

Illawarra Legal Centre Inc



Submission to the National Human Rights Consultation

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The constitutional, legislative and common law protections for human rights that exist in Australia have insufficient coverage and the standards of protection are uneven. The procedures for accessing these protections are lengthy, expensive and uncertain and do not ensure adequate protection of rights. Many important basic rights are unprotected.

The need for legislative protection for human rights is recognized throughout the world, especially in countries with a common law tradition. There is no reason for Australia to be without such protection.

1) The rights to be protected

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Australia should respect, protect and implement into domestic law the rights and obligations of the human rights treaties that we are a State Party to. These include:

- *Convention on the Elimination of all Forms of Discrimination Against Women*
- *International Convention on the Elimination of all Forms of Racial Discrimination*
- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*
- *Convention Against Torture*
- *Convention Relating to the Status of Refugees (and Optional Protocol)*

Further Australia should also protect, respect and promote the rights in the *Universal Declaration of Human Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples*

The rights that should be protected at a minimum are those described in the

- *International Covenant on Civil and Political Rights* (ICCPR)
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)

With the addition of:

- Recognition of Australia's indigenous peoples, their cultures and connections to the land.
- The right to a safe and sustainable environment.
- The right of people with disabilities to enjoy substantive equality and to be free from discrimination;
- The rights of people of all genders (including transgender) and sexualities to enjoy substantive equality and to be free from discrimination; and
- Provision for any further rights that are identified by the public as being in need of protection.

Human rights are interconnected and indivisible. Lack of access to adequate and secure housing, health services, education and fair conditions of employment can prevent the exercise of other rights.

2) These Human Rights are not currently sufficiently protected or promoted

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- Few rights are either expressly or impliedly guaranteed in Australia's Constitution. At the federal level, Australia has no comprehensive statement of rights that sets out a minimum standard of protection.
- At the state level the many separate acts that protect human rights are complex and fragmented and the protection of human rights is uneven and inadequate. The lack of uniformity between state and federal laws is a problem as human rights are universal and need to be consistent.
- Common law protection is insecure and not comprehensive. The courts are limited to developing common law in relation to the case/parties before them. The courts cannot make general statements of rights. Common law principles can be displaced by legislation.
- International law attributes to State Parties a tripartite obligation to 'respect, protect and fulfil' human rights. Australia is a party to most important international human rights treaties. However, these treaty obligations have no binding effect unless they are incorporated into domestic Australian law by the Commonwealth Parliament.

Implementation of Australia's international human rights obligations into domestic law has been selective.

3) Human rights can be better protected and promoted by: 21 – 31

- Passing a Federal Human Rights Act.
- A Federal Human Rights Act *should apply to public authorities broadly defined to include privatised service providers.*
 - Core public authorities (as defined in section 3.2)
 - Functional public authorities (as defined in section 3.2)
- *Public authorities* should have a *substantive obligation* to act in a way that is compatible with human rights and *procedural obligations* to give 'proper' consideration to relevant human rights in decision-making.
- *Human rights protection should only be for the protection of natural persons, not other legal identities such as corporations.*
- *Parliamentary mechanisms to ensure legislative compliance with human rights* should include:
 - Statements of compatibility/Ministerial declarations
 - A Joint Standing Committee of Parliament to scrutinise legislation, or strengthening the Senate Scrutiny of Bills Committee.
- *Judicial declarations of inconsistency*
A Federal Human Rights Act should empower superior courts of record to declare that legislation infringes or is inconsistent with protected human rights. This declaration of inconsistency would not challenge the validity of the law but would require a formal parliamentary response.
- *Interpretation clause*
There should be a clause that requires all courts, tribunals and judicial bodies to interpret all legislation in accordance with human rights insofar as it is possible to be consistent with the purpose of the legislation
- *Reasonable limitations clause*
The ILC recognises that Parliament will need to have the capacity to pass legislation that has the effect of limiting rights under certain circumstances subject to reasonable limits as can be justified in a free and democratic society
 - *No withstanding clause*

The ILC is not in favour of a notwithstanding clause. A blanket notwithstanding clause is indiscriminate. The inclusion of a limitations clause has the required effect.

- *Comprehensive remedies – both court and non-court*
It is ineffectual and meaningless to have an act to protect human rights if no remedy is available to an individual if those rights are breached. The provision of an effective remedy is itself a basic requirement of human rights and is a basic principle of law. A broad provision for remedies would give needed flexibility and discretion in deciding remedies that are the most effective in the circumstances.
- *An individual cause of action*
There should be an independent cause of action contained in a Federal Human Rights Act. It is also the opinion of the ILC that *third parties* should be given standing to act on behalf of a person whose rights have been infringed, as it is not uncommon that the person whose rights have been breached may not be in a position to bring an action.
- *Establish a body to oversee the implementation of the Human Rights Act.*
- *Accountability requirements:*
There must be adequate auditing and reporting procedures to ensure implementation of human rights obligations into policy development and service delivery. This should include:
 - Auditing and reporting on human rights.
 - Developing human rights policies, guidelines and action plans in all government departments.
 - Reporting annually on performance.
 - Five yearly review of the Federal Human Rights Act
- *There should be training in human rights implementation and capacity building for:*
 - The Public Service
 - The Judiciary
 - The Legal Profession
- *Adequate funding for public education on human rights*
- *Provision of adequate advocacy and support services* such as specialist Community Legal Centres, Legal Aid and Aboriginal Legal Services to assist people to access appropriate remedies for breaches of human rights.

