



15 June 2009

National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office, Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Consultation Committee

NATIONAL HUMAN RIGHTS CONSULTATION

1. Women's Legal Services NSW (WLS NSW) welcomes the opportunity to make a submission to the National Human Rights Consultation.

About Women's Legal Services NSW

2. WLS NSW is a community legal centre that aims to provide a voice for women in NSW and to promote access to justice, through the provision of legal services, law reform and community legal education, particularly for women who are disadvantaged by their social and economic circumstances. Areas of expertise include women's rights, family law, family and domestic violence, victim's compensation, sexual assault and discrimination.

About this submission

3. This submission is based on the professional experiences of WLS NSW staff and their clients, as well as feedback we have received from various stakeholders. It is structured according to the three questions asked by the Consultation Committee.
4. WLS NSW ran training sessions with 25 domestic violence and health workers to educate them about human rights and find out their views on the Committee's questions. We also collected submissions from 21 people at International Women's Day gathering in the Sydney CBD. These submissions have been forwarded to the Committee separately.

Terms of reference – constitutional bill of rights

5. It is disappointing that the terms of reference expressly preclude consideration of a constitutional bill of rights. All options for improving the protection of human rights in Australia should have been open to consideration by the Committee.



Which human rights should be protected and promoted?

Recommendation 1:

All human rights – civil, political, economic, cultural and social – should be protected and promoted, especially the:

- right to be free of gender-based violence;
- right to equality;
- right to live free from discrimination;
- right to family;
- right to housing; and
- right to health.

All human rights should be protected and promoted

6. Australia is obliged to protect human rights under a number of United Nations human rights treaties, including the International Convention on Civil and Political Rights, the International Convention on Economic, Cultural and Social Rights and the Convention on the Elimination of all forms of Discrimination Against Women. Australia should meet its international obligations by ensuring that all these rights are protected in domestic law.
7. The rights that are set out in the United Nations Declaration on the Rights of Indigenous Peoples should also be protected in Australia. The Declaration affirms the ‘minimum standards for the survival, dignity and well-being’ of Indigenous peoples. These minimum standards should be protected in Australia.

Human rights are indivisible and interdependent

8. Civil and political rights and economic, social and cultural rights are indivisible and interdependent. If basic economic, social and cultural rights are not protected, then it is often difficult to enjoy civil and political rights.
9. For example, a homeless woman – escaping domestic violence and unable to obtain housing – would have trouble being able to vote because she may not have a residential address at which to enrol.

Human rights that are most important for our clients and stakeholders

10. While WLS NSW believes all human rights should be protected and promoted, our clients’ stories and consultation with stakeholders reveal that some rights are of particular importance. These include the:
 - right to be free of gender-based violence;¹
 - right to equality;²
 - right to live free from discrimination;³
 - right to family;⁴
 - right to housing; and⁵
 - right to health.⁶

¹ CEDAW Committee General Recommendation 19.

² International Covenant on Civil and Political Rights, Article 3; International Covenant on Economic, Cultural and Social Rights, Article 3; Convention on the Elimination of all forms of Discrimination Against Women, Article 3.

³ Convention on the Elimination of all forms of Discrimination Against Women, Article 2.

⁴ International Covenant on Economic, Cultural and Social Rights, Article 10.

⁵ International Covenant on Economic, Cultural and Social Rights, Article 11; Convention on the Elimination of all forms of Discrimination Against Women, Article 14.

Are these human rights currently sufficiently protected and promoted?

11. No, human rights are not currently sufficiently protected and promoted in Australia. Nearly all our clients have had their human rights breached in some way. This will often be in relation to their right to live free from gender-based violence.
12. We are aware that other submissions, such as that from the Human Rights Law Resource Centre and the Gilbert + Tobin Centre of Public Law, outline in detail the inadequacies of the Australian legal system in protecting human rights. We refer you to those submissions. However, we have included some of our clients' stories in this submission to provide some examples to the committee of the ways in which their rights are violated:

Case study 1: Mary and her rights to housing and to be free of gender-based violence

Mary came to a women's legal service advice clinic in south-western Sydney. She was seeking assistance to complete a public housing survey form, required for her to remain on the public housing waiting list. She presented at the interview very anxious to obtain housing to enable her to leave her husband. She had bruising to her neck and upper arms, although she claimed that the cause was accidental.

The waiting period in the area she was seeking housing was 15 years; and the priority housing waiting period was up to five years. She was not ready or able to accept assistance to find refuge accommodation or information about seeking a violence protection order and wanted safe, affordable housing to enable her to separate. Due to the lack of safe, affordable housing, it seemed likely that Mary would be unable to leave her violent husband.

Case study 2: Sarah and her rights to housing and to be free of gender-based violence

Sarah was physically assaulted by her husband, Billy. The police took out criminal assault charges and sought an apprehended violence order on Sarah's behalf. They also attempted to get an interim exclusion order – excluding Billy from the home so that Sarah would not be forced to leave her home to escape violence – but the magistrate refused to do so after Billy said he needed to look after their fifteen year old daughter. However, there was no reason why Sarah could not look after the daughter and there was a possible risk of harm to the daughter if Billy was not excluded from the house. As Billy remained in the home, Sarah had no option but to leave the house to avoid further violence.

