	
The freedom to go where I want	35	81%	
People should not treat me badly because I am from a different country, am a woman, gay or any other reason that makes me a bit different from others	36	84%	
Being able to buy the basic things I need	37	86%	
The right to join a union to protect me at work	33	77%	
My privacy	39	91%	
Protection of my family and children from anyone hurting them or telling us what to do	39	91%	
The right to a good education	40	93%	
Right to have my own culture/language	33	77%	
Non discrimination. People should not treat me badly because I have a disability	39	91%	
Being treated with dignity and respect	39	91%	
The right to follow any religion (church) without fear	38	88%	
No bad treatment of me	37	86%	
A fair trial if I have to go to court	37	86%	
The freedom to say what I like, as long as I don't say things that hurt other people	39	91%	
To enjoy and be included in my community	37	86%	
The right to vote in elections, even if I don't have an address or I am in jail	30	70%	
The right to work	38	88%	
Enough money, and pension from the government if I need it	35	81%	
Enough food and water	39	91%	
Other	8	19%	

2. Are these rights protected enough?	8	19%	
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3. Have you ever felt that your rights were not respected?	20	47%	
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4. Do you think Australia needs a special law to protect human rights?	40	93%	
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Median age of respondents (optional)	43.5	56%	
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Total number of respondents	43
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Survey conducted in Mildura, Victoria April to June 2009