Submission to the National Human Rights Consultation

The Illawarra Legal Centre

Introduction

a) The ILC and role we play in the community

The Illawarra Legal Centre (ILC) is a Community Legal Centre providing free legal advice to people in the Illawarra and surrounding areas. The ILC is an accredited member of the National Association of Community Legal Centres (NACLC) and is based in Warrawong, a southern suburb of Wollongong. The Centre was established in 1985 and has strong connections to the Illawarra community. Since beginning to record statistics on the Community Legal Services Information System (CLSIS) the ILC has assisted:

- 4,095 cases;
- 16,388 information activities; and
- 37,171 advice activities (this higher figure is a result of people receiving advice on more than one occasion).

In the year 2008-2009, the ILC assisted 2,801 clients and conducted 178 Community Legal Education projects.¹

The ILC combines a casework focus with community education and law reform to work towards overcoming the legal problems in the lives of those seeking assistance at the Centre.

The ILC:

1. Provides free legal advice and assistance in the following areas:
 - a. General civil law
 - b. Tenancy and residential parks
 - c. Welfare rights
 - d. Financial counselling
2. Supports young people at Port Kembla Children's Court through the Children's Court Assistance Scheme (CCAS).
3. Carries out community legal education (CLE) activities such as writing fact sheets and providing workshops and training sessions (strategically linked to casework and community demand).
4. Undertakes law reform activities.

The ILC is funded by the NSW State Government, the Federal Government and the Law and Justice Foundation.

¹ CA1.1 Activity Summary Report, Community Legal Services Information System (CLSIS). Accessed 01/06/09

b) ILC's work on human rights

All the work of the ILC has a human rights focus as we provide access to justice for people living with disadvantage. Human rights are integral to this in relation to individual clients, our community education projects and our work towards law reform.

In 2009, the ILC established a Human Rights Working Group (HRWG) at the Centre to research and develop our submission to the National Consultation. The members of this group are:

Sharon Callaghan	- Childrens, Court Assistance Scheme Worker /CLE Worker
Claudia Castro	- Solicitor (HRWG Project Researcher)
Jody Clarke	- Aboriginal Legal Access Project Worker
Phillip Dicalfas	- ILC Principal Solicitor, general law
Truda Gray	- Welfare Rights Advocate (HRWG Project Researcher)
Simon Howard	- Solicitor (Convenor of the HRWG), general law
Linda Meyns	- Solicitor, general law
Amanda Smithers	- ILC Centre Coordinator
Warren Wheeler	- Tenants' Rights Advocate

The ILC HRWG:

- Consulted with 175 members of the local community specifically on the questions to be addressed in this submission. (See Appendix 1)
- Attended conferences and workshops on human rights.
- Attended the National Consultation Session in the Illawarra Region.
- Conducted community legal education projects on human rights.
- Held weekly meetings to discuss the issues surrounding the debate about how to protect human rights in Australia.

This submission has been prepared by Truda Gray with the assistance and advice of the members of the ILC's HRWG. The survey research was designed and analysed by Claudia Castro.

c) The focus of our submission

While human rights are universal, the focus of our submission is informed by our work with people in the Illawarra. Our relationship with the community shapes our work through:

- Being connected daily to the issues of local people who:
 - Walk into the Centre and
 - Phone us for advice.
- Running outreach services;
- Networking with local service providers;
- Responding to requests from local people/groups for community legal education workshops;

- Consulting widely with people by setting up stalls in popular places such as the local markets in the central shopping precinct, the University of Wollongong and the local TAFE College.

In the course of our work, the ILC has frequent contact with people living with multiple disadvantages. The Illawarra is a region of high unemployment and multiple indicators of social and economic exclusion. While unemployment is only one measure, the Illawarra had the highest recorded rate of youth unemployment in NSW last year at 22.2%.²

Access to justice is repeatedly denied to those who live with poor literacy, disabilities and limited access to financial and social resources.

Our work in the Illawarra community particularly highlights the need for the protection of social, economic and cultural rights as well as the civil and political rights.

² “Youth Left Behind” *Wollongong & Northern Leader* 16 June, 2008.

The teenage unemployment rate for 15 – 19 year olds was 28% for the year ending Dec 2007. *Youth Unemployment in the Illawarra: Final Report* Illawarra Regional Information Service (IRIS) Research, June 2008, 12.

1. Which human rights (including corresponding responsibilities) should be protected and promoted

1.1 Which rights should be protected?

Australia should respect, protect and implement into domestic law the rights and obligations of the human rights treaties that we are a State Party to. These include:

- *Convention on the Elimination of all Forms of Discrimination Against Women*
- *International Convention on the Elimination of all Forms of Racial Discrimination*
- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *Convention on the Rights of the Child*
- *Convention on the Rights of Persons with Disabilities*
- *Convention Against Torture*
- *Convention Relating to the Status of Refugees (and Optional Protocol)*

Further Australia should also protect, respect and promote the rights in the *Universal Declaration of Human Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples*.

