Australia Is Ready:

The Positive Case for an Australian National Human Rights Act

The Australian Centre for Human Rights Education

Response to the

National Human Rights Consultation

12 June 2009

Executive Summary

- ACHRE Believes Australia is ready to implement its own domestic human rights act.
- The common law and the assumption of 'responsible government' are insufficient to both protect and fulfil human rights in Australia. There have been an increasing numbers of contested issues around 'responsible government'. The use of human rights in court decisions is limited, their relevance to judgements unclear to the public most of the time and change via the present mechanism is too slow and piece-meal to accomplish human rights as a clearly articulated value system through which those resident in Australia can achieve a 'fair go'. Further, the present focus largely ignores the added benefit a human rights-based approach built on clearly stated principles can have for public authorities in the everyday delivery of services.
- No constitutional impediment has been argued strongly enough to outweigh the benefits that would accrue from implementation of national legislation. A dialogue model contributes to democracy and resolves issues around the balance of power between the three arms of Government. In the very few cases in which any government would have to respond to a judicial statement of incompatibility, the debate would be in the public domain. Ultimately since the public will be better informed because of this debate, the decision of government will ultimately act as a litmus test of public opinion and will add to democracy.
- Australia has a history of involvement in supporting international human rights Conventions and Treaties. It presently has international obligations under a number of UN Conventions and a national Human Rights Commission in place with working practices easily adaptable to the requirements of any new national legislation.
- The success of the implementation of human rights acts in Victoria and ACT augers well for national legislation but also points to an inequity across States and Territories in relation to human rights protections which cannot be sustained.
- The new legislation should adopt international convention rights to which Australia is already signatory.
- At the very least ICCPR and ICESCR rights should form the basis of domestic legislation. ICCPR and ICESCR rights are interdependent and achieving 'a fair go' in Australia depends on the adoption of both.
- The benefits of a domestic human rights act should not be measured solely against the capacity of the law to *protect* rights. The everyday *fulfilment* of rights is vital. The role of public authorities and improvement in participatory processes that will result from this approach will produce more systematic visibility of disadvantage. A clear set of rights-based principles will adapt policy and practice to those most disadvantaged and result in more efficient targeting, more satisfaction amongst those who use services and, therefore, a more efficient use of resources.
- The Australian public are ready and willing to embrace a human rights act for Australia.

1. Status of Report

1.1. This contribution to the national consultation on human rights has been made by members of the Australian Centre for Human Rights Education (ACHRE for brevity) which is based at *RMIT University*.

1.2. ACHRE at RMIT University is conceived of as a workshop for the development of ideas, strategies and tools for applied human rights with a focus of learning, advocacy and empowerment. ACHRE seeks to develop innovative research around applied human rights and supports the development of resources that can be used more widely across government and in the community. Our vision is a society where people flourish and fully participate in society, as active and engaged citizens. ACHRE emphasises empowerment through learning and we presently deliver Postgraduate Diploma and Certificate courses in Applied Human Rights and are developing a Masters Programme and short non-certificated courses for the public at large.

1.3. The submission represents the views of the ACHRE at RMIT University.

2. Introduction

2.1 ACHRE welcomes the opportunity to contribute to the national consultation on human rights and sees this as an opportunity to *present the **positive case*** for national human rights legislation.

2.2 We approach our response to the Consultation by making the positive case for a human rights-based approach and concomitant national legislation in paragraph 3 of this submission. In making this case we rely on a framework provided by Finnegan and Clarke (2005) in relation to new human rights legislation around the effectiveness of the law in changing the way a society acts. Using evidence we demonstrate how human rights legislation leads to the *everyday* accomplishment of a fairer Australia for all its residents. Having established the positive case for national human rights legislation we then answer the three consultation questions in paragraph 4 of this submission.