Sarah is working and earns a modest salary. She could just afford alternative rental accommodation, however this meant she could no longer afford to pay the mortgage for the home that Billy was staying in without contributing any mortgage payments. In addition to this Sarah had the added financial burden of a loan for a car she had to buy as she could not retrieve her car from Billy despite it being in her name.

While the legal avenue of appeal against the magistrate's decision not to grant an extension order was available to Sarah, the time lag for an appeal to proceed to the superior court meant this process was of little use to Sarah.

Due to the systemic failures in protections for domestic violence victims Sarah, despite charges being laid against Billy, faced a choice between living with violence, homelessness, or potential bankruptcy and home repossession. Sarah's daughter continues to live with a violent person.

⁶ International Covenant on Economic, Cultural and Social Rights, Article 12; Convention on the Elimination of all forms of Discrimination Against Women, Article 12.

Case study 3: Teleah and her right to freedom of movement

Teleah moved to Emerald, a remote town in Queensland, to live with her boyfriend, Tyrone, when she was 17. A few weeks later she became pregnant with his child, who they named Chantelle. Tyrone was very violent towards Teleah but not towards Chantelle. Chantelle also had a good relationship with Tyrone's mother.

Three years after moving to Emerald, Teleah saw a social worker who encouraged her to leave Tyrone because his violence was causing her both significant psychological and physical injuries. She had no family or friends in Emerald, and found it very difficult to find a safe place to live in town as most people in town are family or friends of Tyrone's family.

Teleah wanted to move back to Nowra to be with her family so that they could support her in her recovery from years of a violent relationship. Tyrone and his mother do not want Teleah to take Chantelle back to Nowra. A lawyer advises Teleah that, even though she is Chantelle's primary carer, it would be difficult for her to move back to Nowra with Chantelle given Chantelle's good relationship with her father and grandmother. As a result, Teleah is 20 and stuck in Emerald without any friends or family, or a way to exercise her right to freedom of movement without potentially relinquishing her daughter.

Case study 4: remote areas of NSW

WLS NSW auspices Family Violence Prevention Legal Services in Bourke-Brewarrina and Walgett. Residents of these regions face a lack of services as a result of their remote locations, including health, legal, and counselling services. Housing is also extremely limited in some of these towns, leading to overcrowded residences. This serves to further disadvantage members of the Aboriginal communities living in these areas.

For example, due to the lack of qualified practitioners in these areas, sexual assault victims are forced to travel excessive distances to towns such as Orange, Dubbo and Bathurst for forensic examinations. This adds to the distress and trauma of victims of sexual assault. Victims are not to shower, brush their teeth or change their clothes before being examined. To stay in this state for hours in transit adds to the degrading experience and traumatic nature of the process involved. Victims may decide not to have forensic examinations undertaken on this basis. They may also be uncomfortable being transported long distances alone with male police officers following a sexual assault.

These factors discourage victims of sexual assault in these regions from participating in the forensic process, which has implications for charge and conviction rates for sexual assault in these areas of NSW. The United Nations CEDAW Committee has noted that it is concerned about Australia's human rights record in relation to charge and conviction rates for sexual assault, and limited access to services in rural areas.⁷

Lack of access to services has been further exacerbated by the cancellation in late 2008 of commercial flights between Dubbo and towns including Walgett, Lightning Ridge, and Bourke.

⁷ Committee on the Elimination of Discrimination Against Women, Concluding Comments, 34th session, 3 February 2006, CEDAW/C/AUL/CO/5.

How could Australia better protect and promote human rights?

A national Human Rights Act

Recommendation 2:

Australia should introduce a national Human Rights Act. Such an Act should:

- protect *all* human rights, especially:
 - right to be free of gender-based violence;
 - right to equality;
 - right to live free from discrimination;
 - right to family;
 - right to housing; and
 - right to health;
- include a separate free-standing statement on gender equality, similar to that in the Canadian Charter of Rights and Freedoms, ICESCR and ICCPR;
- protect *all* natural people subject to Australia's jurisdiction against human rights violations, regardless of their citizenship, residency or immigration status;
- require compliance from public authorities, including government departments and statutory authorities, and parties that perform functions of a public nature on behalf of government;
- require Parliament to consider the human rights impact of any draft law, and require the responsible Minister to state whether or not the law is believed to comply with the Human Rights Act and provide a justification for any incompatibility;
- require courts to interpret all Commonwealth legislation in a manner compatible with human rights and empower courts to issue a declaration of incompatibility where it is not possible for a law to be interpreted with human rights; and
- include a cause of action for breaches of human rights and a range of remedies for human rights breaches, including monetary compensation.

13. We refer the Committee to the submissions from WomenSpeak, the Human Rights Law Resource Centre and the Gilbert + Tobin Centre of Public Law for further detail on these various elements of a Human Rights Act. In this submission, we elaborate on the importance of protecting the right to be free of gender-based violence, and the ways in which a Human Rights Act could help clients of WLS NSW.

