



Submission to the National Human Rights Consultation
Committee on the Promotion and Protection of
Human Rights in Australia

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Acronyms

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| Organisations, Committees and Legal Centres | |
| Australian Human Rights Commission | AHRC |
| Community Legal Centre | CLC |
| Human Rights Committee | HRC |
| Committee on Economic, Social and Cultural Rights | CESCR |
| National Association of Community Legal Centres | NACLC |
| Non-Government Organisation | NGO |
| Organisation for Economic Co-operation and Development | OECD |
| Victorian Equal Opportunity & Human Rights Commission | VEOHRC |
| International Conventions | |
| Convention on the Rights of the Child | CROC |
| European Convention on Human Rights | ECHR |
| Convention on the Elimination of All Forms of Discrimination against Women | CEDAW |
| International Convention on the Elimination of All Forms of Racial Discrimination | CERD |
| International Covenant on Civil and Political Rights | ICCPR |
| International Covenant on Economic, Social and Cultural Rights | ICESCR |
| Legislation | |
| Disability Discrimination Act | DDA |
| Victorian Charter of Human Rights and Responsibilities Act | VCHRRRA |
| New Zealand Bill of Rights Act | NZ BoRA |
| New Zealand Human Rights Act | NZ HRA |
| Australian Capital territory Human Rights Act | ACT HRA |
| United Kingdom Human Rights Act UK | UK HRA |
| Rights | |
| Civil and Political Rights | CPR |
| Economic Social, Cultural and Environmental Rights | ESCER |
| Universal Declaration of Human Rights | UDHR |

Introduction

Women's Legal Service Victoria (WLSV) has been providing free legal advice, information, representation and legal education to women for over 25 years. We specialise in issues arising from relationship breakdown and violence against women. Our principal areas of work are crimes compensation, family violence (principally intervention orders) and family law. A significant proportion of our clients have experienced family violence and their experiences of violence are often central to their cases, even outside the area of intervention orders.

We applaud the Government on the establishment of the National Human Rights Consultation Committee (the Committee). We commend the work of the Committee in seeking the views and input of the community. We also thank the Committee for the opportunity to make this submission.

As we are aware of the substantial number of submissions that will be made to the Committee, WLSV will not add to the voluminous background information provided to the Committee in many of those submissions. We have therefore chosen to confine our submission to setting out the features of a Charter of Rights that we consider essential to the national protection and promotion of women's rights as human rights. We have limited the detail of our submission to our areas of specialisation, women's issues; particularly in the areas of family law and family violence.

The scope of our submission will be set out according to the parameters set out by the terms of reference put forward by the Committee. We hope to demonstrate the current ways women's rights are being protected under current legal and policy frameworks and how they can better be protected under a Human Rights Charter.

We will conclude by considering the possible options for redress and make recommendations about what rights should be included and the best avenues for enforcement of those rights.

Executive Summary

Over 60 years ago, Australia played a pioneering role in championing the UN Declaration of Human Rights through representatives like Dr Herbert Vere "Doc" Evatt. Dr Evatt found himself President of the United Nations' General Assembly as it took its first significant steps to recognise, protect and promote human rights around the world and he included women in the Australian delegation to the foundation meeting of the United Nations - at a time when politics, particularly international politics, was seen as the sole preserve of men.

Australia's advocacy on human rights, political legitimacy and parliamentary democracy in Asia Pacific countries like East Timor arguably contributed greatly to a speedy and just resolution of the turmoil. The result confirmed Australia's reputation as a just and stable leader in the region. It also led more swiftly to a peaceful and economically viable environment on our own doorstep.

Even with our progressive views and history at the United Nations, it is necessary to recognise that the enduring protection of human rights is not a foregone conclusion and that particular groups have historically been disadvantaged and disproportionately marginalised or disempowered as a result of entrenched societal attitudes and a lack of awareness about specific experiences of these marginalised or minority groups.

Whilst there is much for Australia to be proud of, there are also many areas of significant concern. Entrenched forms of systemic discrimination continue to affect the lives of many groups within the community and these groups remain less represented and vulnerable to various forms of neglect, harassment, intimidation and violence. These groups include; women, children, Indigenous Australians, the disabled, the mentally ill, the elderly, homeless people, gay, lesbian and transgender people and other marginalised groups.

While women constitute about half of the population, we only make up a small percentage of the people on corporate boards and in positions of authority within the community. Women continue to earn 84 cents of every dollar compared to men. Women, being the primary carers of children and other family members, are at a greater risk of poverty, lower superannuation and they are also at a significantly greater risk of violence and injury in intimate relationships. According to the VicHealth 2004 Report violence against women is the leading cause of ill health to women between the ages of 15 and 44 years.

The National Council to Reduce Violence against Women and their Children reports that the 2008 – 2009 total cost of violence against women and their children is \$13.6 billion.

Apart from this enormous financial cost, the social cost and the emotional, developmental and psychological damage done to women and their children is immeasurable.

Being a woman is thus still an unfortunate indicator of social and economic disadvantage as well as gendered victimisation in today's society.

While a Charter will not immediately solve any of these problems, it is a strong statement of our shared values and a commitment by the community as a whole about the importance these shared human values play in our lives. It will also educate, inform and influence laws and policy development so that Human Rights are given priority in drafting legislation and policy.

As a woman's legal service we will discuss the rights and responsibilities we recommend in a National Human Rights Act from a woman's rights perspective with regard to the terms of reference set out by the National Human Rights Consultative Committee.

Terms of Reference

- Which Human Rights and responsibilities should be protected and promoted?
- Are Human Rights sufficiently protected and promoted in Australia?
- How can we best protect and promote these rights in Australia?

Which Human Rights and Responsibilities should be protected and promoted in Australia?

Australia is a signatory to a number of Human Rights Conventions at the United Nations. Therefore all of Australia's human rights obligations under international human rights law should be incorporated and protected under Australia's domestic law. Australian domestic law should enshrine the fundamental civil, political, economic, social, cultural and environmental rights that are necessary for all people to live with respect, dignity and integrity and to fully participate equally in the community.