2.3 Our major arguments are that:

- Premised upon its widely stated and widely known aspiration of a 'fair go', Australia is ready to adopt a legislative mandate based upon human rights principles.
- The ideal of a 'fair go' has been an unspoken assumption of *everyday* Australian life and not simply one which protects rights *in extremis* through the prosecution of legal cases.
- This implies, firstly, that the law informs society's attitudes and values as well as being informed by them and that electoral process and legislature will not be supported where they are too out-of-step with public opinion. The groundswell of positive public opinion around human rights is evidenced by this Consultation itself as well as Australia's leadership around the development of international human rights instruments since the Second World War, its adoption of international human rights conventions and human rights legislation in both Victoria and ACT. Australia is a society now ready to endorse the establishment of its own federal human rights framework.
- A second implication is that in addition to the law, the human rights agenda is as much to do with the practical everyday rights experienced by all *people in* Australia. ACHRE believes that the development of a human rights culture in wider society will contribute substantially over time to addressing the recalcitrant features of social inequality and injustice by bringing into light 'invisible victims' whose life quality does not presently amount to 'a fair go'.
- A third implication is that the response of public authorities in their everyday decision-making will be substantially better where there is clarity over a set of identified human rights. This will lead to diligence in the enforcement of the law but more besides, as outlined below.
- A fourth implication and, we would argue one of equal importance to others, is that public authorities as duty-holders will over time make systemic changes to the implementation of policies and practices that reflect a human rights framework. These changes may be made by application of human rights principles but, since a human rights model sees rights-holders as having autonomy, may also be prompted through the advocacy of disadvantaged groups and *people* themselves. This process is already in evidence in Victoria and ACT both of which have human rights legislation.

- We argue that the dual responses of public authorities as duty-bearers and people as rights-holders both working with a clear human rights framework leads to services that are responsive, less wasteful and better able to accomplish the fair go Australians envision for all.
- We suggest that the public supports national legislation and that such legislation is a vital to adopting a public policy focus on inclusion, equality and social justice.

3. The positive case for a national human rights act

3.1 *Background*

This Consultation poses in one of its questions, 'Are human rights in Australia currently sufficiently protected and promoted?' This requires an assessment of at least two things

a) The level of protection and promotion of human rights afforded by present arrangements
b) An assessment of whether these are sufficient or whether they can be improved upon by the introduction of a national human rights act.

The approach taken in what follows seeks to make an assessment of a) by examining the extent to which the adoption of international covenants alongside rights enshrined in common law promote and protect and have protected the human rights of people living in Australia over the last sixty years. We seek to address b), the question of 'sufficiency', in two ways. Firstly as we proceed we will summarise inherent limitations in **red** text boxes. These will be kept to a minimum given our stated intention to make the *positive* case rather than to make the case on the basis that the alternative is faulted. Secondly comparisons will be made on theoretical grounds and by drawing on empirically based evidence and experiences in Victoria and the ACT since their adoption of human rights legislation. Summaries of these will be set out in **green** boxes.

We adopt as a framework for the following discussion the case made by Finnegan and Clarke (2005) in *Human Rights For All* about the law and its ability to bring about social change. These authors assert that there is a two-fold impact of human rights legislation,

> '*...the direct prosecution of cases when there has been a denial of a person's rights...and the development of a human rights culture reflecting the values of the [legislation] in wider society'* (ibid: p.7).

On these grounds the authors argue that current jurisprudence points to a number of common features which lead to effectiveness of the law in changing the way a society acts. These features, adapted to the present Australian context and for the purposes of this consultation, are:

i. The clarity of the law
ii. The direct prosecution of cases and enforceability of the law
iii. The diligence of enforcement
iv. A visible victim
v. The weight and focus of public policy on the issue
vi. The degree of compatibility of the law to existing values, (*ibid, passim*: p.9-11).

In the following submission the above features are used as paragraph headings to provide some structure to the ACHRE response.

3.2 *Clarity of the law and the direct prosecution of cases*

Australia's engagement with human rights has been ongoing and incremental since its substantial contribution to drafting the Universal Declaration of Human Rights in 1948. In the following sixty years Australia has recognised the collaborative international work on the fundamental human rights that accrue to all humans by becoming party to a number of Conventions.

Amongst the most important of these are the International Convention on Civil and Political Rights, ICCPR (signed in 1972 and ratified in 1980) and the International Convention on Economic, Social and Cultural Rights, ICESCR. Their particular importance is that they represent the most systematic codification of international values around fundamental and inalienable human rights. They are, moreover, binding at Federal, State and territory levels requiring submissions to the UN under the monitoring and reporting mechanisms upon which Concluding Observations can be made in response.

