

# Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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## Response to the National Human Rights Consultation

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Older Persons Law Working Group

Violence Against Women & Children Working Group

Anti-Terrorism Laws Working Group

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# Glossary of Terms and Abbreviations

<b>CEDAW</b>	Convention on the Elimination of all Forms of Discrimination against Women
<b>CLC</b>	Community Legal Centre
<b>CRC</b>	Convention on the Rights of the Child
<b>HRA</b>	Human Rights Act
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic Social and Cultural Rights
<b>NACLC</b>	National Association of Community Legal Centres
<b>VALS</b>	Victorian Aboriginal Legal Service

## About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty one community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

## About community legal centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

## Introduction

Community legal centres (CLCs) aim to provide a bridge to the justice system so that it is accessible, welcoming and fair for all Victorians. Genuine access to justice also means that there are adequate and appropriate remedies available to address violation of rights, and that all members of the community have an understanding of the legal system, their rights within it, and their options for achieving justice.

Many CLC clients are from disadvantaged and marginalised communities. The experience of these clients functions as a litmus test for assessing whether the goal of access to justice has been met; and thereby informs the policy and law reform work of the Federation.

In 2005 the Federation, together with the Victorian Council of Social Service, undertook a series of community consultations with members of disadvantaged communities, in order to facilitate meaningful participation in the Victorian Government's consultation process concerning human rights.<sup>1</sup> On the basis of this consultation, the Federation advocated for a Victorian Charter of Human Rights;<sup>2</sup> and the Federation and its individual member centres continue to apply a human rights framework, including the Victorian Charter, in our day-to-day work.

In this submission we outline the need for a federal Human Rights Act. We submit that there are many, often interconnected, human rights in Australia that require protection, and that present approaches do not provide this in an effective and equitable manner. Proper protection and promotion of human rights requires a legislative dialogue model of human rights which engages the executive, legislative and judicial arms of Australian Government, and offers accessible redress for individuals and groups whose rights have been violated.

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

The Federation submits that all of Australia's human rights obligations under international law should be protected and promoted via implementation in Australian domestic law. These obligations are outlined in the Universal Declaration of Human Rights and the core treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights;<sup>3</sup> and are expanded upon in other treaties and instruments, including:

- the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;<sup>4</sup>
- the Convention on the Rights of the Child ('CRC');<sup>5</sup>
- the International Convention on the Elimination of all Forms of Racial Discrimination;<sup>6</sup>
- the Convention on the Elimination of all Forms of Discrimination against Women ('CEDAW');<sup>7</sup>

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1 Stephanie Cauchi, *Making Human Rights Real: Final Report of the Victorian Human Rights Community Engagement Project* (2006), available at <http://www.vcross.org.au/pubs/reports.htm#HumanRights> .

2 Federation of Community Legal Centres, *Submission to the Human Rights Consultation Committee in response to 'Have Your Say about Human Rights in Victoria'* (August 2005) and *Feedback to the Human Rights Consultation Committee Final Report 'Rights, Responsibilities and Respect'* (January 2006), both available at <http://www.communitylaw.org.au/lrs.php#Human%20Rights> .

3 Universal Declaration of Human Rights 1948 GA Res. 217A (III), 71, UN Doc A/810; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

4 Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

5 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

6 Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

7 Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

- the Convention on the Rights of Persons with Disabilities;<sup>8</sup> and
- the International Declaration on the Rights of Indigenous Peoples.<sup>9</sup>

We believe that all of these rights should be protected and promoted in Australia because they are all important to the realisation of human dignity, and are frequently indivisible from one another. For example, Australia's obligation to protect the right to life of a woman who is subjected to domestic violence – a civil and political right – requires Government to ensure that if that woman flees the relationship, she is able to obtain adequate housing – an economic, social and cultural right.<sup>10</sup> Similarly, the right to just conditions of work and wages sufficient to support a minimum standard of living – an economic, social and cultural right – cannot be protected unless workers are also able to realise their right to equality before the law – a civil and political right.

Another illustration of the interdependence of human rights concerns the right to take part in public life. Without secure housing, a reasonable standard of living and adequate medical care, an individual's capacity to participate in social and political life is greatly diminished.

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<sup>8</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>9</sup> G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

<sup>10</sup> For detail on the tripartite obligation to respect, protect and fulfil human rights, see our response to Q2 below. For more on the indivisibility of economic, social and cultural rights, including the right to housing, from other human rights, see eg the submissions to the National Consultation from our member centres, Tenants Union of Victoria, St Kilda Legal Service, and Youthlaw.

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

The human rights outlined in response to Q1 above are not currently sufficiently protected and promoted in Australia. Some rights are simply not protected at all; others are protected only in some jurisdictions and to a less than full extent, with varying effectiveness in practice. We refer the Committee to the comprehensive discussion by our member centre, Human Rights Law Resource Centre, in its first submission to the National Consultation, *A Human Rights Act for All Australians* (paragraphs 77-127).

Further, under international human rights law, Australia has an obligation not only to protect and promote the human rights set out in the international instruments listed in our response to Q1, but to respect, protect and fulfil those rights. 'Respect' requires States to refrain from interfering directly or indirectly with human rights, while 'protect' includes the obligation to take measures to prevent third parties from interfering with human rights. The obligation to 'fulfil' contains further obligations to facilitate, provide and promote human rights, and thus requires States to adopt appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of human rights.<sup>11</sup>

One specific example of how human rights are not sufficiently respected, protected and fulfilled is the issue of violence against women. Violence against women and their children is a 'profound moral and social problem in Australia,'<sup>12</sup> which costs \$13.6 billion a year.<sup>13</sup> Australia is a signatory to a number of international human rights instruments that address aspects of violence against women and their children; such as CEDAW, CRC and the Declaration on the Elimination of Violence Against Women;<sup>14</sup> and yet violence against women and children has not diminished.<sup>15</sup>

In an attempt to systematically address this problem, the Australian Government recently established the National Council to produce a National Plan for Australia to Reduce Violence against Women and Children.<sup>16</sup> The Plan outlines, and the Commonwealth Government response acknowledges, the need for harmonisation of laws and prevention strategies across Australia, including improving responses to coronial recommendations and coordinating information from reviews of family homicides; and other cross-jurisdictional collaboration such as a national register of intervention orders.<sup>17</sup>

The National Plan clearly shows that one of the profound challenges to the goal of ending violence against women and their children is the fact that both State and Federal Government laws, policies and practices are

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<sup>11</sup> Committee on Economic, Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health, UN Doc E/C 12/2000/4 (2000), para 33. See also Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 46-48.

<sup>12</sup> National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 16; National Council to Reduce Violence against Women and their Children, *The Cost of Violence against Women and their Children* (March 2009).

<sup>13</sup> Commonwealth of Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (April 2009) 2.

<sup>14</sup> Declaration on the Elimination of Violence against Women, GA res. 48/104, 48 UN GAOR Supp. (No. 49) 217, UN Doc A/48/49 (1993). For more detail see National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 22-24.

<sup>15</sup> National Council to Reduce Violence against Women and their Children, *A Snapshot to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 5.

<sup>16</sup> National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009); National Council to Reduce Violence against Women and their Children, *The Cost of Violence against Women and their Children* (March 2009); National Council to Reduce Violence against Women and their Children, *A Snapshot to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009); National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009).

<sup>17</sup> National Council to Reduce Violence against Women and their Children, *A Snapshot to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 5-6; Commonwealth of Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (April 2009) 4-5.

involved. For example, while Victorian law comes into play if a woman seeks justice for an assault, the Federal Government has at least responsibility for issues that may be related to the woman's safety, such as housing and immigration matters.

Other proposed initiatives to try to produce more effective and 'wrap around' service provision include a national domestic violence and sexual assault telephone and online crisis service; a better 'fit' between family law and family violence legislation; systematic monitoring and evaluation of 'what works'; adequate funding; and approaches which recognise the diversity of women and their children while still integrating sector responses.<sup>18</sup>

We will return to this example in our response to Q3, which considers how Australia could better fulfil its human rights obligations.

In the remainder of this section, we present further examples that show that human rights are not being sufficiently respected, protected or fulfilled in Australia. While these examples do not exhaust all of the human rights that we submit should be protected, many of them indicate the interdependence of rights.

### Rights to equality and non-discrimination

These rights are particularly central to the protection of human rights, because they require that all human rights must be enjoyed without discrimination of any kind, and that the equality must be substantive, meaning that all persons in Australia must be, in practical effect, treated and protected equally by the law.<sup>19</sup> Domestic implementation of these rights remains partial, including in legislation which expressly proscribes discrimination but provides for a raft of exceptions and exemptions (see *Appendix One* for Victorian examples). Those individuals, social groups and communities who already suffer disadvantage are also disproportionately vulnerable to both direct and systemic discrimination.<sup>20</sup>

*Example: Access to Centrelink* (see Right to social security below)

*Example: Older people's access to public facilities and services*

Many older people have limited mobility and rely on public transport; yet aged care facilities and public buildings are not always close to train stations, tram stops or bus routes. This often makes it difficult for older people to visit places such as town halls, council buildings, libraries, medical centres, courts and community legal centres. Physical access to these sites is a vital prerequisite to participation in public life and enjoyment of many human rights. Currently there is no legal obligation on public authorities or town planners to take into account the needs of less mobile older people when deciding the location of a public facility or service. There is also no legal requirement for public transport operators to take older citizens' needs into account when planning routes or determining the frequency of services.<sup>21</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> For more detail, see eg *Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights* (September 2008), paras 200-242, available at <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/>. The Federation was both a supporter of and a contributor to this submission, as were many community legal centres around Australia.