We submit that Human Rights are indivisible and interdependent. Having all of the rights enshrined in the relevant conventions be included in a National Charter is not only good practice but it allows all the rights to mutually reinforce each other. We further acknowledge that historically women's roles were designated to the private sphere and therefore appeared invisible in law, practice and protection. Part of that private relegation is reinforced by having civil and political rights be included in the Charter while economic, social and cultural rights are either not included or given a lower status. This is because most of the rights that affect women and a number of disadvantaged groups are located within the economic, social and cultural spheres.

Therefore all of Australia's human rights obligations under international law should be protected in Australian domestic law. Our International human rights law obligations are contained in the Universal Declaration on Human Rights (UDHR), ICCPR and ICESCR.

An inexhaustive list of the rights we recommend are listed below.

1. The Human Rights Act should include the following civil and political rights derived from the ICCPR:

- the right to legal recourse when rights have been violated, even if the violator was acting in an official capacity;
- the right to self-determination;
- the prohibition against retrospective punishment and penalty;
- the prohibition against double jeopardy;
- the right to equality of men and women in the enjoyment of civil and political rights;
- the right to a fair hearing;
- the right to presumption of innocence until proven guilty;

- the right to appeal a conviction;
- the right to life;
- freedom from inhuman or degrading treatment or punishment;
- the right to humane treatment in detention;
- freedom from slavery and servitude;
- the right to liberty and security of the person;
- freedom from arbitrary arrest or detention;
- freedom of movement;
- the right not to be imprisoned for an inability to fulfil a contractual obligation;
- the right to be recognised as a person before the law;
- the right to privacy and protection of that right by law;
- freedom of thought, conscience, and religion;
- freedom of opinion and expression;
- freedom of assembly and association; and
- the right to equality before the law and equal protection.

2. The Human Rights Act should include the rights enshrined in the International Economic Social and Cultural Rights Covenant (ICESCR):

- the right to an adequate standard of living, including adequate housing;
- the right to work, including the right to gain one's living at work that is freely chosen and accepted;
- just conditions of work and wages sufficient to support a minimum standard of living;
- the right to equal pay for equal work and equal opportunity for advancement;
- the right to form trade unions and the right to strike;
- the right to adequate food, water and sanitation;
- the right to the enjoyment of the highest attainable standard of physical and mental health;
- the right to social security;
- free primary education, and accessible education at all levels; and
- children's freedom from social exploitation.

3. Inclusion of obligations under CEDAW and other international human rights obligations

The Human Rights Act should include all our Convention and Treaty obligations including CROC, CERD, CEDAW and CRPD. As a woman's organisation, with reference to our areas of specialisation being Relationship Breakdown and Family Violence, we shall refer particularly to CEDAW.

Rights consistent with our CEDAW obligations and women specific issues

We recommend that the Human Rights Act should refer specifically to Human Rights as including gender equality as in Canada's Charter of Rights and Freedoms which would ensure that laws and policy are guaranteed a gendered perspective when being developed and implemented. The right to be free from discrimination also encompasses the right to be free from prejudice based gender stereotyping. We recommend that one of the responsibilities of the Act be to eliminate all forms of prejudice based on stereotypes; including gender stereotyping. The CEDAW committee has made recommendations that state parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act.

- **The Right to be free from gender-based violence.** CEDAW recognises this as a form of discrimination that limits the full potential of women and the full enjoyment of their other human rights. Though this right is not specifically mentioned in any instrument it is recognised that gender based violence is an inherent and grave problem specifically directed towards women thus discriminating against women and breaching their fundamental human rights by this gendered form of violence. This will also be in line with the governments' commitment to tackling violence against women in a very significant and substantive way.
- **The Right to bodily and psychological integrity including reproduction and the right to security and control over one's body.** We recommend that this right includes the right to determine the number, spacing, timing of their children also in keeping with the Right to found a family.
- **The Right to Health** as stated by the committee on ESCR, they have explained this right to health as the highest attainable standard of health and that this includes control over one's health and body and sexual freedom. This right therefore incorporates the right to control over one's sexuality and sexual function.
- **The Right to be free from discrimination.** Though this is a widely recognised right we submit that it specifically include sex, gender identity, sexual orientation, pregnancy and marital status as unlawful grounds for discrimination. The Act should therefore include the obligation for governments to implement policies that eliminate discrimination on the basis of sex. CEDAW also requires governments to take preventative measures to eliminate stereotyping based on gender as this is at the core of most discriminatory practices.

We also note that discrimination occurs where the outcome of policies and laws has a disproportionately negative impact on women and that this is a form of discrimination in effect if not in intent. Policy makers should thus take into account the impact of women's rights when devising legislation and policy.

Are these Human Rights currently sufficiently protected and promoted?

All rights derive from and simply express with greater specificity the overall human right stated in Article 1 of the Universal Declaration of Human Rights (UDHR): “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood”.

This is also recognised in the preamble of both the ICCPR and the ICESCR: “in accordance with the UDHR, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as his civil and political rights”.

While there are several anti-discriminatory and equal opportunity laws in Australia, their level of protection is not consistent and there are also several of these rights that are not currently protected in any legislation. There are thus many gaps in the current system. A National Human Rights Act would create consistency and ensure that the human rights of everyone in Australia are protected. In addition a Human Rights Act would provide important social and cultural benefits, including; improving law-making and government policy, improving public service delivery and results, protecting marginalised Australians by addressing disadvantage and by promoting Australia’s reputation as a good international citizen and regional and global human rights leader.

We shall illustrate the human rights gaps and the impact of these deficiencies on women and their children using the framework of our areas of specialisation; violence against women and relationship breakdown.

Violence against Women

When violence is perpetrated against women, their human rights are violated, meaning that these women cannot enjoy their human rights equally with men. The unfortunate result is that women are discriminated against. Both the ICCPR and ICESCR commit Australia to ensure that all the human rights enshrined in the Covenants are enjoyed equally by men and women.¹ Therefore, the Australian government is responsible for such acts of violence against women even if perpetrated by private individuals.