Australia should protect all the rights to which Australia has committed itself at international law. At a minimum Australia should protect the rights set out in the:

- *International Covenant on Civil and Political Rights (ICCPR)*,³ and
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*

The ILC also submits that a Federal Human Rights Act should, to the extent to which they are not adequately covered in the above two covenants, explicitly provide for:

- The recognition of Australia's Indigenous peoples, their continuing cultures and connection to the land;

³ The ILC sees the right to life, as protected in the ICCPR, as beginning at the time of birth. The ILC does *not* see the right to life as operating to prevent a woman from exercising control over her own body, or as preventing an informed and voluntary decision to take one's own life. The right to life operates to restrain the Government from taking the life of any person in its jurisdiction. See Jane Stratton & Robin Banks PIAC *Submission to Human Rights Consultation Committee, Victoria on a Proposed Charter of Rights*. The Public Interest Advocacy Centre, 17th August 2005 13.

While the general human rights in the above conventions would offer protection to Indigenous people as they do to all people, the ILC considers that there should be specific recognition of the rights of Indigenous peoples in an Australian Human Rights Act.

Article 27 of the ICCPR, referring to the rights of persons belonging to ethnic, linguistic and religious minorities is not considered by the ILC to be adequate to protect the specific rights of Indigenous people.⁴

Indigenous people should be consulted specifically about their views on the inclusion and wording of specific rights.

- The right to a safe and sustainable environment;
- The right of people with disabilities to enjoy substantive equality and to be free from discrimination;
- The right of people of all genders (including transgender) and sexualities to enjoy substantive equality and to be free from discrimination; and
- The establishment of a process by which any further rights identified through community consultations as appropriate are incorporated.

1.2 The interconnectedness and indivisibility of human rights

The interconnectedness and indivisibility of human rights is manifest. Lack of access to adequate and secure housing, health services, education and fair conditions of employment can also prevent the exercise of other rights.

The interconnectedness of human rights is well recognised by the international community. The World Conference on Human Rights in 1993 declared that:

“All human rights are universal, indivisible and interrelated...While the significance of national and regional particularities and various historical and religious backgrounds must be borne in mind, it is the duty of states regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁵

⁴ See the *United Nations Declaration on the Rights of Indigenous Peoples* and the *ILO Convention Concerning Indigenous and Tribal Peoples*. Recognition of Indigenous rights would be consistent with constitutional and legislative developments internationally, and at state level. For example Canada, New Zealand and Victoria. For details of the Declaration and the Convention see http://www.hreoc.gov.au/social_Justice/internat_develop3.html accessed 11/06/09

1.3 The inclusion of economic, social and cultural rights does not face the difficulties that opponents raise.

Article 2(1) of the ICESCR requires only that each State Party to the Covenant take steps

“to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in (the ICESCR) by all appropriate means, including particularly the adoption of legislative measures.”

Questions of resource allocation are left to the discretion of the Government concerned.

Civil and political rights are rights that can largely be immediately realised and protected by laws. These rights are protected if governments leave their citizens alone, free to exercise and enjoy these rights.

Economic, social and cultural rights are protected if the government acts to invest resources and establishes infrastructure to support these rights. These rights are not immediately enforceable but are to be achieved progressively over time.

1.4 The need for the protection of social, economic and cultural rights

What we have learned from our work in the community

- The need for protection of social, economic and cultural rights as well as civil and political rights is apparent daily in the work of the ILC. Our clients face many forms of economic, social and cultural disadvantage and often their legal problems have an impact on other aspects of their lives.
- The need to have adequate shelter, food, health care and a source of income (as in the ICESCR) are as pressing as the need for the right to vote (as in the ICCPR). Human rights do not exist in isolation.

What we have learned from our community consultations

The ILC has consulted with 175 members of the community about their thoughts on the need for a Federal Human Rights Act.

⁵ The Vienna World Conference on Human Rights in 1993 declared that all categories of rights as indivisible, universal, interrelated and interdependent: See *Vienna Declaration*, UN Doc A/CONF 157/24 5, 8.

- There is overwhelming support for the inclusion of a wide range of human rights beyond the civil and political rights.

Of 175 people consulted by the ILC, in response to “I think that Australia should have a Federal Human Rights Act”

- 155 said Yes
 - 8 left this blank but indicated that there was need for protection of specifically listed human rights;
 - 10 were undecided; and
 - 1 said no. (See appendix 1)
- There is extremely high interest in the issues surrounding the need for a Federal Human Rights Act.
 - Wherever we have consulted people they are wanting and are requesting information about human rights.
 - Within the community there is wide support for the economic, social and cultural rights that are seen to be of more immediate relevance to peoples’ lives. This is especially so for:
 - The right to social security
The greatest number of comments on our surveys referred to the right to social security and the great need for income support for people in the most disadvantaged positions.
 - The right to work
In the Illawarra region there is strong support for the rights of trade unions; public holiday pay rates; opposing discrimination against people in the workplace based on age; and for the protection of whistleblowers.
 - The right to a sustainable environment
The importance of the right to have clean air and water was noted by a number of our survey participants, particularly in conversation at our public stalls.
 - Indigenous rights
The importance of respecting, protecting and fulfilling Indigenous rights is a fundamental obligation of Australian culture. The ILC works closely with local Indigenous people through our networks, community legal education activities and as clients.

Examples from our community

i) Right to social security/right to work

Problem (Visa restrictions)

Our client is on a bridging visa, has no right to work and cannot access social security. She has no family here and has exhausted all other means of informal support from well meaning others.