<sup>20</sup> For more in-depth discussions of the human rights violations experienced by some of these particularly disadvantaged social groups and communities, we refer the Committee to the submissions from our member centres, Youthlaw, Seniors Rights Victoria, MHLIC, Tenants Union of Victoria, St Kilda Legal Service and the contribution by Victorian Aboriginal Legal Service to the joint Aboriginal and Torres Strait Islander Legal Services submission.

<sup>21</sup> Example provided by Older Person's Law Working Group.

*Example: Young people*

Young people exemplify a social group which experiences multiple forms of discrimination, especially when that is coupled with another form of disadvantage, such as being female, Indigenous or mentally ill. The submission to the National Consultation from our member centre, Youthlaw, is based on the experiences of young clients and those of young people who participated in workshops run by the centre, many of whom did not feel that their human rights were protected. Youthlaw documents numerous examples of discrimination in areas including wages, 'move on' powers and anti-graffiti laws; as well as harassment by police, shopkeepers and ticket inspectors.<sup>22</sup>

Right to life

*Example: The death of Paul Carter*

Paul Carter was an Aboriginal man with a cognitive impairment and a history of mental illness and substance abuse. On 7 August 2006 he died after being hit by a truck on the Sturt Highway, 12 km out of Mildura. Earlier that day, Paul's brother had died unexpectedly from an epileptic seizure. Paul had spent much of the day with his family mourning his brother's death, and then went to his girlfriend's house where the police were called later in the night. It was understood that the police were taking Paul to his father's house, but he was dropped off on the highway about 13 km away, where in the dark and cold, with no footpath and under the influence of grief and alcohol, he ran into the path of the truck. The Coroner found that it 'goes without saying that had Paul been delivered to his father's home that night, he would not have been at risk of running in front of a truck on the Sturt Highway.'<sup>23</sup>

Victoria has recently mandated agency and other entity responses to coronial recommendations,<sup>24</sup> making it only the third Australian jurisdiction to do so. Without mandatory responses, agencies can ignore or even lose recommendations without having to inform the court, the deceased's family or the public of their response.<sup>25</sup> A lack of systematic monitoring also makes it difficult to learn from patterns of deaths, particularly across Australian jurisdictions.<sup>26</sup>

*Example: The death of Tyler Cassidy (see Right of children to protection from violence below)*

*Example: Family violence deaths*

'These deaths occurred following a Family Court decision for the father to return the children to their mother. There had been a lengthy history of domestic violence prior to separation which included verbal, emotional and physical abuse and included violence which was ongoing through pregnancy. There had been several interventions by police and courts. A police officer advised the woman to "leave or she would be leaving in a box". In March 2004, she left the family home taking her two young children with her. Her husband found her at her

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22 With regard to Indigenous youth, see also the contribution by Victorian Aboriginal Legal Service to the joint Aboriginal and Torres Strait Islander Legal Services submission.

23 Inquest into the Death of Paul Wayne Carter, 13 May 2009, 40.

24 *Coroners Act 2008* (Vic) s 72. The Act does not come into force until 1 November 2009.

25 See eg Ray Watterson, Penny Brown and John McKenzie, 'Coronial Recommendations and the Prevention of Indigenous Death' 2008 12(2) *Australian Indigenous Law Review* 4.

26 *Ibid.*

mother's place and she was once again compelled to call the police. A domestic violence protection order was in place and the perpetrator was charged with breaching the order. He entered a not guilty plea and was released on bail. When the mother of the children was hospitalised, the father successfully applied to the Family Court for custody of the 2 children aged 10 weeks and 18 months. This decision was eventually overturned but instead of returning the children to their mother, as ordered by the court, the father killed them and himself.<sup>27</sup>

Of the 74 intimate partner homicides in Australia during 2005-6, 39 had a prior history of domestic violence.<sup>28</sup> Male intimate partners pose the greatest death risk to women.<sup>29</sup> Many women and children who die in these circumstances had contact with a range of agencies prior to their death.<sup>30</sup> Domestic violence incidents often have predictive elements to them, and an examination of these homicides could help prevent future deaths by uncovering patterns, risk indicators and systems failures.<sup>31</sup> To date, however, Victoria is the only Australian jurisdiction to have established a Systemic Review of Family Violence Deaths.

#### Freedom from forced work

*Example: Sexual slavery* (see Right of women to protection from violence below)

#### Freedom from torture and other ill-treatment

*Example: Strip searching*

S 'had a little cry' on her first day of being in prison for the first time. For this reason, S was removed from other prisoners, medicated with Valium and placed, naked, in a padded cell for four days on 15-minute observations.

Prisoners and visitors to prison facilities in Australia are regularly subjected to strip searching when entering or moving around prison facilities. Current policies regarding strip searching do not require the searches to be conducted in a manner that represents a permissible limitation on human rights. The practice is also an ineffective tool in discovering contraband.<sup>32</sup>

Strip searching has a particular impact on women prisoners, between 40 and 89 per cent of whom are victim/survivors of sexual or physical violence.<sup>33</sup> Strip searching can reinvolve and replicate previous experiences of such abuse and the consequent trauma.<sup>34</sup> Women prisoners may forego visits from family or external medical treatment in order to reduce the number of searches.<sup>35</sup>

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27 'A Father's Deadly Rage', *Australian Women's Weekly* (June 2004), quoted in Betty Taylor for the Domestic Violence Death Review Action Group, *Dying to be Heard: Domestic and Family Violence Death Reviews Discussion Paper* (2008) 23.

28 Betty Taylor for the Domestic Violence Death Review Action Group, *Dying to be Heard: Domestic and Family Violence Death Reviews Discussion Paper* (2008) 11.

29 Ibid.

30 Ibid.

31 Ibid.

32 *Freedom Respect Equality Dignity: Action: NGO Submission to the Human Rights Committee: Australia's Compliance with the International Covenant on Civil and Political Rights* (September 2008), paras 363-4, available at <http://www.hrlrc.org.au/content/topics/civil-and-political-rights/un-human-rights-committee-review-of-australia-march-2009/>.

33 See eg B A Hockings et al, Department of Corrective Services, *Queensland Women Prisoners' Health Survey* (2002) 52-3. 'Sexual assault' figures here do not include strip searches.

34 Federation of Community Legal Centres and Victorian Council of Social Service, *Request for a Systemic Review of Discrimination against Women in Victorian Prisons* (2005), available at <http://www.vals.org.au/news/submissions/33%20ExecutiveSummaryFinal%20Discrimination%20against%20women%20in%20prison.pdf>

35 Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 52-3.

*Example: Abuse of older persons by carers*

Centrelink does not monitor whether an individual who is receiving a Carer pension is providing adequate care. Our member centre, Seniors Rights Victoria, has received many calls relating to abuse of an older person by an adult child or carer who is living with the older person and receiving the Carer's pension. This abuse includes neglect - failing to care for the older person - and may also involve physical, emotional or financial abuse. For case studies and more detailed discussion of elder abuse, see the submission from Seniors Rights Victoria.

*Example: Seclusion in a psychiatric hospital*

'I was ill, confused and very afraid. . .I was ordered by the nurse to go inside a small cell-like room with no window, only a makeshift bed in one corner, and in the heavy wooden door, a window made of thick glass for the nursing staff to look into the cell. . .Becoming desperately scared, I started pounding on the door, shouting for the nurse to come, as I needed to go to the toilet. . .My yells were ignored. . .I ended up having to suffer the utter humiliation of passing urine on the floor of that cell.'<sup>36</sup>

Right of women to protection from violence

While there have been significant advances in legislative and enforcement responses to violence against women in recent years, ongoing issues across state and territory jurisdictions include lack of or inadequate access to justice; less than best practice investigation, trials, punishment and remedies; and inadequately resourced services.<sup>37</sup> These failures in protection are often compounded when the victim of violence is a member of a group that suffers additional disadvantage and discrimination.

Violence against women is both a fundamental rights violation and a form of discrimination.<sup>38</sup> Violence can also be fuelled by other forms of discrimination and marginalisation: characteristics such as disability; sexual orientation; age; coming from a culturally or linguistically diverse background; or being Indigenous, homeless, a refugee, a migrant, or in prison can make some women particularly vulnerable to violence.

As part of Australia's obligation to respect, protect and fulfil the right of women to be free from violence, Australia has a duty 'to prevent, investigate, punish and provide compensation for all acts of [violence against women] wherever they occur.'<sup>39</sup>

*Example: Family violence deaths (see Right to life above)*

*Example: Sexual harassment*

Sarah came to Australia in the early 1990s as a refugee and has since been granted a Permanent Residence visa. While she can speak English at a basic level, her knowledge is minimal and she has difficulty reading and

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<sup>36</sup> Human Rights and Equal Opportunity Commission, *Human Rights and Mental Illness: Report of the National Inquiry into the Human Rights of People with Mental Illness* (1993) 270.