The recognised centrality of human rights to Australian society was further recognised under the Human Rights and Equal Opportunity Act 1986, which mandated the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission). The HRC reports to Federal parliament through the Attorney-General on a number of Acts: the Racial Discrimination Act, 1975, which partially implements the International Convention on the Elimination of all Forms of Racial Discrimination (CERD); the Sex Discrimination Act, 1984, which partially implements the International Convention on the Elimination of all forms of Discrimination Against Women (CEDAW); the Disability Discrimination Act, 1992 which partially implements the ICCPR and the ILO Convention Concerning Discrimination in Respect of Employment and Occupation; and the Age Discrimination Act, 2004. The Commission has further responsibilities in relation to law reform, education, investigations and the conciliation of disputes.

Point 1- Australia is signatory to international conventions which plainly set out human rights. It has legislated a statutory body in relation to human rights and submits reports on its human rights record as an international obligation.

Having read some of the submissions to this consultation process we believe the legal case for a national human rights act has been well made by legal experts and in particular the submission of the Human Rights Law Resource Centre (HRLRC, 2009) to which we offer our full support. However, in making the positive case for a national human rights act we do need to touch fleetingly upon what we perceive to be some of the limitations of the present system of legal rights and redress.

Despite Australia's commitment to clearly defined internationally agreed human rights, the application of rights in legal cases in Australia draws on the common law and relies on the principle of responsible government in supporting a system which achieves social justice. Since the common law does not explicitly cover all ICCPR and ICESCR rights and since judgments are made primarily from Australian common law the centrality of human rights is therefore demoted to a supporting role to common law, to the acuity of judges in drawing upon and referring to international instruments in their judgements and to the development of law under the principle of precedent. Further, where judgements are made they apply to the case before the court and to the rights of the parties involved, rather than to a general statement of rights. In this way the application of human rights principles is piece-meal and movement towards recognition of human rights principles slow and cumbersome. For all but the most informed members of the Australian public the clarity of the system leaves a lot to be desired with the links between legal judgements and human rights tenuous at best and inconspicuous to most people, most of the time.

Limitation 1 – The links between the common law and human rights are opaque to most members of the public. The application of human rights principles is piecemeal and reliance on precedent means human rights principles are slow to change and the practical accomplishment of human rights more difficult to accomplish.

The lack of clarity in relation to rights has been compounded by the rather unfortunate effect of high profile and newsworthy cases being overtly 'politicised' through media involvement. Given this high profile, such reporting is likely to be taken by at least *some* members of the public to be the sum total of what constitutes the human rights debate, obfuscating the intention of human rights legislation and the topic matter over which the debate should rightfully be held. Indeed, it is the view of ACHRE that when faced with a list similar to that presented in Box 1 below members of the public with few exceptions, would affirm these as important fundamental rights.

Box 1

- No person should have their life unlawfully taken away from them
- A person should not be held in slavery or servitude or be required to perform forced or compulsory labour
- People should be free from torture, cruel, inhuman or degrading treatment
- People should not be arbitrarily arrested or detained
- People deprived of liberty should be treated with humanity and dignity
- People should have a right to a fair hearing, equality before the courts, the right to representation and legal advice, procedural fairness, a hearing without undue delay
- People have the right to privacy and not to have family, home or correspondence arbitrarily interfered with
- Everyone has the right to found a family, to marry if they so wish and all families should be afforded protection regardless of status, gender, socio-economic status or ability
- People have a right to freedom of movement within Australia
- People have the right to choose their religion or believe and to practice these publicly or privately
- People have the right to freedom of expression subject to laws relating to defamation or in the interests of national security
- People have the right to peacefully assemble and associate with others
- People have an equal right to take part in public affairs without discrimination
- People have the right to social security where they are unable to provide for themselves
- People have the right to work and to freely take part in employment s/he freely chooses or accepts
- People have the right to an adequate standard of living including food, water, clothing and housing
- People have the right to control of their own body and access to healthcare to attain the highest level of health possible
- People have the right to free primary and secondary education and low cost higher education
- People have the right to determine their political affiliation and how to pursue their economic, social and cultural development
- People have the right to enjoy their culture, declare and practice their religion and use their own language

It is the view of ACHRE that the rights listed above, many of which are taken from the ICCPR and ICESCR to which Australia is signatory, provide clarity for the public and should do so for the judiciary in their decision making around human rights issues.