Possible Solution/Action Under a Human Rights Act

Use the right to work to alter the conditions of her Visa to allow her to work.
Use the right to social security to allow her access to income support.

ii) Right to housing

Problem (Losing eligibility for accommodation)

Our client was homeless, living in the street and dropping into a shelter every week or so. He was on the list for housing. A letter came for him telling him he had to contact the Housing Department to confirm that he would take a vacant flat. He didn't receive the letter in time to respond and lost the flat and his place on the list.

Possible Action Under a Human Rights Act

Use the right to housing to get a different outcome. The right to housing could be used to influence Housing NSW to allow this man to access the flat that had been offered to him or at the very least, not to lose his position on the waiting list.

iii) Right to social security

Problem (Social security refused)

Our client was hospitalized for a psychiatric illness. She was granted sickness benefit. Medical reports said that they were unfit for work. Her sickness benefit ceased as her illness was not considered to be temporary. Our client was not told by the hospital social worker or by Centrelink of her possible eligibility for the Disability Support Pension (DSP), and went without access to social security for two years and was supported by her elderly, poor, non-English speaking parents until admitted to hospital again and a social worker picked up the problem and arranged for our client to access DSP. This matter has been pursued without remedy through the SSAT & the AAT. Centrelink has denied legal liability and declined a CCDA claim.

Possible action under a Human Rights Act

Use right to social security to negotiate better practices within Centrelink to make more information and advice available to clients.
Use right to social security to get two years arrears for the period our was client not told by Centrelink of eligibility for DSP

1.5 Responsibilities and obligations⁶

1.5.1 Responsibilities

- The purpose of an act to protect human rights is to protect people from abuse of power by governments and other public bodies in a democratic society. It is the responsibility of the government not to infringe those rights protected by the act.
- The responsibilities that are required are both negative and positive. They are negative in that the government is to refrain from actions that would infringe on human rights and positive in that the government has to act to protect and enforce human rights.

1.5.2 Tripartite Obligations

International law attributes to State Parties tripartite obligation to ‘respect, protect and fulfill’ human rights.⁷ This tripartite obligation involves the following elements:⁸

1. The obligation to ‘respect’ requires States to refrain from violating human rights.
2. The obligation to ‘protect’ requires States to prevent third parties from violating human rights and to remedy any breach of rights.
3. The obligation to ‘fulfill’ requires States to take measures (which can include positive actions), to ensure that human rights are enjoyed by those within the State’s jurisdiction.

These three elements operate differently depending on which human right is under consideration.

1.5.3 Procedural and substantive obligations

Public authorities (as defined in section 3.2 of this submission) should have a substantive obligation to act in a way that is compatible with human rights and procedural obligations to give ‘proper’ consideration to relevant human rights in decision-making.

⁶ Material for this section (and other sections of our submission) is drawn from the discussion paper by Phillip Lynch & Phoebe Knowles *The National Human Rights Consultation ‘Engaging in the Debate’* Human Rights Law Resource Centre Ltd., Melbourne, 2009 64.

⁷ *Ibid.*

⁸ Asjorn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjorn Eide*, UN Doc E/CN.4/Sub.2/1987/23 (1987) [67]-[69] as quoted in *Engaging in the Debate* above note 6, 64.

Substantive obligation

Having a substantive obligation does not prevent a public authority from acting in a way that limits a right. The limitation would not be incompatible if it was justified as reasonable in the circumstances according to the balancing of rights required by the principles/doctrine of proportionality (as outlined at 3.3.5).

Procedural obligation

Requiring 'proper' consideration holds public authorities to a higher standard than the usual administrative law requirement of relevant consideration. This will ensure that courts can weigh the appropriate level of consideration as required rather than just to determine that consideration was given.⁹

⁹ The information for this section is drawn from the discussion paper *Engaging in the Debate* above note 7, 66- 67.

2. Are these human rights currently sufficiently protected and promoted?

The ILC is concerned at the current inadequate level of protection for human rights in Australia. Many people living with disadvantage have little or no redress for breaches of human rights particularly in relation to social, economic and cultural rights.

What few rights the current system protects are difficult to assert without assistance. Access to justice is compromised and many people are losing faith in the capacity of the system to deliver. This is especially so for people who are living with disadvantage.

There is a great deal of public interest in the issues raised in consideration of the need for protection of human rights. People want to have rights protected and want information. The most effective way to raise awareness of and to protect human rights in Australia is to start by passing an act at the federal level and by properly funding necessary education programs and support services.

2.1. Human rights protection at the Federal level is inadequate

- Few rights are either expressly or impliedly guaranteed in Australia's Constitution.¹⁰
- Constitutional rights although entrenched cannot be enforced by the judiciary unless someone has challenged the constitutionality of legislation in the courts.
- Some rights have protection at the federal level however the protection is partial.
- At the federal level, Australia has no comprehensive statement of rights that sets out a minimum standard of protection.
- Implementation of Australia's international human rights obligations into domestic law has been selective.

2.2 Human rights protection at the State level is uneven and fragmented

- There are many separate acts that protect human rights at the state level and Victoria and the ACT have human rights acts/charters.

¹⁰ See '*Engaging in the Debate*' above note 6, 22-24

- Having many and diverse pieces of legislation makes it complex and fragmented resulting in the protection of human rights being uneven and inadequate.
- The lack of uniformity between state and federal laws is a problem as human rights are universal and need to be consistent.

2.3 Common law protection is insecure and not comprehensive

While some human rights are protected in the common law, the protection is neither comprehensive or consistent.