¹ Article 3 of the *ICCPR* and Article 2 of *ICESCR*

CEDAW states that the Right to be free from Discrimination includes the right to be free from gender based violence as gender based violence is one of the many ways women continue to be discriminated against in that they cannot enjoy their full potential or fully enjoy their other rights if they are not safe from violence or have adequate protection for themselves or their children.²

As violence against women is still so prevalent in the community, it is important for the community and especially women to see the importance of it by having the right to be free from gender based violence specifically mentioned in the Act.

The National Council to Reduce Violence against Women and their Children reports that without appropriate action, the total cost of violence against women and their children in 2021 is estimated to be \$15.6 billion. The largest contributor being pain, suffering and premature mortality at \$7.5 billion.³

The ways women and their children experience violence and the options open to them in dealing with violence and the extent to which they have access to services to meet their needs are shaped by the intersection of gender with other factors such as disability, English language fluency, ethnicity, physical location, sexuality, Aboriginal or Torres Strait Islander status and migration experience . The total cost estimates for vulnerable groups if appropriate action is not taken by 2021 – 22 is over 4 billion for immigrant and refugee women, almost 4 billion for women with disabilities over 2 billion for Indigenous women and over 1.5 billion for children who witness violence.⁴

Apart from this enormous financial cost, the social cost and the emotional, developmental and psychological damage done to women and their children is immeasurable.

The most prevalent forms of violence perpetrated against women are sexual assault and family violence. The overwhelming majority of such violence in Australia is perpetrated by men against women. Below are some statistics from the National Council's Plan for Australia to Reduce Violence against Women and their Children:

- Violence against women affects women from all cultural, religious, socio-economic backgrounds, all ages and all abilities;
- 1 in 3 women experience physical violence and almost 1 in 5 experience sexual violence over their lifetime³.
- Women usually experience violence from men they know, usually in their home and often repeatedly;
- Indigenous women are more likely to report higher levels of physical violence and sustain serious injuries;

² General comments 19 - <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

³ A Snapshot to Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children March 2009 , pg 4.

⁴ Ibid

- Women with disabilities are more vulnerable to violence with fewer options for appropriate support or options to escape the violence;
- Young women experience higher rates of sexual assault;
- Immigrant and refugee women are more likely to be murdered as a result of family violence;
- 1 in 4 children in Australia has witnessed violence against their mother or step-mother;
- Women and their children who have experienced violence have poorer health and are more likely to use mental health services more often after they have escaped the violence;
- The cost of violence against women and their children to the Australian economy is estimated to be \$13.6 billion in 2008 – 2009;
- If nothing is done 750,000 women will report being victims of domestic violence in the year 2021 – 2022 and it will cost the Australian economy \$15.6 billion.⁵

As recent figures show, large numbers of women in Australia are experiencing or have experienced violence, and sexual assaults. In some cases, these women have died at the hand of their partners. One only needs to look at a circle of three friends and think that one of them could have been subjected to family violence. These women cannot enjoy many of the same civil, political, social, economic and cultural rights as men because they are or have been subjected to violence and sexual assaults. In particular such women are significantly disadvantaged in accessing health, education, housing, legal and other services.

Violence against women therefore remains one of the greatest challenges for Australia. We will now consider the particular rights that affect women in relation to violence.

Freedom from inhuman or degrading treatment or punishment and the Right to life

Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence.⁶ Article 6 of the ICCPR provides that every human being has the inherent right to life. Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman

⁵ A Snapshot to Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children March 2009 , pg 4.

⁶ *ibid*

or degrading treatment or punishment. Given the prevalence in Australia of family violence, sexual assaults and deaths of women at the hand of intimate partners, women's right to life and freedom from inhuman or degrading treatment need to be better protected and promoted.

Unfortunately the problem does not stop with the adult generation of today. Research has found that children from homes in which interpersonal conflict is common are more likely to be bullies at school and continue to be highly aggressive in their later life. The problem is further exacerbated, in that it has also been found that victims of bullying develop an approval of violence against weaker people and that boys who are bullied at school are more pre-disposed than others to feel that wife abuse is legitimate.⁷ As such, family violence can lead to bullying in schools. Those bullies will continue to be aggressive in their adult lives and most likely to their partners. But alarmingly, these bullies will create a new breed of men, those boys who were bullied, to then be violent to their partners in the future.

The focus is not just on the prevention of violence against the women of today, but also the women of tomorrow. Unfortunately, whether measures are put in place to prevent such violence depends on the policies of the government of the day. Protection and promotion of the right to life and freedom from inhuman and degrading treatment should be protected by a Human Rights legislation that survives the change of governments and their policies. Protection and promotion of these rights should not be left to the government policy of the day but one that outlives successive governments.

Enjoyment of highest attainable standard of physical and mental health

Women experiencing violence and sexual assault need to have access to appropriate health care. Intimate partner violence is the leading contributor to death, disability and illness in Victorian women aged 15 to 44.⁸ Alarmingly, in an Australian survey of 400 pregnant women, 27% of these women reported that they had experienced violence during pregnancy.⁹

Indigenous women, women with disability, homeless women, refugees and migrants, and women from non-English speaking backgrounds experience

⁷ See Department of Education, Employment and Workplace Relations <http://www.dest.gov.au/NR/rdonlyres/2FC379D8-2839-4247-A01F-192CD5AE3037/1640/ResearchSummary.pdf>

⁸ Vichealth 2004

⁹ VicHealth 2008

particular barriers in accessing health services. Such barriers to adequate health care for people can include among others, financial barriers, language and cultural barriers, lack of transportation to medical facilities, competing needs such as food, accommodation and income and lack of health insurance.