Point 2 – The ICCPR and ICESCR provide a clearer link between for the application of law based on human rights principles than does the present system of common law and reliance on responsible government.

Because of the 'lack of clarity' and the 'veil' of the common law it is also the view of ACHRE that present arrangements select-out and sieve the applicability of human rights in bringing cases and making judgements, to just a minority of the cases. This implies that the cases which are known for their relevance to human rights are a minute portion of those that might be both addressed and reported in that way, were a national human rights act to be legislated.

Limitation 2 – The small number of cases in which judges make reference to human rights in their judgements is a much smaller proportion than would be the case were there a national human rights act against which judgements were made. This has the effect of lowering the public's knowledge of human rights and their applicability.

There has been criticism of national human rights legislation on the grounds that it would cause constitutional difficulties by allowing the judiciary to override the will of the legislature. However, the experience of Victoria and the ACT demonstrates that such criticism is misplaced when human rights charters are contained in ordinary pieces of legislation.

An additional issue with the direct prosecution of cases under the common law is that it assumes Parliament does not intend to override basic human rights unless it expresses an intention to do so. Some commentators have posed questions about the extent which government has acted responsibly in relation to human rights for example historically in relation to Indigenous people, and more recently in relation to Indigenous rights to native title, the Northern Territory Emergency Response and in the compulsory detention of refugees and asylum-seekers including their children. Clearly the primacy of domestic law is closely protected by parliament. This was exemplified in the government's response to one of the eleven potential or actual violations of the ICCPR raised in the Committee's 'concluding comments' to Australia's submission for the fifth periodic ICCPR report (UNHRC, 2002),

> '*Nor is there anything...to support the Committee's view that 'lawfulness' in article 9(4) is not limited to compliance with domestic law'* (UN Human Rights Committee, 2008: paragraph 12),

indicating that the Government of the day saw the provision of domestic law as outweighing its duty under the provisions of the ICCPR.

Limitation 3- There is understandable debate over whether Government always acts responsibly in relation to people's rights and arguments to suggest that this has not always been the case.

It is the contention of ACHRE that any national human rights act organised so that Government can legislate for exceptions, builds democracy because such decisions are in the public domain and would require an open dialogue between the legislature, executive and judiciary. Indeed, the additional scrutiny and debate would add to democracy and to an electorate sufficiently informed to cast its vote on the balance of argument.

Point 3 – If organised correctly a national human rights act would allow dialogue between judges who ruled a law to be inconsistent with human rights and both the legislature and executive. This would add to democracy by making exceptions to human rights open to debate in the public domain.

Point 4 – It would not be acceptable to prevent a national human rights act, which would benefit the many, for the sake of a very small number of cases that involve a judicial declaration of incompatibility with human rights.

In terms of the direct prosecution of cases under the present arrangements the UN Human Rights Committee has also recently observed of Australia that,

> '*The Committee notes that the Covenant* [ICCPR] *has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law, including the Covenant*' (UN Human Rights Committee, 2009: paragraph 8).

Point 5 – The UN Human Rights Committee has made a strong case to Australia to adopt a legal framework covering covenant rights at national level.

In summary at present we do not have clarity around human rights and few judgements have specifically drawn upon international conventions directly. The responsibilities for accountability to the international community under the ICCPR and ICESCR have been recognised by successive Australian governments for thirty years and the importance of practical attempts to operationalise such rights has been reflected in the role of the Human Rights Commission. The international covenants represent a set of clear codes compared to the complexity of the common law and institutions are already in place with the requisite experience to continue their work using such international convention rights within a domestic framework. Insofar as this is the case no objection against domestic legislation, similar to that adopted in Victoria and the ACT, seems supportable. Indeed such legislation has real potential to add to dialogue and democracy.

Point 6 – Australia already has the ICCPR and ICESCR as a basis for drafting national human rights legislation, the institutions in place to oversee its implementation and governance and two examples in Victoria and the ACT where similar legislation is successfully operating. There is no practical reason, therefore, on which to delay its adoption.