- Courts have developed rules of statutory construction that protect human rights from legislative interference.¹¹ Where legislation is unambiguous the courts are not able to apply these rules.
- When legislation is unambiguous, there is no mechanism by which the courts can or are required to interpret legislation as being subject to fundamental human rights.¹²
- The courts are limited to developing common law in relation to the case/parties before them, they cannot make general statements of rights.
- Common law principles can be displaced by legislation.

2.4 International human rights obligations are not binding

- Australia is a party to most important international human rights treaties. However, these treaty obligations have no binding effect unless they are incorporated into domestic Australian law by the Commonwealth parliament.¹³

¹¹ For example, the principle that legislation affecting human rights is to be construed strictly. *Coco v The Queen* (1994) 179 CLR 427.

¹² For example in *Al-Kateb v Godwin* J McHugh said “the justice of the course taken by Parliament is not examinable in [the High Court] or in any other domestic court. It is not for the courts, exercising federal jurisdiction, to determine whether a course taken by Parliament is unjust or contrary to human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.” *Al-Kateb v Godwin* (2004) 219 CLR 562,595.

¹³ Under section 51(xxix) of the Constitution.

- There is only limited capacity for courts to take into account Australia's international human rights obligations.¹⁴

What we have learned from our work in the community

The daily work of the ILC makes us constantly aware that rights necessary to a dignified life are not adequately or consistently protected. People with insecure or no housing, who struggle for access to rights at work or access to social security, who are victims of violence and many forms of discrimination are not adequately protected under current Australian law. The absence of uniform protection of human rights makes negotiating access to justice, either by people themselves or for those advocating on their behalf, a fragmented and patchy exercise with many gaps.

- Many breaches of human rights are currently not addressed.
- Mechanisms and resources for the protection of human rights are inadequate.
- There is little public knowledge about, or capacity to access protection for human rights.
- There is great disillusionment in the community where people who have become involved with the legal system have the experience of finding their rights unprotected.

What we have learned from our community consultation

- There is overwhelming support for the need for a federal act to protect human rights.
- People regularly express surprise that Australia does not have a human rights act.
- There is general popular thinking that Australia has a Bill of Rights (US style).
- Many people in the community do not know that important rights are not protected.
- People are disconcerted to find out that Australia is without a human rights act and that almost all other western democratic countries have one.

¹⁴ Courts presume that governments intend to legislate in accordance with their international human rights obligations unless it is expressly indicated to the contrary. *Polites v The Commonwealth* (1945) 70 CLR 60; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1

- There is a great deal of interest in the community about human rights.
- Many people request information about human rights issues.

Examples from our community

i) Right to Life

Problem (Attempted suicide)

A client living with a mental disability was being investigated by Centrelink. Centrelink investigators come to our client's home. Investigators did not inform our client of her rights. They behaved in a way that our client perceived as threatening. Our client reported that they confused, distressed and scared her. She became so upset that she tried to commit suicide resulting in our client being hospitalised in a coma for four weeks.

Possible action under a Human Rights Act

Use right to life to get procedures changed within Centrelink (currently there are no guidelines for interviewing clients living with mental disabilities). Use right to life to get an appropriate remedy for our client, an apology would be particularly relevant, which has not been forthcoming.

ii) Right to Health Care

Problem (Lack of adequate health care)

Indigenous people have long suffered from inadequate health services. This has resulted in Indigenous life expectancy being significantly less than that of the Non-Indigenous population.¹⁵

Many health services in the Illawarra have been closing down or have been restructured in ways that makes access for people even more difficult. For example, the inpatient Orana Detoxification Unit at Wollongong Hospital has become an outpatient service. The use of this service is hampered by inadequate transport facilities and by fragmented family support networks which makes difficulties for people to be supported during detoxification at home.

Possible action under Human Rights Act

Use the right to health care to support the need for resources to establish access to inpatient services, adequate transport and social support for patients in need.

¹⁵ See < http://www.aihw.gov.au/mortality/life_expectancy/indig.cfm > accessed 10/06/09

iii) Indigenous Cultural Rights

Problem (Destruction of Aboriginal cultural heritage)

The ancient body of a Kuradji man (a highly respected wise man) was found in the sand dunes at Sandon Point (Wollongong). Archeological investigations reveal the area to be a burial ground and a highly significant meeting and trading place. A large development (to house approx 2,000 people) has been given the go ahead on the location.

Possible Action Under a Human Rights Act

Use recognition of Indigenous cultural rights to negotiate protection of this site to reconsider the conditions on the development approval to take into account and accommodate the need to protect the cultural heritage of the Indigenous people.

3. How could Australia better protect & promote human rights?

3.1 A human rights act at the federal level

Better protection of human rights can be achieved by passing a comprehensive human rights act at the federal level. A human rights act at the federal level is one of the most significant and effective ways of achieving a human rights culture in Australia.

Australia is a country that was largely founded on the oppression of its Indigenous people. Many came to this country either originally as convicts or subsequently as refugees from world wars and from oppression and abuse of human rights in their countries of origin. Our nation is largely made up of people who have directly experienced what it is like to have their human rights disregarded. Protection of human rights is not an abstract notion for very many people in Australia.