The Committee on the CEDAW recommended that Australia take necessary action to ensure that bulk billing for health services is available to women in rural areas.¹⁰ The Committee also recommended that Australia take immediate measures to address the lack of access to health services for women with disability, particularly due to the lack of special equipment and other infrastructure.¹¹ Further, the Committee on the Elimination of Racial Discrimination has recommended that Australia increase its efforts to eradicate the disparities faced by Indigenous peoples in such areas as health and ensure that a sufficient number of health professionals provide services to Indigenous people.¹² Such recommendations by the key international human rights monitoring body show that women's right to the enjoyment of highest attainable standard of physical and mental health has not been met. It is hoped that a Human Rights Act will require politicians and policy makers to consider human rights and to ensure that the health needs of women in the most vulnerable positions are met.

The connection between domestic violence and mental health concerns has been established by numerous studies.¹³ Depression is the most common consequence of sexual and physical violence against women, and such women have a higher risk of stress, anxiety disorder and post traumatic stress disorder.¹⁴ A history of victimisation is a strong risk factor for developing chronic mental health concerns. In particular:

- Women who have a history of violent and abusive relationships are more likely to be affected by mental illness.

¹⁰ *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006).

¹¹ *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia*, UN Doc CEDAW/C/AUL/CO/5 (2006).

¹² *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005).

¹³ e.g. Krug et al., 2002; Roberts et al., 1998; Carlson et al., 2002, referred to in 'Collaboration between Mental Health and Domestic Violence' by Australian Centre for HealthCare Innovation <http://www.archi.net.au/e-library/coordination/access/collaboration-domestic>

¹⁴ UN 2006

- Women with (pre-existing) mental health concerns may be more vulnerable to experiencing domestic violence and less able to take protective action for themselves or their children.
- Mental illness in a perpetrator can lead to increased frequency and severity of violence.¹⁵

Mental health service providers need to be able to effectively identify domestic violence as an underlying factor in many women's presentations to their services. Failure by mental health services to respond appropriately to domestic violence, can place women at risk of ongoing and escalating violence and compromised mental health.¹⁶ Further, women and children may experience harm, in addition to the direct effects of domestic violence, if their attempts to seek help are met with inappropriate responses.¹⁷ The Senate Committee inquiry into mental health in 2006, found that more emphasis is needed on prevention and early intervention and it recommended that there be 'a substantial overall increase in funding for mental health services over time, to more closely reflect the disease burden and to satisfy the very significant unmet need'.¹⁸

There is a need for a women's rights approach to the provision of health services to women who have experienced violence, to allow for a more targeted response. For example, women escaping from violence who are also mothers need to have a system that supports them in their mothering role, and does not leave them disadvantaged. The right to the highest attainable standard of health should not be one that is available to only those that can afford it. The proportion of funds available to the public health system needs to meet the needs of the most vulnerable persons in our society, one that is specifically targeted to those women that are further marginalised.

Adequate standard of living including housing

Women escaping domestic violence by leaving their home often struggle to find adequate accommodation, particularly long-term housing. Domestic violence, family violence and family breakdown are the major reasons females

¹⁵ referred to in 'Collaboration between Mental Health and Domestic Violence' by Australian Centre for HealthCare Innovation <http://www.archi.net.au/e-library/coordination/access/collaboration-domestic-research> includes examples from; Golding (1999), Taft (2003), Gondolf (1998), VicHealth (2004), and Astbury and Cabral (2000).

¹⁶ Ibid reference to (Humphreys & Thiara, 2003).

¹⁷ Ibid

¹⁸ *A National Approach to Mental Health: From Crisis to Community* (2006)

approach homeless services for assistance.¹⁹ More than 350 people a day are turned away from homelessness services across Australia because of a lack of capacity and resources, with women and children the most likely to be rejected.²⁰ When crisis accommodation is unavailable or inadequate there is a risk that women and children will stay or return to a situation of violence.

Right to family

The amendments to the *Family Law Act 1975* (Cth) in 2006 place a greater emphasis on the role of both parents in the life of a child and that serious consideration should be given to sharing children's time between the parents.²¹ There is now a presumption that 'equal shared parental responsibility' is in the best interests of the child, although this presumption does not apply if there are reasonable grounds to believe that family violence or child abuse is involved.²² Where a court makes an equal shared responsibility order, it must consider giving parents equal time, or if not equal time then 'substantial and significant time' with the child.²³

Even before the 2006 amendments, a survey of 40 Family Court files involving children between in 1999-2000 found a tendency for little judicial attention to be paid to allegations of violence and control, and a failure to link those behaviours to the father's parenting capacity. In all but the most severe cases of violence, contact was virtually given.²⁴ There is a concern that the current emphasis on 'the benefit to the child of having a meaningful relationship with both of their parents may directly conflict with and override the provisions that are intended to recognise the need to protect children from family violence and abuse'.²⁵

¹⁹ Australian Government, *Homelessness: A New Approach* (2008) available at http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/documents/homelessness_report/section1.htm

²⁰ See NGO Submission to UN Committee on Economic, Social and Cultural Rights, "Freedom, Respect, Equality, Dignity: Action". Australian Institute of Health and Welfare, *Demand for SAAP Accommodation by Homeless People: 2005-06* (2007) 6, 56

²¹ B Fehlberg & J Behrens, *Australia Family Law, The Contemporary Context*, Oxford University Press, 2008.

²² *Family Law Act 1975* (Cth) s 61DA.

²³ *Family Law Act 1975* (Cth) s 65DAA.

²⁴ B Fehlberg & J Behrens, *Australia Family Law, The Contemporary Context*, Oxford University Press, 2008.

²⁵ Women's Legal Services Australia, *Submission to the Senate Legal and Constitutional Committee Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) 3 available at http://www.aph.gov.au/Senate/committee/legcon_ctte/family_law/submissions/sublist.htm.

Right to fair trial – cases of sexual assault and Family Violence

Whilst the right to fair trial is an important right to be enjoyed by all, the new Human Rights Act should balance that right with the right of a victim in family violence and sexual assault cases. Such protective measures should cover such things as the prohibiting irrelevant cross-examination of an alleged victims sexual history, limiting some access to counsellor's records, and prohibiting cross-examination by self-litigants of victims of family violence.