3.3 *The diligence of enforcement and visibility of the victim*

However, to limit the argument to the place of the law in protecting human rights (as assumed in the paragraph above) also raises questions about the extent to which there is *diligence in enforcement* and, relating to this, the *visibility of victims*. The present model of diligence rightly emphasises 'protection' which prevents third parties from violating a person's human rights and this is achieved in *some* cases that reach the courts. However, if a human rights approach also includes 'respect' which is about *abstaining* from the violation of rights or the active 'fulfilment' of rights by taking *measures to ensure such rights* are met within any jurisdiction, then the present system will fail if measured solely against those cases brought before the courts. There is therefore a need to examine *respect for* and *fulfilment of* rights as criteria against which to measure the diligence of enforcement and the visibility of the victim, which we do below.

Limitation 4 – A sole focus on the protection of rights by the courts ignores the positive ways in which public authorities under any human rights act engage in approaches that ensure they abstain from infringing rights and actively work to accomplish their fulfilment.

Whilst the last half century has seen significant improvements in the Australian economy and the overall wealth of the nation (AIHW, 2007) there remain a substantial number of people and groups who suffer disadvantage and significant hardship despite anti-discriminatory legislation and the direction of social policy initiatives geared to inclusion and challenging disadvantage. Many of these people and groups are the 'invisible victims' unable to share in the wealth of the nation nor, inter-generationally, to move themselves and their families out of social exclusion and disadvantage. Indeed, the gaps between those who thrive and those who do not are growing, leaving many falling through systemic cracks and into poverty (Saunders, Hill and Bradbury, 2007).

For example over half of those over retirement age will have a disability alongside reduced personal social and economic resources to offset these challenges. As their capacity to act autonomously reduces and their support networks fracture they experience concomitant difficulties in engaging specialist legal services when these are required (ABS, 2000a); a disproportionate number of Indigenous people do not own their own homes, are living in high rental, over-crowded and poorly

maintained buildings or in emergency accommodation (ABS, 2001); 62% of Indigenous people have not completed a secondary school education (ABS, 1997) and have lower levels of access to health services with life expectancy 20 years less than the total population (ABS, 2001), lower employment rates (ABS, 2000b); people with disabilities are over-represented in the criminal justice system (Byrnes, 1999) and have difficulties as witnesses and in giving evidence. They have unequal access to health care (Alborz et al., 2003) and housing solutions which differ from the wider population and inevitably involve some form of group living. They have lower levels of employment and higher levels of unemployment (AIHW, 2008); people from culturally and linguistically diverse populations are less able to access justice and have low levels of awareness and knowledge of their rights (ALRC, 1992).

The list above is indicative and by no means exhaustive in relating either disadvantage and inequality itself nor the groups to whom such disadvantage and inequality applies. The data indicate inequalities not just in relation to civil and political rights but also to economic, social and cultural rights. They point to the mutual interdependency of different forms of disadvantage indicating the vacuousness of any approach which addresses some human rights issues but not others. The list also suggests that since these issues are seemingly irremediable there is a need for new and innovative approaches to tackle disadvantage and social injustice. But to do this it is necessary to understand how it is possible for the interests of some groups to be seemingly unseen in terms of the policies and inputs that have been engineered to challenge their disadvantage.