Right to be free of gender-based violence

14. Gender-based violence is a form of discrimination that limits women's achievement of other human rights.⁸ With one in three women affected by physical violence,⁹ violence against women is arguably the most wide-spread human rights abuse in Australia.

15. We acknowledge this right can be derived from other rights, including gender equality and the right to liberty and security of person. However, we argue the right to live free from gender-based violence should be expressly protected because of the widespread nature of violations of this right and the slow rate at which violence against women is being eliminated.

16. An express right to be free of gender-based violence would mean that the impact of proposed legislation on women's safety would be considered by Parliament. This could

⁸ CEDAW Committee General Recommendation 19.

⁹ National Council to Reduce Violence Against Women and Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children 2009–2021 - A Snapshot*, March 2009.

contribute greatly to the elimination of violence against women in Australia. In addition, including such a right would be publicly reinforce, for men and women, that violence against women is not acceptable and is a human rights abuse.

How a Human Rights Act could help clients of WLS NSW

17. The human rights of WLS NSW's clients would be better protected by the creation of a national Human Rights Act. If their rights were breached, there would be a legal avenue to seek to remedy this. Further, if parliament and government considered the impact of new laws and policies on human rights, including housing, health and freedom from violence, some of the human rights violations suffered by women could be prevented.
18. For example, many clients tell us that they would rather remain with their violent husbands than risk leaving them only to have a court order that their husband can have unsupervised contact with their children. They feel that they can best protect their children from harm by staying with their husbands at the expense of their own right to live free from violence. Examining the impact of family law changes on human rights, such as the right to be free of gender-based violence, would ensure that laws and policies are developed that assist our clients in realising their rights, rather than contributing to ongoing violations of them.
19. Women's experience in other jurisdictions reveals how a Human Rights Act could assist WLS NSW's clients. In South Africa, the Constitutional Court found that the rights of assault victim, Alix Carmichele, were breached by police and prosecutors and that she was entitled to compensation. It found that the Bill of Rights and international law obliged the government to prevent gender-based discrimination and to protect the dignity, freedom and security of women. Alix was brutally attacked by a man who had already been charged with attempted rape and murder but had been released from custody pending his trial. By recommending the assailant's release, the police were found to have breached this right. The prosecutors were also found to have negligently failed their duty to place before a court any information relevant to the refusal or grant of bail.¹⁰
20. In the United Kingdom, the *Human Rights Act 1998* (UK) was used to assist a women fleeing domestic violence with her children. Her husband kept tracking them down and they would move towns whenever he discovered their whereabouts. The family eventually arrived in London and were referred to the local social services department. Social workers told the mother she was an 'unfit' parent and that she had made the family intentionally homeless. They said that her children had to be placed into foster care. An advice worker helped the mother to challenge this claim on the basis of the right to respect for family life. As a result, the family were permitted to stay together and the social services department promised to provide the deposit if they could secure private rented accommodation.¹¹
21. In Victoria, the Charter of Human Rights and Responsibilities was used to assist a pregnant single mother with two children who were living in community housing. She was given an eviction notice without providing any reasons for the eviction or an opportunity to address the landlord's concerns. Rights to privacy and protection of families and children were used to negotiate with her landlord to prevent an eviction into homelessness and to reach an alternative agreement.¹²

¹⁰ *Carmichele v Minister for Safety and Security and Minister of Justice and Constitutional Development* South African Constitutional Court, CCT 48/00.

¹¹ This example is from British Institute of Human Rights, *The Human Rights Act – Changing Lives*, 2nd ed, 2008, p 18, and appeared in Australian Human Rights Commission, *Human Rights and Women*, 2009.

¹² This example is from Rachel Ball, *Outside Classrooms and Courtrooms: The Good News on Human Rights*, 2009 (paper presented by Emily Howie at the Victorian Equal Opportunity and Human Rights Commission's Human Rights Conference).

Other improvements to human rights protection

Recommendation 3:

Other changes should be made to improve human rights protection in Australia, including:

- constitutional affirmation of the principles of equality and non-discrimination;
- constitutional recognition of Aboriginal people as the traditional custodians of our land;
- increased power and resources for the Australian Human Rights Commission;
- adequate funding of services that assist in the protection of human rights, including community legal centres;
- strengthening women's policy mechanisms; and
- strengthening the Sex Discrimination Act, in line with the 2008 recommendations of the Senate Standing Committee on Legal and Constitutional Affairs.

22. In addition to a Human Rights Act, a number of other changes should be made to the Constitution, existing laws, policies and organisations to improve human rights in Australia. While we have not explored these in detail, we have set them out above. Again, we refer the Committee to the submissions from WomenSpeak for further detail on these matters, as well as the Senate Standing Committee on Legal and Constitutional Affairs 2008 report on its inquiry into the effectiveness of the *Sex Discrimination Act 1984* (Cth).

23. If you would like to discuss any of the issues raised in our submission in more detail please contact or me on 02 9749 7700 or Edwina_MacDonald@clc.net.au.

Yours sincerely,

Edwina MacDonald
Law Reform and Policy Solicitor