Australia is a signatory to the United Nations Declaration of Human Rights (UNHDR) adopted in 1948 as “a common standard of achievement for all peoples and nations”.¹⁶ The ICCPR and the ICESCR further elaborate the rights set out in the UNHDR. Australia was active in promoting the inclusion of economic social and cultural rights and became a party to the ICESCR in 1976 and to ICCPR in 1980.¹⁷

Ratification of these covenants required broad consultation with state governments and with all political parties at the national level. This process has demonstrated widespread support for the rights that are set out in these covenants. Ratification carries the obligation of implementation.

- Human rights protection should only be for natural humans and not for other legal entities such as corporations.
- Human rights protections should extend to all people whether citizens or not, in any part of Australian jurisdiction, whatever status that jurisdiction is given.

3.2 Who would be bound by a federal act?

Public authorities

For the act to be effective, it should be binding on all Federal Government public authorities. The definition of government public authority needs to be

¹⁶ *Universal Declaration of Human Rights* 1948 at <www.un.org/en/documents/udhr/> accessed 10/06/09

¹⁷ “Engaging in the Debate” above note 6, 41.

worded to include the many private entities that are carrying out public functions. The definition should include both 'core' and 'functional' public authorities.¹⁸ *The Victorian Charter, The New Zealand Bill of Rights Act and the UK Human Rights Act* all include functional public authorities in their application. A similar list of core public authorities should be included as in the Victorian Charter.

Core public authorities

- Public officials, including public sector employees, administrative judicial employees and parliamentary officers;
- Governmental departments and entities established by statutory provisions exercising functions of a public nature;
- Federal police;
- Ministers;
- Parliamentary Committees; and
- Other entities declared under the regulations to be 'core' public authorities

Functional public authorities

- In the Victorian Charter, Section 4(1)(c) states that a public authority is:
[A]ny entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise).
- A non-exhaustive list of factors that may be taken into account to guide the determination of whether a function is "public" needs to be included (as provided in section 4(2) of the Victorian Charter).
- The act should specify that if an entity is carrying out both public functions and private activities then they are only considered to be a public authority in relation to the public functions. (For example, a security firm that works under contract for a government prison and also for a nightclub should be considered to be a functional public authority in relation to the work for the prison but not for the nightclub).
- *The ACT Human Rights Act* (From 1 January 2009), adds a helpful non-exhaustive list of factors to consider when deciding whether or not a function is of a public nature. The ACT Act spells out:
 - a) the operation of detention places and correctional centres.
 - b) the provision of any of the following services:
 - i. gas, electricity and water supply;
 - ii. emergency services;
 - iii. public health services;
 - iv. public education;

• ¹⁸ Details for this section drawn from the *Engaging in the Debate* above note 6, 56-59.

- v. public transport;
- vi. public housing

The ILC would also add social security and employment services.

- In view of the extent of privatised involvement in public services, the UK House of Lords has stated that there should be a 'generously wide' and flexible interpretation of 'public function'.¹⁹ They stressed that the category of functional public authority 'has a much wider reach and is sensitive to the facts of each case'.²⁰

Corporations

Corporations are a fundamental part of Australian society. Decisions, actions and omissions by corporations have at least as great an impact on people as do decisions, actions or omissions by government authorities. Human rights should be enforceable against corporations. All corporations should be required to respect and protect human rights.

3.3 Mechanisms for ensuring legislative consistency with human rights

To ensure that law-makers take human rights into greater consideration and to prevent inadvertent infringement of human rights, a federal Human Rights Act should require:

3.3.1 Statements of compatibility / Ministerial declarations

- All proposals for legislation should include a statement of compatibility with the Human Rights Act by the responsible Minister.
- If the legislation is not compatible with protected human rights then the Minister should be required to set out a justification for this in relation to the 'reasonable limits' requirements (as set out below in 3.3.5).

3.3.2 Standing Committee/Joint Committee on human rights

- There needs to be a representative joint parliamentary committee with power to scrutinise proposed legislation for its compatibility with protected human rights. This committee should report to Parliament on the results of their scrutiny.

¹⁹ *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37 [1]

²⁰ *Ibid* [41]

- The committee should have the power to scrutinise all current or proposed legislation (primary or subordinate) in response to a report by the relevant responsible body or in response to a request from Parliament.

3.3.3 Judicial declarations of inconsistency/incompatibility

- A federal Human Rights Act should empower superior courts of record to declare that legislation infringes or is inconsistent with protected human rights. This declaration of inconsistency would not challenge the validity of the law but would require a formal parliamentary response.²¹
- This declaration is a central part of the ‘dialogue’ model in that it sets up an interchange between parliament, the courts and the people in relation to human rights.
- In response to the declaration, Federal Parliament would be required to reconsider the legislation and if necessary amend it. If Parliament does not amend the legislation, it needs to be a requirement that reasons be given.
- The federal act should require parliament to respond formally to any such declaration by a court. Any such formal response should have a short but workable time frame requirement so that any remedial action is not unnecessarily drawn out.

3.3.4 Interpretation clause

There should be a clause that requires all courts, tribunals and judicial bodies to interpret all legislation in accordance with human rights insofar as it is possible to be consistent with the purpose of the legislation.