<sup>37</sup> See more generally, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009), 93-130.

<sup>38</sup> United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, *15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences* (2009); CEDAW General Recommendation No. 19 (11th session, 1992).

<sup>39</sup> United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences, *15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences* (2009) 25; CEDAW General Recommendation No. 19 (11th session, 1992) para 9.

writing. Sarah also has a mild learning disability. She was employed by a well-known company that has a largely male employee base undertaking labour work. During the course of her employment, she was continuously sexually harassed, culminating into a sexual assault by a fellow employee.

Sarah was not aware that the sexual assault was illegal, and as she had found it so difficult to obtain employment, she did not want to inform her employer of the sexual harassment that had occurred prior to the assault. Furthermore, the company had not informed any of its employees of anti-sexual harassment policies or procedures.

Sarah disclosed that she had been sexually assaulted to her friend the next day, who accompanied her to the police station to file a report. The OPP found that as it was 'her word against his', her matter should not be prosecuted due to 'lack of evidence'. However, in most sexual assault matters, the victim will be the only witness to the assault.

Sarah has since found it very difficult to find employment in the same industry, as she has been told that people are aware of her allegations of sexual assault. She continues to suffer from nightmares, isolation and humiliation, exacerbated by her inability to be gainfully employed or occupied. Due to the lack of prosecution, Sarah feels that that she is not believed and that she is being punished for being sexually assaulted and speaking to the police about it.<sup>40</sup>

#### *Example: Sexual slavery*

Tina was told in her country of origin that she would be able to work in Australia in a bar and earn money to pay off debts owed in her home country. Tina spoke minimal English and trusted family friends who lived in Australia to look after her. Her family friends informed her that they would pay for her flights and accommodation expenses and that she could work to pay them off after she settled in Australia. In reality, the family friends lured Tina to Australia under false pretences and subjected her to four years of sexual slavery and debt bondage. Her 'friends' were in fact engaged in human trafficking activities. The traffickers informed her that if she reported them to the police, she would be deported (as she had unwittingly arrived on an illegal visa), and she and her family in her country of origin would be killed.

In the period after she had paid off her debt bondage, Tina found out that she could only stay legally in Australia as long as she was willing to testify against the traffickers. By this stage, Tina had married and had a young child, and was very frightened about any possible repercussions on her new family. Tina therefore still stays in hiding. She is haunted by the idea that the traffickers will subject other young women to violence and forced sexual slavery like herself, but she is not able to report the matter as she will be identified as a witness in the event of any prosecutions.<sup>41</sup>

As part of its obligations to respect, protect and fulfil the right of women to be free from violence, the Federal government must recognise that women who have been trafficked to Australia for the purposes of sexual slavery are extremely vulnerable, due to factors such as lack of language knowledge, limited or no finances, and lack of social supports. Added to this is the immense stigma involved in being a victim of trafficking.

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40 Example provided by Violence Against Women & Children Working Group.

41 Example provided by Violence Against Women & Children Working Group.

*Example: Experience of a sexual assault survivor with communication difficulties*

Caroline has cerebral palsy, is in a wheelchair, and is totally dependent on carers for all personal and daily living activities.<sup>42</sup> Cognitively very aware, she depends on assisted communication to enable her to communicate.

Caroline lives with her mother, who is also her primary carer. Caroline's mother does not drive, so Caroline travelled to and from her mainstream school by taxi each day. Within a few days of starting her year 11 studies, Caroline was sexually assaulted by a taxi driver.

The sexual assault was reported to police and an investigation began. Caroline uses a communication book to communicate, but the book did not have the vocabulary she needed to describe what had happened to her, such as 'penis' or 'rape'. The police would not allow these words to be added to the book after the incident, because in court this would be seen to be leading the witness. The police even advised Caroline's mother, school staff and social worker not to talk to her about what had happened, because the prosecution would again be able to assert that the witness had been led.

It took great courage and much time and energy as Caroline struggled to find the means to reveal the facts of her ordeal. She worked every day with the co-ordinator of the school's special education unit. It was a painstakingly slow process that took its toll not only on Caroline but on the teacher working with her.

Despite Caroline's extraordinary efforts, the police were unable to lay charges due to insufficient evidence. The trauma of her assault was overlaid by the trauma of the police investigation, which ultimately failed to produce a result because there was no process in place which allowed for the sort of assistance and support that Caroline needed, in order to give evidence in a manner which met the requirements of the legal system.<sup>43</sup>

*Example: Strip searching (see [Freedom from torture and other ill-treatment](#) above)*

Right of children to protection from violence

Despite international obligations under the CRC, significant numbers of young people experience violence in the home, at school, in out of home care, in the criminal justice system, and in the community.<sup>44</sup> Youthlaw's submission discusses many forms of this violence, including the fact that corporal punishment is still lawful in Australia; and notes that homophobic bullying at school is an insidious problem that also infringes victims' right to education.

Youthlaw observes that in contact between a child and a police officer, the onus is on the adult officer to protect the human rights of the child. Despite this, 15-year-old Tyler Cassidy was shot dead by three members of Victoria Police in 2008.<sup>45</sup>

*Example: Family violence deaths (see [Right to life](#) above)*

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42 This example is an edited version of a letter that was written by the social worker who assisted 'Caroline'.

43 See also more generally, Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice* (2003).

44 Youthlaw, *Young People Having Their Say About Human Rights*, 22, 26-32.

45 For more detail, see Youthlaw, *Young People Having Their Say About Human Rights*, 31-32.

## Right of lesbian, gay, bisexual, transgender and intersex people to be protected from violence and harassment

### *Example: Homophobic violence*

We refer to the submission to the National Consultation from the LGBTI Network of the National Association of Community Legal Centres, particularly the case study of Lucy and Cara.

## Freedom from arbitrary detention

### *Older persons in aged care facility*

See the example of Mona (Freedom of assembly and association below), and the case study of Wanda in the submission to the National Consultation from our member centre, Seniors Rights Victoria.

### *Example: Involuntary mental health admissions*

In Australia, people with mental health issues can be involuntarily detained when certain criteria are met. International principles recommend that initial involuntary admission should be for a 'short period' pending external review,<sup>46</sup> and that the review should take place 'as soon as possible'.<sup>47</sup> However, most Australian jurisdictions fail to comply with these principles.<sup>48</sup> In Victoria, automatic review by the Mental Health Review Board can take place up to eight weeks after admission. Consequently, 70% of people involuntarily detained do not have review hearings at all.<sup>49</sup>

## Right to humane treatment in detention

### *Example: Treatment of remand prisoners accused of terrorist offences*

In 2004, Corrections Victoria, the Victorian Government office which manages Victoria's prison system, confirmed it had a default policy of placing any remand (ie: innocent until proven guilty) prisoners charged with "any offence/s alleged to be associated with terrorism" in an A1 High Security unit - the most restrictive regime in the prison system.

To put this in context, amongst Victoria's 4000-odd prison population, there would only be a handful of sentenced prisoners classified A1 and subjected to this extreme deprivation of liberty. They would have been convicted of the most heinous crimes.

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46 *United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, Principle 16.2.

47 *Ibid*, Principle 17.2.

48 See eg Sophie Delaney, 'An Optimally Rights Recognising Mental Health Tribunal - What Can be Learned from Australian Jurisdictions' (2003) 10 *Psychiatry, Psychology and Law* 71.

49 For more detail see Vivienne Topp, Martin Thomas and Mim Ingvarson, *Lacking Insight: Involuntary Patient Experience of the Victorian Mental Health Review Board* (October 2008), available at [http://www.communitylaw.org.au/mentalhealth/cb\\_pages/li\\_contents.php](http://www.communitylaw.org.au/mentalhealth/cb_pages/li_contents.php) ; Federation of Community Legal Centres, Letter to the Mental Health Act Review (6 March 2009), available at <http://www.communitylaw.org.au/lrs.php#Mental%20Health> .

Similar policies exist across Australia in State and Territory prison systems in relation to the treatment of terror suspects.

Compounding the effect of this policy, Federal legislation makes it extremely difficult for terror suspects to get bail. Except with the worst crimes such as murder, there is normally a presumption in favour of granting an accused bail. With the range of terrorism offences however, the Federal Parliament reversed this presumption so that bail will only be granted in “exceptional circumstances”. Accordingly, anyone charged with a terrorist offence is likely to be remanded to prison in these conditions until their trial.

In 2005, Corrections Victoria’s policy was implemented in relation to 12 men charged with membership of a terrorist organisation (carrying up to 10 years imprisonment). Some of the men were also charged with other terrorist charges. None were charged with engaging in any terrorist act.

The men were denied bail. For their first year or so in prison, they were held in solitary confinement for up to 23 hours a day. They were permitted only ‘non-contact’ visits with adults, meaning they could not touch their wives, parents or siblings. They were allowed contact visits with their children only once per month and were shackled during these visits. A senior forensic psychiatrist told a Supreme Court hearing that an ordinary person experiencing the conditions ‘could reasonably be expected to experience a very significant degree of psychological and emotional distress.’

Over time, after action by their lawyers, these conditions ameliorated slightly. But they were still kept in a high security unit remaining on the highest security classification possible in the prison system; A1 High Security. On court days, the men were woken at 6am, strip searched, handcuffed (with the cuffs fixed to a waist belt), fitted with leg shackles and placed in small box-like steel compartments in a prison van for the 65-80 minute journey to court. On return, they were strip searched again. They were strip searched before and after any contact visits.

