

Submission to the National Human Rights Consultation Committee by the Welfare Rights and Legal Centre (ACT)

About WRLC

The Welfare Rights and Legal Centre is a community legal centre providing legal advice and advocacy in the areas of Social Security law, Tenancy law (particularly public and community housing) and Disability Discrimination law. It provides services to people on low incomes or with disability within the ACT and local region.

Most of the WRLC's workload takes place in a jurisdiction (the ACT) which already has a degree of protection for human rights in the form of the *Human Rights Act 2004*.

Which Human Rights (including corresponding responsibilities) should be protected and promoted?

The ACT *Human Rights Act 2004* ('HRA') contains rights drawn from the ICCPR, but omits a number of rights from that instrument. It does not contain any of the rights found in any other international instrument, most notably, it does not contain the rights set out in the ICESCR.

For much of its history, the Act contained no direct action for individuals, instead requiring Parliament and the Courts to consider the rights contained in the Act when legislating or interpreting legislation. The effect of this construction has been to concentrate the effect of the Act in the area of criminal law. There has been regular discussion of the HRA in the criminal division of the ACT Supreme Court, but relatively little in other jurisdictions, such as the (former) Administrative Appeals Tribunal.

In our own practice, there has been limited scope for use of the HRA for three reasons. Firstly, two of our three areas of practice involve Commonwealth laws (eg: Discrimination and Social Security laws) which fall outside the scope of the HRA. Secondly, the area of our practice which does fall under the HRA (Tenancy law) sometimes involves actions by private landlords, who are not covered by the HRA. Thirdly, the absence of the ICESCR rights in the HRA means that those rights which are included in the HRA generally do not address the issues faced by our clients.

In our experience, many of the rights contained in the ICCPR tend to affect people on a personal level on a periodic or irregular basis only.. They are



undoubtedly important rights which are essential to a functioning democracy. However, the rights contained in the ICESCR affect the daily lives of all Australians. The need for a secure home, education, health and work are common to all of us. Although many of our clients experience treatment which could be considered a breach of one of the ICESCR rights, there is currently no remedy for such breaches under the HRA. In the area of Tenancy for example, such breaches can result in homelessness, damage to a person's physical health, debt, and the break up of families. For this reason, the WRLC strongly supports the inclusion of the rights contained in both the ICCPR and ICESCR in any bill or charter of rights.

Are these Human Rights currently sufficiently protected and promoted?

In relation to this question, the WRLC endorses paragraphs 36 to 51 of the submissions of the Law Council of Australia, particularly in relation to the need for effective protection to include a system by which individuals can obtain remedy for breach of Human Rights.

How could Australia better protect and promote Human Rights?

In our view, to be effective, any system of Human Rights protection must have the following elements:

- a clear enunciation of the rights protected;
- a means of ensuring that our laws are consistent with Human Rights;
- a means of ensuring that decision makers, both administrative and judicial, consider applicable Human Rights in their decision making;
- an educational function designed to promote an understanding of the operation of Human Rights at a practical level among both those who hold rights and those who hold responsibilities arising from those rights, and
- enforceable remedies for breach.

In relation to this last point, the WRLC would add that it is important to provide alternatives to litigation for individuals seeking remedies. While litigation has the advantage of producing case law which assists in the understanding of the practical operation of human rights, it is generally slow, expensive and often inaccessible to vulnerable and disadvantaged members of the community people, most in need of its protection. The WRLC recommends that any Human Rights legislation should make provision for alternative mechanisms for remedy such as conciliation, preferably through an institution such as the Australian Human Rights Commission.

The WRLC is of the view that a system of rights protection should extend beyond Australian citizens to all people within the jurisdiction of Australian law,

whether present in Australia or not. An exception to this would be those rights in the ICCPR which are expressed as being rights attaching to citizenship.

How can Human Rights be used in practice?

The following examples are drawn from the WRLC's practice in the ACT jurisdiction. They give some insight into the types of situations in which Human Rights can play an important part in the lives of individuals. Some identifying details have been changed to protect the privacy of our clients.

In litigation:

- The WRLC represented an elderly female client in the Residential Tenancies Tribunal in a case involving a failure by Housing ACT to make repairs to the client's public housing property. The client paid a rebated rent of 25% of her income. She sought a rent reduction and/or compensation for the failure. Housing ACT argued that when a rent reduction was ordered on a rebated rent, the reduction should only be applied in so far as the reduction exceeded the difference between the market value and the rebated rent. The WRLC used section 8 (equality before the law and non-discrimination) to argue that this was an unacceptable interpretation of the *Residential Tenancies Act 1998* (ACT) as it would result in tenants receiving different levels of compensation for identical breaches depending on whether they were paying market or rebated rent. The Tribunal rejected Housing ACT's argument and awarded compensation on the basis that a reduction of a rebated rent would not provide financial compensation equal to the loss incurred.

In general advocacy:

- A vulnerable female client who was being intimidated by a neighbour sought Housing ACT's permission to modify her rented property to limit access. The submission to Housing ACT relied on, amongst other things, the client's right to privacy (section 12 Human Rights Act 2004). Permission to make the modifications was granted.
- Following the death of her mother, a client found that she and her children were not entitled to remain in her mother's public housing property, as the lease had been in her mother's name. The children had always lived in the house and had close contacts with the local community, especially their school and nearby friends. The mother was in contact with Care and Protection and there was a risk the children would be taken from her care if she did not have a home for them. In submissions to Housing ACT we raised the right to protection of family life (s. 11 Human Rights Act 2004). The client was given a lease over the property.
- A client 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. Our client was not eligible for priority housing as she had outstanding debts to Housing ACT from a previous tenancy. We used the right to protection of family life (s. 11 Human Rights Act 2004) to advocate for flexibility in applying the allocation rules. The client was housed as a priority candidate prior to arranging repayments on the debts.

Summary of submissions

The current coverage of Human Rights in Australia is inadequate and lags behind the standard in most other developed nations. The efforts of the Governments of Victoria and the ACT to provide some mechanisms by which Human Rights can be exercised are to be commended, but a State by State approach will not ensure coverage for all Australians. Unequal protection of rights is itself a breach of the most fundamental of the rights contained in the *International Covenant on Civil and Political Rights* ('ICCPR') – the right to equality before the law.

The WRLC supports:

- the introduction of a legislative bill or charter of rights containing each of the rights set out in the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') and containing particular reference to the cultural rights of Indigenous Australians;
- provision for the limitation of rights only where such limitation is:
 1. necessary to achieve a purpose recognised as legitimate and justifiable in a democratic society,
 2. contained in legislation, and
 3. the least restrictive means of achieving the purpose.
- an Act which imposes obligations on:
 1. Federal parliament to consider whether new and amended legislation is consistent with Human Rights;
 2. the judiciary to consider whether legislation brought before it is consistent with Human Rights, to interpret legislation in a manner which is consistent with Human Rights in so far as that is possible and report cases where legislation cannot be interpreted consistently with Human Rights.
- an enforcement mechanism which contains both a direct right of action in a Court / tribunal and an alternative such as conciliation, preferably through a dedicated body such as the Australian Human Rights Commission.

- The extension of human rights protection to all individuals under the jurisdiction of Australian law, regardless of physical location or citizenship status.

As the Committee's terms of reference do not permit it to consider a constitutionally entrenched charter or bill of rights, we have only considered legislative options in this submission. However, we note that the WRLC would support the introduction of a constitutionally entrenched system of human rights protection in preference to a legislative model.

Helen Dalley
Solicitor
Welfare Rights and Legal Centre Limited