Right to Social Security

Women who escape violence need to have access to an adequate income to be able to live with dignity and be able to enjoy other human rights particularly, the rights to health, sufficient food and water, education, housing and participation. Often, women survivors of violence experience severe emotional stress about the future and often they will not have the ready funds to be able to set themselves up again. The effect of the violence strains their ability to work or to look for a job.

A person receiving social security payments needs to meet certain 'mutual obligation' requirements, whereby payments are made in return for job search and the achievement of other activity requirements. Failure to enter into such an agreement may render a person ineligible to receive the benefit claimed. There are currently some measures in place to deal with women escaping domestic violence, however they do not go far enough.

A study commissioned by the Department of Family and Community Services in 2003 found that over a 12 month period 45 per cent of single parents receiving income support had a diagnosable mental health disorder.²⁶ Given that 83 per cent of single parents in Australia are women, a large portion of the single parents on income support will be women experiencing mental illness. Women escaping violence need to be protected to ensure that payments are not discontinued because they are finding it difficult to meet their obligations, particularly given the high level of mental stress that such women experience. They would be particularly disadvantaged by the mutual obligation requirements. Further, parenting payments must be adequate, accessible to all and provided without discrimination. Australia's minimum social security payments should not be lower than the global average poverty line.

²⁶ See NGO Submission to UN Committee on Economic, Social and Cultural Rights, "Freedom, Respect, Equality, Dignity: Action" - P Butterworth, 'Estimating the Prevalence of Mental Disorders among Income Support Recipients: Approach, Validity and Findings' (Department of Family and Community Services, Policy Research Paper Number 21, 2003).

Relationship Breakdown

Almost half of all marriages will end in divorce. As 83 percent of sole parents in Australia are women, the inadequacy of parenting payments disproportionately affects women the most. The overall income of those reliant on income support is close, but often below the poverty line estimates. Women would also have accrued less superannuation than men because of the impact of their carer status in looking after children and other family members. They therefore take time out of the paid labour force and when they return they are more likely to have casual or part time jobs. Women also tend to be in jobs that have traditionally lower rates of pay. This creates vulnerability and an inequity in negotiating equality within the relationship as well as when the relationship breaks down. In many instances women are left poor if they are unable to access justice through the courts.

Right to just and fair working conditions

Women tend to spend less time in the workforce and are more likely to work part time or have casual jobs when caring for children. A recent study has found that about 70% of all part-time employees in Australia are women, and more commonly this will be mothers with dependent children regardless of age.²⁷ Part-time work is the dominant form of employment for women in lower skilled occupations such as Clerical, sales and service workers, although part-time work is also common among female Professionals.²⁸ In Australia in May 2008, the average total weekly earnings for all employees were \$702.30 for women and \$1,075.10 for men. These estimates produce a ratio of female to male earnings of 65.3 per cent, which equates to a gender pay gap of 34.7 per cent.²⁹ In 2007, the average superannuation balances for Australians aged 15 years and over with superannuation coverage were \$87,589 for men and \$52,272 for women.³⁰ These figures show that ultimately women are earning less and accumulating less for their retirement, and regrettably they are not been provided with any form of protection for providing the care for children, elderly and disabled. The Committee on ESCR in its concluding comments noted with concern that homeworkers, who are predominantly women, do not enjoy any form of social protection.³¹

²⁷ As at August 2008 see Women in Australia 2009, Office for women at <http://www.fahcsia.gov.au/sa/women/pubs/general/womeninaustralia/2009>

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ *Ibid*

³¹ *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/1/Add.50 (2000)

Further, Australia remains one of only two Organisation for Economic Co-operation and Development countries in the world not to have fully implemented a national paid maternity leave scheme. Although the current government is planning to introduce paid maternity leave, this is to be mean tested and not to be implemented until 2011. This is despite recommendation back in 2000 by the Committee ESCR's that Australia consider enacting legislation on paid maternity leave. Women have to wait again.

The right to family life and Freedom of movement

A common parenting dispute after separation is one involving a proposal by one of the parties to move residence (relocation) with the child/children. Relocation disputes have significant gender dimensions because primary care takers tend to be women. There are many reasons why women desire to relocate. In cases of family violence, women wish to move to make a fresh start. Often women move to be nearer to their mothers or other family members who may be able to help her with the children, to find a job or find cheaper housing.

Women that wish to relocate with their children after separation, face a hurdle in been able to make this move. Under the *Family Law Act* if a relocation would result in one parent not having a meaningful involvement in the life of a relocating child and in the absence of evidence of violence, abuse or neglect, the weight of the statutory provisions indicating against relocation exceeds that indicating for relocation. Even in our highly mobile society that values the freedom of its people to move as they please, the provisions of the *Family Law Act* seem to preclude relocation of the child, and child's parent in most cases.³² The current law operates to the detriment of the primary care taker who is far more often than not the mother.

In a recent case, a mother who moved from her home town of Sydney to a remote town in Queensland because of her then husband's job, was required to stay in Queensland even after separation.³³ The mother wanted to move back to Sydney. She told the Court that she was isolated and broke, and wanted to move back to Sydney where she would be able to find a job and would have the support of her mother.³⁴

The trial judge in the case, had asked the mother if she would still go to Sydney if her daughter was to stay in Queensland. The mother told the Judge that that she would not, because she would never leave her daughter. The Judge then asked the father if he would live in Sydney if that was where his daughter was to live. He said that he would not because he wanted to keep

³² The New Family Law Parenting System, National Seminar Series 2006, Law Council of Australia
Ibid pg 91

³³ *Rosa & Rosa* [2009] FamCAFC 81

³⁴ Caroline Overington, Lives Torn Apart, The Australian, 9 June 2009.

working at his job. He told the court that he could find a job in other places but wanted to stay in his job because it was interesting. The Court found the father's response reasonable and given that the father would not leave Queensland and the mother would not leave her daughter, the judge found that the only way that the daughter could have a meaningful relationship with both parents was require that the mother live in far North Queensland. The decision effectively ties the mother to the father's job, and what would be the case should the father take up a job in another area? Given that 83 percent of single parents are women, in practical terms, court orders restraining movement of a custodial (or residence) parent ordinarily exert inhibitions on the freedom of movement of women, not men.³⁵