Finally, in March 2008, the Supreme Court ruled<sup>50</sup> that the totality of the men’s conditions of imprisonment and transport rendered their trial unfair and intolerable. At the application, Corrections Victoria led no evidence that there had been any rational consideration of the risk profile of individual terror suspects.

After the ruling, Corrections Victoria agreed to drastically alter the men’s imprisonment by moving them to a prison close to the court, reducing the frequency of strip searches, ensuring they spend at least 10 hours per day out of their cells, stopping the use of shackles and otherwise not subjecting them to conditions worse than those normally imposed on remand prisoners.

The criminal case finally ended in September 2008. Four of the men were found innocent and immediately released after spending around 3 years in prison in these conditions.

*Example: Strip searching* (see [Freedom from torture and other ill-treatment](#) above)

*Example: Seclusion in a psychiatric hospital* (see [Freedom from torture and other ill-treatment](#) above)

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50 *R v Benbrika* (Ruling No 20) [2008] VSC 80.

### Right to a fair hearing

*Example: Mental Health Review Board*<sup>51</sup>

In 2006/07, only 5.6% of individuals who appeared before the Mental Health Review Board in Victoria had legal representation. Many patients are unable to present their cases as well as they might wish because of their mental illness, or they may be reluctant to speak openly at a Board hearing.<sup>52</sup>

The presence of an advocate provides support and ensures that the patient's rights are appropriately protected. Individuals who appear before the Board and have legal representation are two to three times more likely to successfully challenge their treatment order.

The very low level of representation in matters before the Board is particularly concerning given the extreme consequences of Board decisions on the liberty and security of persons who may be subject to mental health treatment orders.

### Right to privacy

*Example: Financial abuse of older people*

Centrelink currently allows a pension recipient to nominate a person to deal with payment arrangements and / or Centrelink correspondence. Centrelink is not currently required to monitor older people's files for evidence of financial abuse by the nominee. Centrelink's nominee arrangements may facilitate the abuse of older people without capacity 'due to the lack of appropriate safeguards to protect older people's privacy and financial security.'<sup>53</sup>

*Example: Man not receiving mail at a residential aged care facility*

Arthur, a 75-year-old man, lives in a residential facility in Victoria. Julia is his only child and also has his financial power of attorney. Arthur is experiencing some memory loss but is still lucid. Julia made a decision to exercise the use of the power of attorney, and instructed the facility that all mail should be redirected to her. The facility commenced redirecting mail to Julia without the knowledge or consent of Arthur.<sup>54</sup>

*Example: Increasing use of CCTV*

Youthlaw notes that the use of closed circuit television cameras by both public authorities and private organisations is increasing, and that this impacts disproportionately on homeless and young people, and other groups reliant on public space.

*Example: Strip searching* (see Freedom from torture and other ill-treatment above)

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<sup>51</sup> See *Example: Involuntary mental health admissions* under Freedom from arbitrary detention above.

<sup>52</sup> For more detail see Vivienne Topp, Martin Thomas and Mim Ingvarson, *Lacking Insight: Involuntary Patient Experience of the Victorian Mental Health Review Board* (October 2008), available at [http://www.communitylaw.org.au/mentalhealth/cb\\_pages/li\\_contents.php](http://www.communitylaw.org.au/mentalhealth/cb_pages/li_contents.php) .

<sup>53</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth of Australia, *Older People and the Law* (2007) 102.

<sup>54</sup> Example provided by Older Persons Law Working Group.

### Freedom of movement

*Example: Older woman forced to live in aged care facility (see [Freedom of assembly and association](#) below)*

*Example: Young people and 'move on' powers (see [Rights to equality and non-discrimination](#) above)*

*Example: Public drunkenness laws*

We refer to the contribution by Victorian Aboriginal Legal Service (VALS) to the joint Aboriginal and Torres Strait Islander Legal Services submission to the National Consultation. VALS submits that public drunkenness laws, even when repealed as they have been in some jurisdictions, tend to reappear in practice. VALS submits that public drunkenness is a health issue which should be appropriately resourced, rather than the present policing approaches which contribute the over-representation of Aboriginal people in the criminal justice system, and in some cases, to deaths in custody (see eg *The death of Paul Carter* in [Right to life](#) above).

### Protection of families and children

*Example: Older woman forced to live in aged care facility (see [Freedom of assembly and association](#) below)*

*Example: Strip searching (see [Freedom from torture and other ill-treatment](#) above)*

*Example: Older person refused contact with wife*

Gina and Ted are married. Ted has Alzheimer's disease and lives in a Commonwealth-funded residential facility. Ted has a daughter from a previous marriage, Michelle. Michelle is Ted's guardian. Michelle instructed the facility that Gina was not to take Ted on outings. Michelle also attempted to limit Gina's contact with her husband at the facility. Seniors Rights Victoria assisted Gina to negotiate with Michelle and the facility, raising the Charter of Residents' Rights and Responsibilities with the management of the facility. The management maintained that it needed to act in accordance with the direction of the guardian. However, Michelle's powers did not extend to access to the person. An application was made to VCAT and VCAT refused to extend the scope of the guardian's powers to include access to the person.<sup>55</sup>

See also Case Study Examples 1 & 2 in the submission to the National Consultation from our member centre, Seniors Rights Victoria.

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<sup>55</sup> Example provided by Older Persons Law Working Group.

## Freedom of thought, conscience and religion

### *Example: Muslim prisoners*

The prisoners remanded on terrorist charges (see Right to humane treatment in detention above) were served meals with pork, which was deeply offensive to their religious beliefs. They were also denied the right to pray together, and banned from reading literature in languages other than English.

### *Example: Shopkeepers and hijabs*

Youthlaw documents how some young Muslim woman have encountered shopkeepers who assume they are hiding stolen goods under their hijab.

## Freedom of expression

### *Example: Tamil radio program*

Australia has anti-terrorism legislation that impinges on the freedom of expression of particular ethnic groups, in particular the provisions of the *Criminal Code* creating offences relating to 'terrorist organisations'.

Person X is of Tamil origins and hosts a Tamil radio program on a community radio station. Under Australian law, the Liberation Tigers of Tamil Eelam (LTTE) may fall within the legal definition of a 'terrorist organisation'. Person X has observed that in the prosecution of several Tamil-Australians in relation to their links with the LTTE, political materials relating to the plight of Tamils in Sri Lanka have formed part of the prosecution's evidence. Person X is therefore reluctant to speak about matters relating to the situation in the north-eastern region of Sri Lanka in his radio program, for fear of being linked with the LTTE and for fear that political commentary might be used to incriminate him. He therefore avoids speaking about Sri Lankan politics on his radio program altogether.

### *Example: Internet censorship*

Freedom of expression is not currently guaranteed in Federal law (other than a limited implied constitutional right to freedom of political communication). Accordingly, there are little or no legal safeguards limiting what the government can censor and how it achieves this censorship. This lack of protection has been highlighted by the Federal Government's proposal to introduce mandatory internet censorship. The initial focus of the censorship is on websites containing child abuse and in particular child pornography. Clearly, the aim of limiting access to websites with this material is legitimate. However, internet experts have highlighted a range of flaws<sup>56</sup> in the proposed censorship filter including:

- It is likely that the filter will be easily circumvented by readily available software;
- Censorship blacklists will not be able to keep up with the pace of new content being added to the internet;
- It is likely that a range of legitimate content will be inadvertently censored by the filter (eg: entire user-generated content sites like YouTube and Wikipedia could be blocked over a single video, photo or article);
- Free software is available to users who want to voluntarily install internet filters on their local personal computers. This software can be as effective as the mandatory filter that the Federal Government proposes to introduce;

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<sup>56</sup> See eg A Moses, 'Fatal flaws in website censorship plan, says report', *Sydney Morning Herald*, 23 December 2008.

- The filter may be costly and difficult to implement for ISPs; and
- The filter may lead to significant reductions in Internet access speeds.

*Example: The ‘Gunns 20’ litigation*

We refer to the submission of the Australian Network of Environmental Defender’s Offices.

#### Freedom of assembly and association

*Example: Older woman forced to live in aged care facility*

Mona, an 84-year-old woman with mild dementia, was moved to a Commonwealth-funded residential aged care facility against her will by her daughter, June. Mona had previously appointed June as her financial power of attorney. June was not Mona’s guardian or medical attorney. On June’s instructions, the facility prohibited Mona from leaving its premises or from communicating with her friends or her long time companion. Seniors Rights Victoria (SRV) raised the Charter of Residents’ Rights and Responsibilities made pursuant to the *Aged Care Act 1997* (Cth). Although the facility agreed to allow visitors onto its premises, it continued to restrict Mona’s movement. SRV appeared on behalf of Mona at the Victorian Civil and Administrative Tribunal and an independent guardian was appointed. With the advocacy support of SRV, Mona returned home.

*Example: Young people and ‘move on’ powers (see Rights to equality and non-discrimination above)*

*Example: The ‘Gunns 20’ litigation*

We refer to the submission of the Australian Network of Environmental Defender’s Offices.