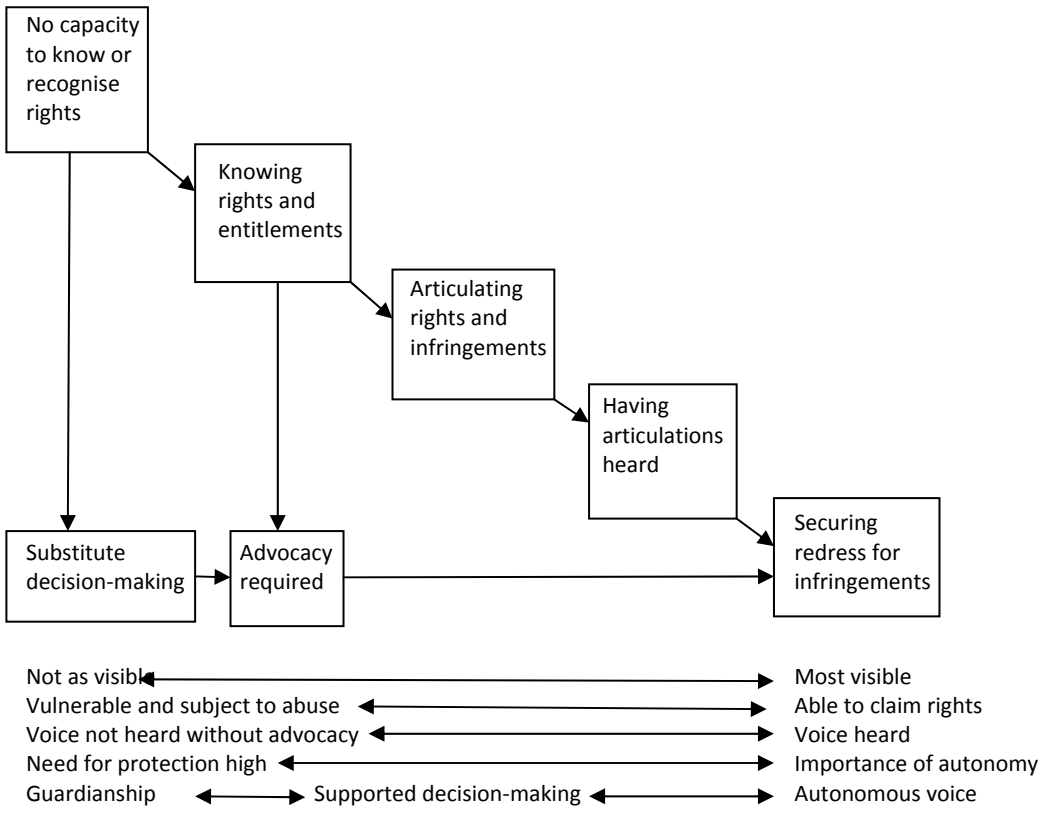
Point 7 – Human rights are mutually interdependent and mutually reinforcing. It is therefore important to legislate widely around economic, social and cultural rights as well as civil and political rights.

A growing body of empirical evidence now suggests that some individuals and groups have real problems even in getting their issues and problems onto the radar, much less having these issues of disadvantage and social justice addressed. This is the particularly the case where people are unable without support or advocacy to speak for themselves nor to act autonomously to accomplish their own goals (Boyle, 2008). Where a person is not visible then even the procedural let alone substantive rights cannot be met and this applies in everyday interaction as much as in complaints procedures or in the courts.

The inability to have ones voice heard is likely to occur not just where a person is unable to verbalise but also where they do not speak a language that can be understood, where they do not have any power nor leverage in the right places or where others prevent their voice being heard. This is likely to be true for a number of groups such as people from culturally and linguistically diverse

backgrounds and Indigenous communities, children, many older people and a good proportion of people with disabilities and mental health problems amongst others. It has been proposed using a model of advocacy that the less able a person is to have their voice heard, the more the opportunity for the perpetration of abuse, whether this is active or through negligence (Grant and Ramcharan, 2007). The advocacy model is shown in Diagram 1 below:

Diagram 1 – Levels of advocacy required at different levels of visibility.



(Adapted from Grant and Ramcharan, 2007: p.44)

Finnegan and Clarke (2005), in their study of the impact of the UK Human Rights Act on people with intellectual disabilities, point to a number of ways in which people remain 'invisible' to the system. Support staff do not pursue complaints, tend to 'deal with matters' internally using arbitrary rules, and feel that their primary alliance is to their employers and professions. There is insufficient scrutiny and far too little independent advocacy available to seek redress for infringements to rights, nor to insist on their everyday fulfilment. In this sense, and in then having problems within complaints systems and as witnesses in the criminal justice system, the authors argue there is no 'equality of arms' for people with intellectual disabilities. We would argue that this is true for other groups occupying similarly disempowered social spaces.

Point 8 – A human rights-based approach will provide clear guidelines through which rights can be claimed and duty bearers held accountable. Around these accepted rights principles there is more likelihood for *equality of arms* to be achieved and for people to claim and accomplish their rights in practice.

Invisibility does not only lead to the inability to actively pursue redress. Finnegan and Clarke also point to a fabric which weaves the cloth of disadvantage so tightly that escape becomes virtually impossible. They found for example people with intellectual disabilities were more likely to be housed in high crime areas where they became common targets for victimisation, bullying and harassment; little choice was found to have been given about where and with whom they lived; segregated schools and day services accentuated exclusion; lack of employment led to economic disadvantage and to bad health, the latter being particularly problematic since they were also found to have worse access to health care than the population as a whole. Most importantly the external control over the organisational systems for the delivery of services meant that few new strategies empowered them to take control of their own lives and circumstances.