Justice Gaudron in the High Court case of *U v U* observed that:

"The failure of a primary judge to give separate and full consideration to the true proposal of a mother, as designated primary carer and residence parent...The burden of such injustices will ordinarily fall, as here, on the wife. It will be she, not the husband, who will usually be confined, in effect, in her personal movements, emotional environment, employment opportunities and chances of remarriage, repartnering and reparenting. Effectively, as here, it is she who will be controlled by court orders that require her to live, and make the most of her life, in physical proximity to the husband's whereabouts. In this way, inconvenience to the husband is minimised. But the effect on the wife may be profound... Significant effects on the mother's emotional, residential, economic, employment and personal life have an inevitable impact on the happiness and best interests of the child."³⁶

In the same case, Justice Kirby noting the interests of a father and also of a child to have, and maintain, regular contact, observed that such contact can include telephonic, Internet, photographic, filmed and intermittent physical contact. He went on to say:

Today, contact does not have to be exclusively physical or face to face if the cost of insisting on such physical contact is to impose serious deprivations upon the human rights of custodial parents, who are mostly women. To take the contrary view is to entrench gendered social and economic consequences of caregiving upon women in a way that is contrary to the Convention on the Elimination of All Forms of Discrimination against Women to which Australia is a signatory. That Convention requires that such discrimination and inequality should be eliminated from the law of this country.³⁷

³⁵ *AMS v AIF and AIF v AMS* [1999] HCA 26; (1999) 199 CLR 160 at 206 [140] citing Australian Bureau of Statistics figures mentioned in *B and B: Family Law Reform Act 1995* (1997) FLC ¶92-755 at 84,195 [7.5].

³⁶ *U v U* [2002] DCA 36 at 142

³⁷ *Ibid* at 161

Equitable Access to Justice

It is imperative that women have access to legal advice and representation in times of relationship breakdown. Currently Cases in the family law jurisdiction are more complex, costly and time consuming than in the Magistrates Courts dealing with family violence matters. It is a fundamental right that women have equitable access to the courts and legal aid funding to get justice. As women are usually the poorer ones in a relationship, they are more likely to need legal aid when the relationship breaks down. Limited financial resources are a major impediment faced by women in need of legal assistance.³⁸ Women and their children often become permanently financially disadvantaged following separation or divorce.³⁹

The legal aid system has a central role in improving women's access to equality and justice. Currently the shortcomings affecting women in the system are as follows;

- Indigenous women, women from non-English speaking backgrounds and women with disabilities are chronically marginalised in terms of access to legal services and face significant disadvantage in relation to awareness and exercise of their legal rights support in areas such as domestic violence.
- Since July 1997 the commonwealth's current family law funding priorities have been more restrictive with a restrictive merits test and legal funding cap, the implication being that assistance becomes unavailable for people with high and complex needs.
- While the granting of legal aid appears to be gender neutral, criminal matters are given the highest priority. The majority of recipients of legal aid grants are men and they are more likely to receive it for criminal matters than family law matters. As there are more funds available for criminal matters which usually involve men it creates in effect a gender inequity as the cap in criminal matters is much higher than the cap in family law matters.⁴⁰

³⁸ Senate Legal Constitutional Affairs Committee, Inquiry into Legal Aid and Access to Justice 2004, pg42.

³⁹ *ibid*

⁴⁰ Senate Legal Constitutional Affairs Committee, Inquiry into Legal Aid and Access to Justice 2004, pg42-46.

Equitable access to justice is therefore imperative in assisting women with family law and family violence matters as most family law matters usually involve a nexus between the two.

Case Study illustrations of current gaps

Below are some case studies to further illustrate some of the gaps and the way a Human Rights Act may be used to plug those gaps. We will make reference to stories of women we have come into contact with our service through our Human Rights survey, our telephone advice line, our drop-in clinic and through our court representations. We shall also use ACT, Victorian and UK cases to further illustrate the point.

A number of the case studies are not legal cases and they should therefore not be treated as legal precedents. All names and identifying characteristics have been changed out of respect to their privacy.

The Right to Adequate Housing (ICESCR)

A number of women in the Family Law jurisdiction are also victims of family violence. As a result they sometimes have to flee to refuges. Due to the severe inadequacy of refuges, their children can sometimes be removed from their care if the Child Safety Services determine that a mother's constant transitional status means she cannot provide her children with stability and adequate housing. Sometimes transitional housing can only be provided for a short period of time and so victims and their children have to find alternative housing. Sometimes a woman can become homeless in that transitional period where she cannot access emergency accommodation and while waiting for priority housing from the public housing authorities.

The Right to be free from gender-based violence (CEDAW) and Right to housing (ICESCR)

Tina was a victim of family violence and she had three children, one of whom had special needs. She was on the run from a violent partner and she ended up in a refuge. The public housing authority had told her that they could not give her more than a two bedroom house with very poor facilities. It was very run down and virtually uninhabitable. The client chose to stay in the refuge and she was unsure when or if she would get public housing as she had refused to live in the previous house allocated due to the extremely poor standard.

The Right to be free from discrimination (ICCPR, CEDAW)

Ella was refused clothing at a Christian shelter because she was Muslim and Indigenous. She was advised to go to services for her kind. She returned back with her children when her non-Muslim friend on the same queue was provided with clothing. This time she took off her head scarf and did not declare her Indigenous status and she was provided with clothing and food for her and her children.

A Human Rights Act would impose obligations on public authorities to protect such women and their children from inhuman and degrading treatment, the right to be free from discrimination and gender based violence. A Human Rights Act could therefore inform public authorities on the need to provide and prioritise adequate public housing for domestic violence victims.

Note complexities of discrimination such that a person may be an older disabled woman or a woman from a culturally and diverse background with little or no English language and therefore face multiple layers of discrimination. An awareness of this should also inform the process of thinking about and defining a Human Rights Charter.

How can Australia better protect Human Rights?