#### Right to take part in public life

*Example: Young people and decisions about them*

Youthlaw’s consultations with young people reveal that many of them feel that they lack a voice in government decision-making that affects them. More generally, their experiences suggest that even the civil, political, economic, social and cultural rights framework is adult-centric and so does not sufficiently address the human rights violations experienced by youth.<sup>57</sup>

*Example: The MacArthur Mine expansion (Northern Territory)*

We refer to the submission of the Australian Network of Environmental Defender’s Offices.

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<sup>57</sup> Youthlaw, *Young People Having Their Say About Human Rights*, 32-34.

*Example: The 'Gunns 20' litigation*

We refer to the submission of the Australian Network of Environmental Defender's Offices.

#### Right to social security

*Example: Barriers for people who are mentally ill*

Michael suffers from mental illness. He was deemed by Centrelink to have refused a job offer and an eight-week 'no payment period' was imposed. During the eight weeks he was unable to meet rent payments and became homeless. His mental health deteriorated and he was involuntarily hospitalised.<sup>58</sup>

*Example: Older people living below the poverty line (see Right to an adequate standard of living below)*

#### Right to work

*Example: Older people and work (see Right to equality and non-discrimination above)*

#### Right to an adequate standard of living, including the right to housing

*Example: Older people living below the poverty line*

A significant proportion of older Australians live below the poverty line. Subsisting on very low fixed incomes, they have been disproportionately affected by the rising cost of necessities such as food, housing, petrol and health services, especially dental care. Single pensioners, particularly women and people with severe disabilities, have been worst affected. These older Australians have no financial reserves and are unable to gain paid employment due to their age and disabilities. Despite an increase in pensions in the May 2009 Budget, older people remain particularly vulnerable to poverty.<sup>59</sup>

*Example: Refusal to provide services to older person*

A local service provider refused to provide services to Elaine, due to occupational health and safety concerns because the house had tripping hazards and accumulated dirt and mess on the floor. Elaine was almost blind and therefore could not see to clean. Seniors Rights Victoria advocated on behalf of Elaine, emphasising her rights to services and her right to stay in her home. The service provider agreed to provide services and undertook a major clean up, including laying new lino after which normal weekly cleaning services were sufficient. Elaine was therefore able to continue to live at home.<sup>60</sup>

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<sup>58</sup> Case study provided by Welfare Rights Centre, Sydney.

<sup>59</sup> Example provided by Older Persons Law Working Group.

<sup>60</sup> Example provided by Older Persons Law Working Group.

*Example: No minimum standards for private rental*

In its submission to the National Consultation, our member centre, Tenants Union of Victoria (TUV), describes how the governing legislation relating to tenancy in Victoria does not provide for a basic minimum standard of amenities in a property, and how this has resulted in situations where people have rented a property and then realised that there is no cooling or heating and have not been able to compel the landlord to install any. We refer the Committee to the detailed discussion and case studies in the TUV submission.<sup>61</sup>

### Right to health

*Example: Older people living below the poverty line* (see Right to an adequate standard of living above)

*Example: Strip searching* (see Freedom from torture and other ill-treatment above)

*Example: The intertwining of violence and ill health*

Women's right to be free from violence is intrinsically linked to the right to the highest attainable standard of mental and physical health. Violence often has an adverse effect on the victim's long-term health,<sup>62</sup> and women with mental illness are at risk of higher levels of violence.<sup>63</sup>

*Example: Treatment of people with mental illness*

In Australia, mental illness causes 13% of the burden of disease in the health system, but receives only 7% of the funding.<sup>64</sup> Mental illness often goes untreated or inappropriately treated because people with major mental health problems are in prison.<sup>65</sup> There is too great a use of aversive treatments with harmful side effects and reliance on involuntary treatment regimes, with many people subject to such treatments being stigmatised, distressed and debilitated by weight gain, lethargy, loss of sexual function, involuntary movements, dry mouth, vision problems, inability to concentrate and dulled mental or emotional functioning.

*Example: Prisoners and the right to health*

We refer to the case study of 'Jill' in the contribution by our member centre, Victorian Aboriginal Legal Service, to the joint Aboriginal and Torres Strait Islander Legal Services submission to the National Consultation.

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<sup>61</sup> See also, in relation to private rooming houses in particular, Tom Reilly, 'Our Slumlord Millionaires', *The Age*, 14 June 2009.

<sup>62</sup> Intimate partner violence is the leading contributor to death, disability and illness in Victorian women aged 15-44, higher than risk factors such as high blood pressure, smoking and obesity: Victorian Health Promotion Foundation, *The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence* (2004).

<sup>63</sup> See eg Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victim/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice* (2003).

<sup>64</sup> Mental Health Council of Australia, *Time for Service: Solving Australia's Mental Health Crisis* (2006). See also the submission from our member centre, St Kilda Legal Service, for an example of failure of a client to get help for her mental illness.

<sup>65</sup> Rates of major mental illnesses are between three and five times higher in the prison population than in the general Australian community (James Ogloff et al, 'The Identification of Mental Disorders in the Criminal Justice System', *Trends and Issues in Crime and Criminal Justice*, No. 334, Australian Institute of Criminology (2007) 1).

### Right to a clean and healthy environment

*Example: The MacArthur Mine expansion (Northern Territory)*

We refer to the submission of the Australian Network of Environmental Defender's Offices.

### Right to education

*Example: Indigenous educational disadvantage*

The submission to the National Consultation from our member centre, Eastern Community Legal Centre, details how despite high levels of primary school enrolment, young Indigenous people in the outer east have a significant dropout rate at high school, and that existing laws and policies are therefore failing Indigenous students.

*Example: Young people with disabilities*

The submission from Youthlaw highlights the situation faced by tertiary students with disabilities requiring attendant and personal care. These students face irregular and limited provision of care services, which can restrict their studies and life on campus or even force them to drop out of their studies.<sup>66</sup>

### Right of self-determination

*Example: Decision made without consulting traditional owners*

A proposed bridge across the Murray River in the traditional lands of the Yorta Yorta Nations was sited without consultation with the Yorta Yorta, despite the fact that the bridge had the potential to disturb the only evidence of Yorta Yorta occupation near Echuca, as well as damaging an area of significant spiritual and cultural value.

An alternative bridge route more acceptable to the Yorta Yorta was rejected, despite the fact that an Environmental Impact Statement said that the chosen route was the most detrimental to the environment as well as to the Yorta Yorta's cultural heritage.

Yorta Yorta spokesperson Mr Henry Atkinson said the Yorta Yorta Nations and others supporting their ongoing battle for their lands and waters were upset and angry at the lack of respect and consideration shown by the Government for Yorta Yorta cultural and spiritual values, and for their status as the first peoples of the area. He said the Yorta Yorta first heard about the final decision on the radio, and that the choice seemed set from the start.

*Example: The MacArthur Mine expansion (Northern Territory)*

We refer to the submission of the Australian Network of Environmental Defender's Offices.

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<sup>66</sup> See also Youthlaw, *Young People Having Their Say About Human Rights*, 37.

Cultural rights

*Example: Indigenous educational disadvantage (see Right to education above)*

*Example: Decision made without consulting traditional owners (see Right of self-determination above)*

*Example: The MacArthur Mine expansion (Northern Territory)*

We refer to the submission of the Australian Network of Environmental Defender's Offices.

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

The Federation submits that human rights in Australia would be better respected, protected and fulfilled by a Human Rights Act ('HRA'), supported by a range of non-legislative measures aimed at promoting human rights in Australia.

As just one illustration, to return to our example of violence against women in our response to Q2, federal human rights protection is necessary for the Commonwealth Government to be able to effectively implement the National Plan for Australia to Reduce Violence against Women and Children. The 'joined up' policy and practice of the Plan requires support from a 'joined up' human rights framework. As the National Council to Reduce Violence Against Women and their Children states:

'[T]he analysis reveals many similarities between jurisdictions in the way they respond to violence against women and their children. This suggests that there is considerable scope for greater cooperation and collaboration between the Commonwealth, states and territories in developing a unified, national approach to one of Australia's most pressing social issues.'<sup>67</sup>

Federal legislation that protected the right of all women to be free from violence would send a message to all Australians that violence is unacceptable and that the Australian Government is committed to ending it. It would also recognise Australia's international obligations and thereby enhance Australia's standing in the international community.

More generally, we adopt the Human Rights Law Resource Centre's supporting reasons for, and refutation of myths about, a federal HRA.<sup>68</sup>

#### Ambit of the HRA

The HRA should protect the human rights of all natural persons (and so exclude corporations), whether individuals or groups, who are in Australian territory and subject to its jurisdiction. Protection should exist regardless of citizenship status, other than the right to vote and the right to freely exit and enter the country.

It is appropriate that the obligation to respect human rights rest largely on the Australian Government (see also 'Form of the HRA' below). This obligation, together with the obligations to protect and fulfil human rights, should also extend to contexts where Australian public authorities are operating overseas (with regard to public authorities, see also 'Form of the HRA' below).<sup>69</sup>

We adopt the Human Rights Law Resource Centre's submission that the HRA should bind state public authorities and invalidate state laws or provisions that are inconsistent with the HRA.<sup>70</sup> This approach allows states to enact or continue with their own human rights charters, but also enables 'filling in the gaps' in human rights protection.