Before there is diligence of enforcement of rights, there must be *visibility* of rights.

Point 9 – Any new national legislation must have the potential make human rights widely known and understood if they are to be used in the fulfilment of everyday rights as well as in the pursuit of redress where rights have been infringed.

ACHRE would further suggest that invisibility applies not just to people but also to time and environment. In this category lie the potential issues around how governments manage the balance between individual responsibility, collective action or political management through legislation on issues such as the ageing population, climate change and international movement and displacement of people by conflict or natural disaster. A human rights-based framework can contribute significantly to such debates by counter-posing rights and responsibilities across generations or populations as a basis for long-term planning and management of potentially costly and politically sensitive issues.

Point 10 – Being rights-holders will provide participation in decision-making and ensure that decisions made by duty-bearers reflect a person's choices and personal goals and aspirations. This is a model of everyday empowerment is more likely to deliver more appropriate services, ones which the person is satisfied with and which move the person closer to the life goals s/he chooses.

Because of this it is important that the focus of a human rights act is not simply on legal protection but also on the prior stages of respect for rights and an active pursuit of their fulfilment, i.e. on a *human rights-based approach*. Without this approach at the everyday service and interpersonal level, rights infringements will simply not be visible and the individual's autonomy to act will be subject to rigid services structures which perpetuate the social exclusion that continues to characterise the lives of a significant proportion of people living in Australia.

Point 11 – Clarity over rights and their everyday fulfilment leads to better visibility and, therefore, to better diligence of enforcement where rights are infringed.

And to argue this is to assume that in a *human rights-based approach* those who interact with and support the person have a clear view of rights and an understanding of their role as duty-bearers. This is not likely to be the case where there is no clearly defined rights upon which to base their actions, no compunction to act as might be conferred on public authorities by human rights legislation and finally no training and education upon which public authorities and their personnel base policy and practice. Moreover, where rights are clear the person as a rights-holder and their allies and advocates will have better grounds upon which to pursue and accomplish these rights.

In making the above case ACHRE has moved from the perspective of an argument solely tied to the 'legal case' for a national human rights act to one which also takes into account the everyday ways in which a national human rights act can mobilise wider social action by public authorities to address disadvantage and produce social justice. However this case can only be supportable where it reflects the weight and focus of contemporary public policy in Australia and its degree of compatibility with existing values. These are the last two criteria used by Finnegan and Clarke (2005) in their model relating to the effectiveness of the law in changing the way in which society acts and it will be addressed in the paragraph below.

3.4 *The weight and focus of public policy and degree of compatibility with existing values*

Writing over a decade ago in relation to the case for national human rights legislation the argument was put that,

> *'It is beyond question that our current legal system is seriously inadequate in protecting many of the rights of the most vulnerable and disadvantaged groups in our community.' (Burdekin, 1994).*

In this consultation response we have made this case and have further shown the mechanisms through which this occurs. It is the view of ACHRE that it is impossible to achieve civil and political rights, nor their diligence of enforcement, if the everyday fulfilment of rights is not itself accomplished as a matter of course. In what follows the case is made that the contemporary public policy debate strongly supports the need to challenge inequality and disadvantage. As the case is made further evidence will be provided as to why the human rights act chosen by Australia should include economic, social and cultural rights in addition to civil and political rights.

The present political environment recognises both the cost of social exclusion and the responsibility of government to create and pursue policies aimed at achieving social justice. Most recently this has culminated in the setting up of the present Government's Social Inclusion Unit. In a Joint Media release prior to the first meeting of this unit the Deputy Prime Minister stated that,

> '*Every Australian should have an opportunity to be a full participant in the life of the nation. Unfortunately, too many Australians remain locked out of the benefits of work, education, community engagement and access to basic services. This social exclusion is a significant barrier to sustained prosperity and restricts Australia's future economic growth',* (Joint Media Release, 2008).