Currently the protection of Human Rights in Australia is piece meal and ad hoc, with inconsistent levels and types of protection between the States. Human rights are currently protected through anti-discriminatory and equality legislation.

In spite of the anti-discriminatory and equality legislation across the states within Australia, there are gaps due to insufficient levels of protection.

Australia is a party to many human rights treaties including the ICCPR, ICESCR, CROC, CERD, CEDAW and CRPD. Enshrining all the rights in these treaties would affirm that as a society we are committed to creating the highest human rights standards in accordance with our international obligations.

We therefore recommend that Australia should enact a Human Rights Act that would ensure in a consistent way through a single instrument that the human rights of all people in Australian territory and subject to its jurisdiction are protected.

There are many benefits of enacting a National Human Rights Act. They include but are not limited to the following:

- Improve law-making and the development of government policy by requiring that all legislation and policy is developed with reference to the Human Rights Act and the values enshrined in it;
- It will improve the delivery of the of the public service, therefore reducing the gaps and taking into account the needs of all members of the community particularly those who have historically been invisible and not considered like the disabled, Indigenous Australians', CALD people, women and children, the mentally ill, people in rural and remote areas and other marginalised people;
- The rights of marginalised and historically disadvantaged people will be addressed. People from these social groups come into contact with the public service frequently and as a result are more likely to suffer violations. For instance people in high density housing are more likely to interact with centrelink, the public housing services etc. A Human rights act would ensure that service providers consider the respective needs when developing or implementing policies;
- Entrench a Human Rights culture in society as it would be a clear, single document enshrining our collective values which will contribute to a greater awareness and respect of these rights and an

understanding of the way these rights co-exist to protect us all in an inclusive way throughout the community;

- Add an economic value to the society as the costs associated with developing ineffective policies will be reduced if everyone's needs are taken into account when developing and implementing policies and legislation.
- Promote Australia's image as a good global citizen and regional human rights leader. Australia is currently the only Western democracy without a national human rights law, creating a Human Rights Act would increase our authority, profile and legitimacy in speaking out against abusing internationally and within our own region.

Case Study illustrations on ways in which a Human Rights Act could better protect Human Rights

The Right to Protection of Family Life

Source: Human Rights Law Resource Centre: ACT Case Study Example

A client was temporarily living with one of her children in a caravan park without electricity in NSW. The client's other child was living with her grandmother in the ACT in order to attend school. The client was not eligible for priority housing as she had outstanding debts to the public housing authority from a previous tenancy. The client's advocates invoked the right to protection of family life to advocate for flexibility in applying the allocation of rules. The client was housed with both of her children as a priority candidate prior to arranging repayment of debts.

The Right to Protection of Families (including Family Life) and Children

Source: Human Rights Law Resource Centre: ACT Case Study Example

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 through their school and nearby friends. The client was in contact with care and protection services and there was a risk that her children would be taken from her care if she did not have a home for them. In submissions to the public

housing authority, the right to protection of Family Life was raised. The client was given a lease over the property.

The Right to Privacy

Source: Human Rights Law Resource Centre: ACT Case Study Example

A vulnerable female client was being intimidated by a neighbour. She thus sought permission from her landlord, a public housing authority, to erect a fence around her rented property. The submission to the public housing authority relied on, amongst other things, the client's Right to Privacy. Permission was granted to erect the fence.

The Right to be protected from torture, cruel, Inhuman or Degrading Treatment

Source: WIRE HR Presentation Paper; Activism for women: Women creating Change

A v UK (European Court of Human Rights)

The European court of Human Rights found that domestic violence, involving a child in this case, amounted to a breach of Article 3 of the European Convention (equivalent to S. 10 of the Victorian Charter) and the UK government was held to be responsible for the abuse as its domestic law had failed to provide the victim/survivor with adequate protection against this abuse.

The Right to Family Life and the Right to Education

Source: British Institute of Human Rights, UK

A woman living in poverty left her partner after she found out he had been abusing their children. She and the children were placed in temporary accommodation and regularly moved. Eventually she was informed by social workers that the children would be taken from her and placed into care. They claimed she was unfit and unable to provide stability for her children and having difficulties getting them to school. At the case with the social services department, a local support group helped the woman argue that her children had a right to respect for private and family life and a right to education. The authority was asked to prove, on its track, record that it was better placed to provide the rights for the children. The department decided not to remove the children and within three weeks found stable accommodation for the family with assistance to purchase furniture and other goods.

What form should a Human Rights Act take?

Human Rights Charters can take a number of forms. In making our recommendation, we have considered the forms and operations of Human Rights instruments that exist in New Zealand, the United Kingdom, South Africa, the United States, Canada and other Australian jurisdictions; Victoria and the Australian Capital Territory (ACT).

Broadly the forms can be described as constitutional, legislative and some hybrid of both models.

We note that other Human Rights organisations would have considered the pros and cons of the various forms in more detail than we intend to cover in this submission.

We also note that the government is not considering a constitutional model (as exists in the U.S and South Africa) at this stage. We shall therefore only consider the legislative model and the hybrid model as it operates in Canada.

The Legislative Model

This model exists in various forms in the UK, New Zealand, Act and Victoria. One of the advantages of this model is that it has been tested in similar jurisdictions and in jurisdictions operating within Australia. This model exists as a dialogue among the three arms of government, the Parliament, the judiciary and the executive. This model preserves parliamentary sovereignty and gives parliament flexibility in amending and drafting legislation to reflect societal norms in the development of human rights. It also requires all Acts to be drafted taking into account the Human Rights Act and for compatible statements to be issued and where declared incompatible by the courts, for parliament to either make it compatible or justify its incompatibility.

The disadvantage of this model is that courts can't strike down inconsistent legislation and that Human Rights can be amended and repealed by a simple parliamentary majority.

Constitutional/Legislative Hybrid Model

This is the model Canada has now adopted. In the Canadian model, the Courts can invalidate legislation that breaches the rights in the Canadian Charter. The Charter can also only be amended by a process provided for in the constitution and parliamentary sovereignty is preserved through an override

provision. Therefore Parliament can either amend incompatible legislation or override it with the override provision.