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<sup>67</sup> National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 7. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009) 149-159; Commonwealth of Australia, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (April 2009) 4-5.

<sup>68</sup> Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 234-258, 449-459.

<sup>69</sup> For more detail see Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 411-415.

<sup>70</sup> For more detail see Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 400-410.

## Rights in the HRA

The HRA should include a statement that the governments bound must respect, protect and fulfill the rights in the HRA. Rights should include the human rights in the ICCPR and the ICESCR, and incorporate by reference the human rights contained in all other international agreements to which Australia is a party. The HRA should also list all other human rights recognised in Australia, and provide for future amendments to incorporate by reference the human rights in any other international human rights agreements to which Australia becomes a party or which are otherwise recognised in the future in Australia.

In addition, there are a number of rights that although interpreted as legally incorporated as part of ICCPR and ICESCR rights, should be expressed in their own right in the HRA. We submit that this is important because these rights are not always easily identified as core civil, political, economic, social or cultural rights, especially by non-lawyers; and also have not always been adequately addressed in human rights jurisprudence and in the policies and practices of State compliance. Examples include the right of women and children to be free from violence, and the right to a clean and healthy environment.<sup>71</sup>

Specifying these rights will also assist in approaches to protection and promotion which address the intersection of disadvantage in matters such as youth homelessness due to family violence, and violence against women as a form of torture or inhuman and degrading treatment. These additional express rights will also facilitate a 'joined up' approach to protecting and promoting rights at both federal and state level. For example, in Victoria, the Preamble to the *Family Violence Protection Act 2008* acknowledges that family violence is a fundamental violation of human rights, and it therefore makes sense that at the federal level, violence against women, including family violence, is specified as a human rights abuse.

The wording of these 'additional' rights should be drawn from the relevant international human rights instruments otherwise incorporated by reference into the HRA.

The HRA should also include an explicit statement that its rights and freedoms are guaranteed equally to persons irrespective of gender, in order to encourage an awareness of gender-based discrimination to be applied to interpreting other rights in the HRA. In addition, we submit that it is important for the HRA to provide a non-exhaustive list to illustrate that particular individuals and groups in Australia are especially vulnerable to human rights abuses (as identified in our response to Q2 above). This list of examples should include women, Aboriginal and Torres Strait islander peoples, people from culturally and linguistically diverse communities, people with a disability, older people, children and young people, gay, lesbian, bisexual, transgender and intersex persons, homeless people, asylum seekers and refugees, and prisoners.<sup>72</sup> The highlighting in the HRA of these forms of disadvantage should be supported by associated monitoring and enforcement mechanisms.<sup>73</sup>

The social characteristics above should also be expressly encompassed in provisions concerning the rights to equality and non-discrimination,<sup>74</sup> along with the express addition of genetic characteristics, pregnancy, family responsibilities and marital status.

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71 For more detail on how the right to a clean and healthy environment might be incorporated into the HRA and the necessity of addressing the human rights implications of climate change, see the submission to the National Human Rights Consultation from the Australian Network of Environmental Defender's Offices.

72 The rationale for highlighting these forms of disadvantage is similar to that informing the *Family Violence Protection Act 2008* (Vic) ss 5-7, which provides non-exhaustive examples of family violence to assist interpretation, and therefore fulfilment of the purposes of, the Act.

73 See eg Youthlaw's recommendation for the establishment of an independent National Commissioner for Children and Young People, which we adopt.

74 For example, older people, children and youth are clearly encompassed by 'age'; and transgender and intersex people by 'gender identity'.

A Preamble to the HRA should acknowledge the special significance of human rights to Indigenous peoples as traditional owners of the land in Australia; however, this should not preclude constitutional reform to incorporate a similar acknowledgement of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia.

We also support the recommendation of the Australian Network of Environmental Defender's Offices, of which our member centre, Environment Defenders Office (Victoria), is a member, that the HRA include a statement recognising the importance of intergenerational equity, particularly in the context of climate change.

Consistent with international human rights law, the HRA should provide that certain rights are absolute. These rights should be specified following consultation with international human rights law experts, but clearly include the right to be free from torture and other cruel, inhuman or degrading treatment or punishment, and the right to be recognised as a person before the law.

The HRA should provide that other rights may be subject to limitations, along the lines of the *Charter of Rights and Responsibilities Act 2006 (Vic)* s 7.<sup>75</sup>

### Form of the HRA

The HRA should take the form of a legislative dialogue model enacted by the Commonwealth Parliament, along the lines of the present Victorian Charter. However, although outside the Terms of Reference of the National Consultation, the possibility of eventual, at least partial, constitutional entrenchment should not be closed off and should be included in the scope of legislated reviews of the HRA.

The climate fostered by the Victorian Charter is testimony to the strength of the dialogue model, in which the emphasis is on democratic debate, centred on the separate and distinct roles of executive, legislative and judicial arms of government, and on public education and discussion about the importance of human rights. The experience of the Federation and many of our member centres is that far from opening the floodgates to litigation and uncertainty, the Victorian Charter has functioned as an advocacy tool for systemic cultural and social change, engaging both community and government in reflecting on how best to achieve genuinely just policies and practices, often without reaching the door of the courtroom. As two examples, Youthlaw and Tenants Union of Victoria have had success using the Charter in their casework and advocacy.<sup>76</sup>

At the Federation level, in addition to our 'internally directed' work in 'opting in' community legal centres as public authorities (see p 34 and *Appendix Two*), we are continually using the Charter in our 'externally directed' policy and law reform work in order to try to achieve social justice for all Victorians. The Charts at the end of this section indicate the breadth of this work.

Under the dialogue model, Parliament would be required to take protected human rights into account as part of the law-making process, via the preparation of Statements of Compatibility, the establishment of a joint Parliamentary Human Rights Scrutiny Committee, and responses to judicial Declarations of Incompatibility.

The Federal and High Courts would be required to interpret laws consistently with human rights, drawing on international and comparative human rights jurisprudence; and where appropriate, to issue Declarations of Incompatibility requiring Parliament's response.

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<sup>75</sup> For further discussion, see Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 267-288.

<sup>76</sup> See the submission from Tenants Union of Victoria; and Youthlaw, *Young People Having Their Say About Human Rights*, 43-49.

The Executive would then be bound by the HRA, via the obligations on public authorities to act compatibly with the human rights in the Act and to give proper consideration to human rights when making decisions and implementing legislation. The definition of public authority should include private entities when they are exercising public functions such as delivering services on behalf of Government.

We also support provision for an 'opt-in' model for entities who are not public authorities under the HRA to choose to take on those obligations. In Victoria, while community legal centres are probably not public authorities, the Federation decided that it would be both best practice and good modelling for communities and government if CLCs act as though they are obligated to give proper consideration to human rights and to act in accordance with human rights in internal operations and when delivering services to clients.

This opting in has been informal, as there is no such provision in the Victorian Charter, unlike the ACT Human Rights Act.<sup>77</sup> Our approach has produced a human rights checklist and training workshop for CLCs (see *Appendix Two*), and has dovetailed with the increasing use by CLCs of the Victorian Charter in their advocacy and policy work.

Whether or not such a provision is enacted as part of a federal HRA, under both the HRA and existing international human rights law, the Australian Government would have a responsibility to educate and engage private entities, particularly large corporations, in ongoing dialogue about their human rights obligations under existing law and the desirability of building in human rights compliance into concepts of corporate social responsibility.<sup>78</sup>

One example of where businesses need to be encouraged to comply with a human rights framework is provided by Eastern Community Legal Centre's submission, which describes how they provided assistance to a new migrant from the Sudan who had been sold a car and given finance and insurance despite not having a driver's licence. Subsequently the client had an accident and the insurer refused to cover the claim on the basis that he was unlicensed. The Centre's submission points out that it is unlikely that new migrants will have the cultural, linguistic and financial resources to be able to pursue the matter after the fact as an unconscionable contract, and that it would be preferable if business, government and the community in general were required to take some responsibility in protecting the rights of vulnerable people whose knowledge of rights is limited.

We also support the Human Rights Law Resource Centre's more in-depth discussion of the legislative dialogue model.<sup>79</sup>

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<sup>77</sup> *Human Rights Act 2004 (ACT)* s 40D.

<sup>78</sup> For recommendations on some possible initiatives, see Human Rights Law Resource Centre, *Engage, Educate, Empower*, paras 131-156.

<sup>79</sup> Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 318-391.

Impact of the Victorian Charter on the Federation's work

<b><u>Protection from violence in carer relationships</u></b>	
<b>Issue</b>	In 2007 as part of its response to a Victorian Law Reform Commission (VLRC) recommendation that legislation be enacted to deal exclusively with family violence, the Department of Justice called for submissions on a draft Family Violence Bill. The Federation, together with Human Rights Law Resource Centre and Mallesons Human Rights Law Group, welcomed many of the provisions in the Bill but took issue with the exclusion of paid carers and carers arranged by third parties from the definition of family members.
<b>How the Charter was relied on</b>	We submitted that the issue engaged the Charter rights of equal protection of the law, protection from cruel, inhuman or degrading treatment or punishment, and protection of women and children from violence. The draft Bill would be in breach of the Charter by providing many people with disabilities who were experiencing abuse from their carers, with a lesser level of protection than other victims of family violence. We therefore argued, consistent with a VLRC recommendation, that the definition of 'family member' should encompass all carers where the person is dependent upon that care relationship.
<b>Response from Government</b>	The provision was re-drafted to include a carer as a family member if it is reasonable to regard them as such with reference to a list of factors such as any form of dependence and the provision of care, whether paid or unpaid. This is now the <i>Family Violence Protection Act 2008</i> (Vic) s 8(3).
<b>Evaluation of Charter impact</b>	A number of organisations active in advocating for victims of family violence argued for the greater inclusion of carers in the Bill, but our submission was probably the most detailed use of the Charter. Given the Federation's co-leadership of the Victorian Family Violence Justice Reform Campaign and hence our visible profile in the Bill-related consultations run by Government, it is likely that the Charter was a persuasive factor leading to the change, which has been particularly welcomed by women with disabilities.