3.3.5 Reasonable limitations clause

The ILC recognises that parliament will need to have the capacity to pass legislation that has the effect of limiting rights under certain

²¹ There has been some concern that the Australian Constitution disallows a federal court from making an order that does not directly affect any persons’ rights. A recent roundtable called by the Human Rights Commission addressed this possible problem. The roundtable included leading constitutional and human rights lawyers such as Justice McHugh and former Chief Justice Sir Anthony Mason. They concluded that this problem could be circumvented by taking the courts out of the notification process. Instead, a responsible body such as the Human Rights Commission could notify Parliament through the Attorney General. At http://www.hreoc.gov.au/about/media/media_releases/2009/3... accessed 26/5/09

circumstances subject to reasonable limits as can be justified in a free and democratic society

Whether or not a measure is justified in a free and democratic society has been clarified by the Canadian courts in the case of *R v Oakes*. In this case a test was developed that has had influence throughout the common law world. In the '*Oakes Test*' Chief Justice Dickson for the majority said that two criteria must be satisfied: The Human Rights Law Resource Centre's report "*Engaging in the Debate*" spells out these criteria as:

- i. '[T]he objective of the rights-limiting law must be "of sufficient importance to warrant overriding" [the protected rights]; and
- ii. [T]he party invoking the limitation must show that the measure is "reasonably and demonstrably justified" '.²²

To establish whether legislation is reasonably and demonstrably justified, Dickson CJ devised a three-pronged proportionality test that requires:

- i. '[T]he measures adopted should be carefully (and rationally) designed to achieve the objective in question...;
- ii. The measures "should impair "as little as possible" the right or freedom in question'; and
- iii. '[T]here must be proportionality between the effects of the measures ...and the objective which has been identified as of "sufficient importance" '.²³

The Victorian Charter of Human Rights and Responsibilities limitation provision (section 7) and the ACT Human Rights Act (section 8) draw on the legal principles in the *Oakes Test*.

3.3.6 No notwithstanding/Override clause

The ILC is not in favour of a notwithstanding clause.²⁴ A blanket notwithstanding clause is indiscriminate. The inclusion of a limitations clause as outlined above has the required effect.

²² '*Engaging in the Debate*' above note 6, 54 quoting CJ Dickson *R v Oakes* [1986] 1 SCR [70]

²³ *Ibid* [69]

²⁴ A 'notwithstanding clause' allows parliament to propose legislation 'notwithstanding' the fact that the legislation overrides or infringes upon human rights.

3.4 Remedies

It is ineffectual and meaningless to have an act to protect human rights if no remedy is available to an individual whose rights are breached.

The provision of an effective remedy is itself a basic requirement of human rights and a basic principle of law.²⁵

A range of remedies needs to be provided to accommodate all different circumstances. A broad provision for remedies would give needed flexibility and discretion in deciding remedies that are the most effective in the circumstances.

3.4.1 Obligations under international law

The ICCPR in article 2 (3) requires state parties to the convention to undertake that:

'Any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...;

Any person claiming such a remedy shall have (their) right thereto determined by a competent (authority); and

To ensure that the competent authorities shall enforce such remedies when granted.'²⁶

International law requires that States provide reparations for violations of human rights.²⁷ Reparations include remedies that return the victim as far as possible to the condition they were in prior to the violation of their rights. Such remedies include:

- Restitution (For example, releasing someone from arbitrary detention, restoring a job, or returning a person to their place of residence);
- Rehabilitation (For example, by providing medical or psychological treatment or physiotherapy); and

²⁵ As early as 1703, Lord Chief Justice Holt observed "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it..." *Ashby v White* (1703) 2 Ld Raym 938, 953 as quoted in Human Rights Consultation Committee, State Government of Victoria, *Report of the Human Rights Consultation Committee: Rights Responsibilities and Respect*, Chapter 6 – What happens if there is a breach of the Charter? 2005, 116.

²⁶ See ICCPR Article 2 (3) at <http://www2.ohchr.org/english/law/ccpr.htm> accessed 30/4/09

²⁷ See *Engaging in the Debate* above note 6, 130 and Emanuela-Chiara Gillard, "Reparation for violations of International Humanitarian Law" 851 *International Review of the Red Cross* 30-09-2003 529-554.

<<http://www.icrc.org/Web/eng/siteeng0.nsf/html/5SRLFZ>> accessed 10/06/09

- Compensation (For example, monetary compensation for physical or mental harm, lost opportunities for employment or legal expenses).²⁸

3.4.2 Non Court remedies

Such remedies have the advantage of being fast, efficient, informal and inexpensive. They have the important potential of being effective in bringing about desired change in policies and practices of administrative authorities.

- Lodging a complaint with responsible body (eg Human Rights Commissioner or the Ombudsman)
- Dispute resolution
This process has the advantage of being voluntary and conciliatory and provides the possibility of an apology, which is often (in our experience) a desired and therapeutic remedy in itself.
- Seeking review directly with the public authority, as is currently the process with Centrelink

3.4.3 Court remedies

Available court remedies should include:

- Declarations;
- Injunctions;
- Relevant orders to provide redress for the individual and that address the systemic problem that led to the infringement by the public authority;
- Reparations (required under international law for violations of human rights):
 - Restitution;
 - Rehabilitation;
 - Compensation for pecuniary and non pecuniary damages, including punitive and exemplary damages
- Habeas Corpus.

3.5 An individual cause of action

There should be an independent cause of action contained in the Human Rights Act.

²⁸ See *Engaging in the Debate* above note 6, 130.