The main disadvantage that is significantly different from the disadvantages of the Legislative dialogue model is that where the constitution is restrictive and difficult to amend, over time there might be rights that seem outdated and poorly adapted to the contemporary norms. For example the Right to Bear Arms in the U.S. Bill of rights was particularly relevant during the war of Independence when the Bill of Rights were written, but is now used to the detriment of the Right to Life.

We recommend the Legislative model and are of the view that either a dialogue model that has been tested in the UK, New Zealand and other Australian Jurisdictions or the hybrid Canadian model would work well. However for practical reasons of consistency in operation and flexibility the Legislative dialogue model may be a more suitable model for an Australian National Human Rights Charter.

Form and operation of the Human Rights Act

While we recognise the various models available, to ensure compliance with a Human Rights Act, we believe that an individual cause of action should at least be included.

Our recommendations are in line with the operation of the Human Rights Charter in Victoria with a broader scope for remedies and individual causes of action.

We also support the following operational mechanisms;

- **A duty of compliance by the public sector**

This would have the effect of improving the efficiency and effectiveness of public authorities. They would also provide a framework for balancing competing rights based on proportionality. Therefore individual human rights can be balanced against each other or the rights of the community as a whole in a proportional manner. They also improve accountability by making decision makers take into account the needs of individual service users which would lead to an improved result for those individuals. Therefore all policy, legislation and the implementation of both would be conducted using a Human rights compliance model and assessed for their impact on the Charter.

We believe that clear and unambiguous language will embed the culture of HR more readily and quickly into the public sector and general community discourse. This will further promote a culture of Human Rights which is one of the core objectives of the Charter. We further note that this duty would extend to any individual or organisation that has a contractual obligation meaning it is acting as an agent of the public sector.

- **Reviewing all new legislation to ensure Human Rights compatibility**

We believe compatibility statements can assist in developing a better understanding of the requirements of the Charter. Therefore all bills presented to Parliament irrespective of their source would require a Human Rights compatibility Statement. If it seeks to rely on a justifiable or reasonable limitation of Human Rights then the justifications should be explained with the assessment of compatibility. If it is incompatible then it should be specifically stated with the reasons given. Parliamentary scrutiny will increase parliamentary accountability and transparency in relation to human rights issues and assist in the development of a strong parliamentary culture of human rights compliance. It will also contribute to the creation of a robust human rights culture.

- **Allow judicial declaration of inconsistency**

That courts and tribunals should have the power to declare incompatible with the Human Rights Charter. Such decisions should be subject to the usual appeal process.

- **Possible Limitations and Restrictions**

A Human Rights Act also requires the balancing of rights and the limitation of some rights in certain circumstances. We recommend that any limitation placed on any rights be specifically stated in the Act.

For example the Right to freedom of expression in the Victorian Charter provides for limitation for specific purposes including public morality. This seems like a very vague ill-defined ground that we do not believe should be included in a National Human Rights Act. We also recommend that this right be balanced against the right to be free from discrimination so that freedom of expression will not include incitement of hatred or violence towards any group or individual.

The Charter should therefore include a provision enabling the Parliament to enact legislation that limits the rights recognised in the Charter to the extent that those limitations are reasonable and demonstrably justifiable in a free and democratic society.⁴¹

- **Include an interpretative clause**

The Charter should include an interpretative clause similar to that adopted in the UK which provides that legislation (whether primary or subordinate legislation and whenever enacted), so far as possible, interpreted in a way which is compatible with the rights contained in the Charter.

- **Provide enforceable remedies (including a broad standing provision)**

We submit that the Charter should enable individuals to bring actions for alleged infringement or denial of a right recognised under the Charter. Persons whose rights have been infringed or denied should have access to an effective remedy. This is in line with the position under the *Human Rights Act 1998* (UK) and *Canadian Charter of Rights and Freedoms* which provides courts with the power to grant the relief it considers 'appropriate and just in the circumstances', consistent with its powers to grant such relief or remedy.⁴² This would be consistent with Australia's obligation under article 2(3) of the ICCPR to provide an 'effective remedy' to persons whose Covenant rights have been violated.⁴³

Enabling individuals to bring court actions is not mutually exclusive with the aims supporting a model that promotes dialogue, education, discussion and good

⁴¹ Human Right Law Resource Centre submission to the Human Rights Consultation, 2009.

⁴² Ibid

⁴³ Ibid

practice. Indeed individual court actions can have an educative effect and promote human rights dialogue by providing a springboard for public discussion about human rights issues.

- **Establish an independent human rights commission to intervene in proceedings**

The Charter of Rights should establish a well resourced independent body whose functions include an ability to intervene in court proceedings that involve the application of the Charter.

This is crucial for the promotion of human rights and education within the broader community and it will encourage government agencies and authorities to adopt policies and programs which reflect good human rights practice.

Summary of Recommendations

In summary WLSV recommends that:

- Australia should have a National Human Rights Act to create a consistent and complete document enshrining and protecting all our human rights.
- Australia's Human Rights Act should include all rights arising from all our international obligations in Charters, Covenants, International Human Rights Law and committee principles and conventions. Therefore both ICCPR and ICESCR are indivisible and mutually reinforcing.
- Australia's Human Rights Act should protect all persons, citizens or non-citizens within Australia's jurisdiction. It should not therefore protect corporations but bind private entities acting on behalf of the government or in carrying out roles ordinarily carried out by the government.
- Australia's Human Rights Act should specifically include rights that are particularly relevant to marginalised and historically disadvantaged groups to ensure they are not left behind and that their rights are taken into account when legislation and policy are being developed.
- Australia's Human Rights Act should therefore specifically refer to women and include rights that are particularly important to protecting women's interests like the right to live free from gender based violence.
- Women's Rights as Human Rights should specifically be integrated into policy development and implementation.
- Australia's Human Rights Act should operate using a legislative model with a right to a cause of action by an individual or group with a right of redress or remedy.

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