Impact of the Victorian Charter on the Federation's work (contd)

<b>Better protection from discrimination</b>	
<b>Issue</b>	The Victorian <i>Equal Opportunity Act 1995</i> (EOA) was scrutinised in 2008 through a combination of independent and Department of Justice (DOJ) Reviews. The Independent Review sought views about the efficacy of the EOA, including its framework and mechanisms, while the DOJ Review examined the impact of the numerous exceptions and exemptions on equality of opportunity and the elimination of discrimination. The Federation made two submissions to the Independent Review and one submission to the DOJ Review ( <i>Appendix One</i> ).
<b>How the Charter was relied on</b>	The Federation set its submissions to both Reviews within the broader context of the Charter, arguing that changes must be enacted in a manner which recognise the close relationship between the EOA and the Charter, and that therefore there is a need to acknowledge human rights obligations to offer redress for, and attempt to effectively prevent, all forms of discrimination. Accordingly, we submitted that the Equal Opportunity Commission needs stronger and wider powers. We also submitted that the concept of reasonable adjustments sets too low a threshold for preventing discrimination and that the Charter's approach to limitations on rights provides a more nuanced test. This latter standard is to be preferred over the current exceptions and exemptions approach of the EOA, because we see it as offering more effective protection against discrimination.
<b>Response from Government</b>	The report from the Independent Review, <i>An Equality Act for a Fairer Victoria</i> , makes various recommendations consistent with our submissions, but has mainly not yet had a Government implementation response. The DOJ Review has been referred to the Scrutiny of Acts and Regulations Committee.
<b>Evaluation of Charter impact</b>	While it is too soon to conclude in relation to the exceptions and exemptions in the EOA, it would appear that the Charter helps to set the terms of the discourse around anti-discrimination in Victoria, and that therefore in this human rights area at least, advocates for policy and law reform who wish to be effective should use the Charter.

Impact of the Victorian Charter on the Federation's work (contd)

<b><u>More effective coronial system</u></b>	
<b>Issue</b>	Following advocacy by CLCs, individuals and others who participate in the coronial system, the Victorian Parliament Law Reform Committee reviewed the <i>Coroners Act 1985</i> . The Attorney-General responded to the Committee's Final Report by introducing the Coroners Bill 2008. The Federation welcomed a range of improvements in the Bill, but the Bill ignored, or only partly implemented, key recommendations of the Committee's Final Report. In particular, the Bill failed to require mandatory responses from relevant government agencies to coronial recommendations, meaning that as with the 1985 Act, agencies could ignore or adopt them as they wanted without having to inform the court, the deceased's family or the public, of the response. The Bill also lacked express provision for cultural difference and choice, particularly in relation to Indigenous understandings of senior next of kin and issues such as autopsies, body removal and burial of remains.
<b>How the Charter was relied on</b>	The Federation was aware that the coronial legislation had not been reviewed for 20 years and that another opportunity for substantial reform would be unlikely in the near future, so we lobbied for amendments to the Bill, providing a detailed submission to MPs outlining our concerns and suggested amendments. We also met with the Attorney-General's advisers, the Shadow Attorney-General, and liaised with the Greens. Our submission was underpinned by the right to life in the Charter as a fundamental human right which requires that families of the deceased be fully informed and empowered to participate in the coronial process with genuine access to legal representation in inquests. The right to life also requires that the coronial process take place in an accountable and genuinely preventative framework.
<b>Response from Parliament</b>	The Federation's initiatives assisted the debate in the Legislative Assembly and influenced the Bill's passage in the Legislative Council, where important amendments based on or similar to our submission were successfully proposed by the Greens and subsequently incorporated into the <i>Coroners Act 2008</i> . The highlight of these amendments was the insertion of a requirement that if a Coroner makes recommendations to a particular Minister, statutory authority or entity, they must now respond within three months outlining actions that will be taken in response to the recommendations. The response must be published on the Internet and be provided to any interested person. This is a substantial gain for families and for the prevention focus of inquests. It makes Victoria only the second Australian state to mandate responses.
<b>Evaluation of Charter impact</b>	It is difficult to ascertain whether our work would have been as effective without the Charter. The fact that the changes we sought centered directly on the right to life and turned upon parliamentary debate, combined with Parliament's role as the third arm of Government in the Charter framework, suggests that the Charter was a useful aid.

Impact of the Victorian Charter on the Federation's work (contd)

<b><u>Police use of Tasers</u></b>	
<b>Issue</b>	In 2008, Victoria Police was considering whether or not to expand stun guns (Tasers) to more operational police use. Currently, Tasers are only issued to specialist response teams. The Federation wrote to Victoria Police arguing that it should not expand Taser usage beyond the specialist response teams.
<b>How the Charter was relied on</b>	<p>The Federation relied on the Charter and in particular the right to life to examine when it may be lawful for a police officer to use a Taser. The Federation examined reports of the UN Human Rights Committee and Committee Against Torture, and overseas experience, particularly in Northern Ireland and North America (where over 300 deaths have occurred following Taser usage). The Federation considered the role that Tasers might play in reducing the incidence of police shootings and promoting the protection of the right to life. The Federation also recognised that this needs to be weighed against the risk of loss of life and serious injury associated with Taser usage, and the availability of other less intrusive options to achieve the same purpose.</p> <p>The Federation concluded that Tasers can be legitimately be used in limited circumstances where the Taser usage is immediately necessary to prevent recourse to lethal force (ie: use of a firearm).</p> <p>Applying this test, it would not be lawful to use a Taser on a subject who was non-violent, non threatening or not resisting police. If a subject was violent, Taser usage would only be justified if the use was strictly proportionate to the violence or threatened violence ie: a level of violence that threatens life or serious injury.</p> <p>The Federation argued that after examining Tasers through a human rights framework, the case for expanding their usage in Victoria was not justified, particularly given:</p> <ul style="list-style-type: none"> <li>• the risk of death and serious injury associated with Taser usage;</li> <li>• the risk of Tasers being used to perpetrate abuse by police;</li> <li>• the risk of 'function creep' - where Tasers are introduced as an alternative to firearms but quickly become used in a range of other situations replacing other tactical options (negotiation, open hand, capsicum spray, batons); and</li> <li>• the availability of other options to reduce the likelihood of police shootings (improved training to deal with mental illness, re-introduction of specialist units of police and mental health professionals to deal with crisis situations).</li> </ul>
<b>Response from Victoria Police</b>	The Federation met with representatives of Victoria Police to discuss issues concerning Tasers and police shootings. We asked for, and then lodged a freedom of information request for, Victoria Police policies on Taser use. Chief Commissioner Nixon publicly announced in 2008 that she would not be expanding their use to all operational police. Chief Commissioner Overland made a similar announcement in 2009. Victoria Police refused to provide their Taser policies. This decision is currently being reviewed in the Victorian Civil and Administrative Tribunal.
<b>Evaluation of Charter impact</b>	It is difficult to say whether Victoria Police may have made a different decision on expansion of Tasers if there had been no Charter. The existence of the Charter certainly increased the likelihood of the considerations above being taken into account in Victoria Police's decisions, and increased the ability of the Federation to engage with Victoria Police on these issues. The Charter also provides Victoria Police with a sensible framework for making decisions concerning Taser use (specifically, which officers should be issued with Tasers and when Taser use is lawful).

Impact of the Victorian Charter on the Federation's work (contd)

<b><u>Improved human rights protections in Victorian prisons</u></b>	
<b>Issue</b>	The Corrections Regulations 1998 (Vic) were replaced in April 2009 by the Corrections Regulations 2009 (Vic). In drawing up the 2009 Regulations, Corrections Victoria consulted with stakeholders on issues including the compatibility of the 1998 Regulations with the Charter. The Federation, together with the Human Rights Law Resource Centre (HRLRC), met with Corrections Victoria and made submissions to the review process.
<b>How the Charter was relied on</b>	The Federation and the HRLRC argued for a range of improvements to be included in the 2009 Regulations to ensure their compatibility with the Charter, including in relation to use of firearms on escaping prisoners, use of restraints, prison placement decisions, use of segregation and strip searching of prisoners. Our submissions engaged a number of Charter rights including the right to humane treatment when deprived of liberty, the right to life and the right to protection from cruel, inhuman or degrading treatment.
<b>Response from Government</b>	The 2009 Regulations contain a range of improved human rights protections around the use of restraints, prison placement and the strip searching of prisoners. For example, the Regulations now require that a prison Governor must believe on reasonable grounds that a strip search is necessary before authorising the search, and the Governor must keep a register containing information about strip searches that are conducted, including the reason for the search. A number of our recommendations (for example around the use of firearms), were not adopted.
<b>Evaluation of Charter impact</b>	The existence of the Charter resulted in important human rights safeguards being included in the 2009 Regulations. The 2009 Regulations would not have been improved to the extent they were without the Charter. The Charter was expressly referred to as one of five issues driving the changes to the Regulations. The Charter also provided a framework for us to engage with Corrections Victoria on how to protect human rights in the Regulations. A number of changes would not have been made without our contribution to the review process.