Concerns that this may ‘open the floodgates’ are not supported by experience in jurisdictions such as the UK and NZ that have such freestanding causes of action in their Human Rights Acts/Charters.²⁹

It is also the opinion of the ILC that *third parties* should be given standing to act on behalf of a person whose rights have been infringed. Often the person whose rights have been breached may not be in a position to bring an action themselves.³⁰

3.6 Provision of adequate advocacy support and services

Specialist Community Legal Centres should be maintained and established; Legal Aid Services and Aboriginal Legal Services should be funded to assist people to have access to appropriate remedies. This is especially necessary to assist people living with disadvantage.

3.7 Accountability

It is important that shortcomings in compliance with human rights requirements by federal public authorities are identified. There must be adequate auditing and reporting procedures to ensure implementation of human rights obligations into policy development and service delivery.

- Establish a body to oversee the implementation of the Human Rights Act (responsible body)

Either establish a separate independent body or give resources and powers to the Australian Human Rights Commission.

- Development of policies and action plans

Public authorities should be required to develop policy frameworks, statements of commitment to stakeholders and action plans for the implementation of their human rights obligations.

- Reporting

All public authorities should be required to report annually to the responsible body on their human rights compliance. These reports should be made available to the public.

²⁹ In the UK only three cases have resulted in payment of compensation from the government in 10 years of operation of the Human Rights Act. See *Engaging in the Debate* above note 6, 124.

³⁰ With leave of the Court.

- Auditing

External reviews/audits should be undertaken on the performance of all public authorities in relation to their obligations under a federal Human Rights Act. These reviews/audits should be made available to the public.

- Review act every 5 years

Five years after the commencement of the act, and at least every following five years, there should be a review to determine whether:

- Additional rights need to be protected.
- Any further ways of protecting human rights should be added to the act.

3.8 Training

There should be training in human rights implementation and capacity building for:

- The Public Service (with wide application to public authorities as set out in 3.2 above)
- The Judiciary
- The Legal Profession

3.9 Commitment of resources to public education

- Community legal education

There should be generous funding for public education in human rights issues. The ILC has found a great public interest in information about human rights. It is an important contribution to the promotion of a human rights culture for people to be informed about human rights.

- High School Courses

Development of courses and materials on human rights for use in high schools is an important contribution towards a national culture of human rights.

3.10 The Effect of a Human Rights Act

The ILC considers that the most important impact of a Human Right Act would be its influence on government policy and decision-making. A Human

Rights Act would necessarily promote the active consideration of human rights by public authorities in the formation of policies, in the process of implementing policies and before and during the making of decisions. Combined with flexible non-court remedies, this 'before' impact of a Human Rights Act would greatly enhance the protection of human rights and the human rights culture in Australia.

3.11 The Constitution poses no obstacle to a Federal Human Rights Act

It is the long-term preference of the ILC for Australia to move towards the entrenchment of a full range of human rights in Australia's Constitution. However, at this time, the ILC sees the passing of a federal Human Rights Act as a necessary move towards protecting and promoting human rights in Australia.

Concerns have been raised that a federal Human Rights Act would be "unconstitutional". In this regard the ILC draws attention to the roundtable on this question called by the Australian Human Rights Commission in 2009. The President of the Human Rights Commission Ms Catherine Branson said 'the roundtable reached unanimous agreement on a number of important issues, most importantly, that a Human Rights Act *can* be drafted in a way that *is* constitutionally valid'.³¹

3.12 Concluding Comments

Terms of Reference

The ILC appreciates that the Australian Government is consulting with the people about the need to protect and promote human rights in Australia. The ILC also appreciates that the Australian Government recognises the common equality of all people. However, the ILC is concerned that the terms of reference for the consultation limit the way in which the people can respond.

The specific exclusion of the possibility of recommending a constitutionally entrenched bill of rights unnecessarily confines debate. In our own Centre's consultations with members of the community, there has been much interest in discussion of the differences between a parliamentary act and a bill of rights as part of the constitution.

³¹ See "Constitution poses no obstacle to national Human Rights Act" Australian Human Rights Commission Media Release Wednesday, 6 May 2009 at http://www.hreoc.gov.au/about/media/media_releases/2009/3...>accessed 26/5/09

The ILC considers that all possible models should have been open to debate in this consultation.

Constitutional Model

The protection of human rights should be completely free from possible political interference. Constitutional protection of human rights would provide this necessary security.

The argument that having human rights entrenched in the constitution would transfer power to judges is misplaced. Judicial interpretation of legislation or the constitution is part of the normal role of the courts as required under our legal system.

Under the current terms of reference that ask how could Australia better protect and promote human rights, the ILC also recommends that the constitutional provision in section 51 (xxxvi) that enables the Commonwealth Government to 'make laws for the people of any race for whom it is deemed necessary to make special laws' needs to be removed. At the very least this provision should be amended to only allow the making of laws that are beneficial. This provision contravenes the *Convention on the Elimination of all forms of Racial Discrimination*.³²

The rights that are currently protected in our constitution do not interfere with the sovereignty of parliament. A full charter of human rights in our constitution would protect the sovereignty of the people.

³² *Convention on the Elimination of all Forms of Racial Discrimination* Article 1
< <http://www.unhchr.ch/html/menu3/b/9.htm>> accessed 10/06/09

The Hindmarsh Island Case clearly indicated that this provision gives the Federal Government the power to make laws that are detrimental to a particular group of people. See *Kartinyeri v Commonwealth* [1998] HCA 22 at 176.