Impact of the Victorian Charter on the Federation's work (contd)

<b><u>Bushfire Royal Commission for the people</u></b>	
<b>Issue</b>	<p>The Federation is one of the partners in Bushfire Legal Help, a coalition of legal organisations providing free legal assistance and information to victims of the 2009 Black Saturday bushfires. The Federation was concerned to ensure that victims of the fires were afforded a proper opportunity to participate effectively in the Bushfires Royal Commission, particularly as:</p> <ul style="list-style-type: none"> <li>• all applications for leave to appear before the Royal Commission by individuals and community groups affected by the fires were denied; and</li> <li>• we were concerned about the adequacy of information being provided to victims about the Royal Commission's processes.</li> </ul>
<b>How the Charter was relied on</b>	<p>The Charter guarantees the right to life. International human rights jurisprudence, particularly from the United Kingdom, confirms that the right to life imposes obligations on the State:</p> <ul style="list-style-type: none"> <li>• take appropriate steps to protect life;</li> <li>• conduct a proper independent investigation when there is evidence that the State may have failed in its obligation to protect life;</li> <li>• ensure that there is a sufficient element of public scrutiny in the investigation; and</li> <li>• ensure that the next of kin or the family are involved to an appropriate extent in the investigation.</li> </ul> <p>Relying on the right to life and the duty to ensure that families of the fire victims are involved to appropriate extent, the Federation and its Bushfire Legal Help partners wrote to and met with the Royal Commission to advocate for increased victim participation in its processes. The Federation and the Public Interest Law Clearing House also informed the media on the issue.</p>
<b>Response from Royal Commission</b>	<p>Following our advocacy, the Royal Commission interviewed and obtained witness statements from a number of victims of the fires. Shortly after the hearings commenced, it has ensured that on most hearing days, a victim of the fires has given evidence to the Commission.</p> <p>The Commission also improved a range of information for victims including:</p> <ul style="list-style-type: none"> <li>• preparing a guide to writing submissions;</li> <li>• providing information about the Bushfire Legal Help service on its website;</li> <li>• clarifying that submissions received after 18 May could still be used for its final report; and</li> <li>• providing improved information about how the Royal Commission works and how individuals can participate in the Commission.</li> </ul>
<b>Evaluation of Charter impact</b>	<p>It appears that our advocacy had a direct impact on the Royal Commission's engagement with victims of the fires. Our advocacy was strengthened by the existence of the Charter and the obligations it imposed on the Royal Commission.</p>

### Breaches of rights

When a human right in the HRA has been breached, there should be a range of possible remedies available. The Federation submits that an aggrieved individual or group should have genuine and informed access to both judicial and non-judicial processes and remedies.<sup>80</sup> Processes may accordingly vary from voluntary conciliation to internal review and litigation; and potential remedies should include formal apologies, commitment to policy or practice change, damages or compensation, declarations (including Declarations of Incompatibility), orders, injunctions and writs of mandamus, and any other remedy that is just and equitable in the circumstances.

The HRA should provide an independent cause of action to provide redress whenever there is a human rights breach. Similarly, we submit that within the jurisdiction of the HRA each party should bear their own costs.

We adopt the Human Rights Law Resource Centre's submission that persons whose human rights are directly breached should be able to bring claims, but that third parties, including the Human Rights Commission, should also be allowed to bring a complaint on the aggrieved person's behalf.<sup>81</sup>

Consistent with our submission that all human rights in the HRA are equally important and that civil and political rights are indivisible from economic, social and cultural rights, we submit that aggrieved individuals and groups should have potential access to the same processes and remedies irrespective of the type of human right breached. We are aware that historically there has been reluctance on the part of international States to domestically implement economic, social and cultural rights on the same basis as civil and political rights, due to concerns that the former rights will impose unfairly onerous obligations. We note that the discussion by the Human Rights Law Resource Centre of the concept of reasonableness applied in South African jurisprudence to economic, social and cultural rights issues may assist Australian courts and governments in applying the limitation test to decision-making about whether such rights have been breached.<sup>82</sup>

### Other measures to promote human rights

The Federation submits that for the effective operation of the legislative dialogue model we propose, it is crucial that the Australian Human Rights Commission be given an enhanced capacity to achieve systemic change. We therefore adopt the recommendations of the Human Rights Law Resource Centre concerning expanding the powers and resources of the Commission.<sup>83</sup>

Other important measures to ensure the protection and promotion of human rights in Australia include the Human Rights Law Resource Centre's recommendations to strengthen the social infrastructure supporting human rights understandings and dialogue, and to enable access to legal support for individuals and groups who believe their human rights have been breached.<sup>84</sup> This strengthening must include well-resourced education initiatives at all levels,<sup>85</sup> and appropriate funded consultation and participation mechanisms, informed by

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<sup>80</sup> For more concerning informed access, see 'Other issues' below.

<sup>81</sup> For more detail, see Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 433-434.

<sup>82</sup> Human Rights Law Resource Centre, *A Human Rights Act for All Australians*, paras 71-73.

<sup>83</sup> Human Rights Law Resource Centre, *Engage, Educate, Empower*, Recommendations 1-9, 11.

<sup>84</sup> Human Rights Law Resource Centre, *Engage, Educate, Empower*, Recommendations 10, 12-25. See also the recommendations of our member centre, Seniors Rights Victoria, in their submission, *Recognising the Rights of Older Australians*; the submission from the Australian Network of Environmental Defender's Offices, and the contribution by Victorian Aboriginal Legal Service to the joint Aboriginal and Torres Strait Islander Legal Services submission.

<sup>85</sup> See eg the discussion of Eastern Community Legal Centre's education initiatives, Fred's Fair Play and Human Rights are Aussie Rules, in their submission, *Human Rights – Aussie Rules: Making Fair Play Our Goal*.

community development principles, which effectively engage members of Australia's more disadvantaged communities.<sup>86</sup>

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<sup>86</sup> For more detail see eg the submissions of Seniors Rights Victoria, *Recognising the Rights of Older Australians*; Youthlaw, *Young People Having Their Say About Human Rights*; Eastern Community Legal Centre, *Human Rights – Aussie Rules: Making Fair Play Our Goal*.

## Summary and recommendations

### What human rights should be protected?

All of Australia's human rights obligations under international law should be protected and promoted via implementation into Australian domestic law. These include the key obligations outlined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

### Are these human rights currently sufficiently protected and promoted?

These human rights are not currently sufficiently protected and promoted in Australia. Some rights are simply not protected at all; others are protected only in some jurisdictions and to a less than full extent, with varying effectiveness in practice.

### How could Australia better protect and promote human rights?

Human rights in Australia would be better respected, protected and fulfilled by a Human Rights Act ('HRA').

The HRA should take the form of legislative dialogue model enacted by the Commonwealth Parliament, along the lines of the Victorian Charter. The possibility of constitutional entrenchment should not be closed off and should be included in the scope of legislated reviews of the HRA.

The HRA should protect the rights of all natural persons (and so exclude corporations) who are in Australia and subject to its jurisdiction.

The obligations under the HRA should rest with public authorities (ie; government entities or non-government entities exercising government functions) and should extend to Australian public authorities operating overseas.

The HRA should bind state public authorities and invalidate state laws that are inconsistent with the HRA (allowing states to enact or continue with their own human rights charters but also 'filling the gaps' in human rights protection).

The HRA should include the following measures:

- Requiring Statements of Compatibility to be prepared for any new bills;
- Establishment of a joint Parliamentary Human Rights Scrutiny Committee;
- Requiring Parliamentary responses to any Declarations of Incompatibility;
- Requiring federal courts to interpret laws consistently with human rights, drawing on international and comparative human rights jurisprudence;
- Enabling courts to issue Declarations of Incompatibility where the court cannot interpret legislation consistently with human rights;
- Requiring public authorities to act compatibly with human rights and to give proper consideration to human rights when making decisions.

When the HRA has been breached, there should be a range of possible remedies available. Unlike the Victorian Charter, there should be an independent cause of action to provide redress whenever there is a human rights

breach and compensation should be available as a remedy. In addition to allowing claims to be brought by individuals whose human rights are breached, third parties, such as the Australian Human Rights Commission should also be allowed to bring claims on the aggrieved person's behalf.

There should be an 'opt-in' model allowing entities that are not public authorities under the HRA (such as private corporations and some community sector organisations) to choose to take on obligations under the HRA.

The introduction of the HRA should be accompanied by a range of other legislative and non-legislative measures to promote human rights compliance in Australia including:

- expanding the capacity of the Australian Human Rights Commission to achieve systemic change;
- ensuring access to legal support for individuals and groups whose human rights are breached; and
- proper human rights education initiatives.