Many working in human services, in health and community development as well as in local authorities and in state government departments have been engaged for a substantial amount of time around policies aimed at maximising individual choice and participation to accomplish social inclusion. Although often challenged by economic realities, systemic issues and real problems in working across departments these ideals nevertheless feature strongly in their policies and approach. Yet such policies on participation, inclusion and equality have not featured strongly in the debate over whether there should be a national human rights act for Australia. This seems even more ironic given the contents of Australian submissions to the UN under the reporting requirements of the ICESCR.

For example in its last submission the UN Economic and Social Council in relation to ICESCR considered in May 2009 Australia submitted an 863 paragraph document. It reports on the application of a range of laws (e.g. the Racial Discrimination Act, 1975; the Disability Discrimination Act, 1992; the Work Relations Act 1996; the Fair Work Bill 2008); frameworks, strategies and initiatives aimed at combating discrimination against migrants, persons of foreign origin, Indigenous people and communities, culturally and linguistically diverse communities, young people, women, in relation to families and violence, older persons, low income earners, people with mental health problems and persons with disabilities.

The list provides seemingly endless examples of Federal, COAG and state and territory initiatives aimed at better employment rights, legal rights, housing, health care, education, respect for culture and religion and community development. The examples given implicitly acknowledge that the right to vote, rights in the legal system and to participation in public life are insufficient on their own to produce equality and that such rights do little if you are hungry, living in bad housing or are not in control of your life choices. The examples manifestly acknowledge the links between human rights, social inclusion and social justice. It is our view that a national human right act will help establish these links more comprehensively and will support policies aimed at social inclusion as outlined below.

In his keynote address to the annual Victorian Equal Opportunity and Human Rights Commission conference in March 2009 the Victorian Attorney-General, Rob Hulls suggests that,

> *'Our Charter has been in full operation for a year and I'm proud to claim it a resounding success...Since Victoria's Charter was introduced more than a year ago we have frequently seen human rights in action, redressing disadvantage and improving the lives of ordinary Victorians in particular some of the most vulnerable members of our community. Not only is the human rights dialogue permeating all levels of Government, there has been a change in culture so that when laws are developed, decisions made or services delivered, they are done with the human rights and responsibilities of every Victorian in mind'.*
>
> *I hope that by embedding human rights within our legislation, we act as an inspiration to other governments around the country and pave the way for a Federal Charter, (VEOHRC, 2009).*

Evidence to support the Attorney General's assertion and legal and other case studies in Victoria and the ACT can be found at the Human Rights Law Resource Centre (HRLRC) website.

http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/#victoria

and further case studies from Victoria on the VEOHRC website,

http://www.humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/

The examples point to the ways in which the human rights act in Victoria and the ACT have supported people to claim their rights and further make the case that with a national act there would be better diligence of enforcement.

Point 12 – Evidence from Victoria shows that the human rights charter makes infringements to rights more visible and leads to better diligence of enforcement.

In an opening address to the NSW Young Lawyers forum The Hon Catherine Branson, President of the Australian Human Rights Commission points to another way in which the legislation has wrought practical change in ACT. By adopting a human rights-based approach to the *audit* of correctional facilities improvements have been made and indeed a new youth justice centre built in line with human rights principles, (NSW Young Lawyers, 2009). A clear set of rights criteria is therefore more easily operationalised as a device for monitoring services. Indeed a number of such monitoring tools and frameworks already in existence (see for example, Berman, 2008; BIHR and the Department of Health, 2007; VEOHRC, 2008).

Point 13 – Evidence from the ACT points to how a human rights act can lead to better monitoring and evaluation of services and be used as a guide for social change.

Since implementation of the Victorian legislation supporting documents are also already in place to inform the ongoing implementation of the Charter. Guidelines for implementation and legal compliance have been provided by the Victorian Department of Justice (Department of Justice, 2008). However, as well as legal compliance with the legislation public authorities have been mobilised in a range of additional ways. For example, VCOSS has examined approaches to training around human rights in light of the Victorian human rights legislation (VCOSS, 2008a). That training is becoming more widely available from a range of providers with demand particularly strong from public authorities as defined under the Act. Further, over the past two years, ACHRE itself has actively collaborated with a range of government departments, including the Department of Human Services, the Victorian Local Government Association and Victoria Police to provide training on the Victorian Charter of Human Rights and Responsibilities.

ACHRE has developed and is implementing "an applied human rights incubator" with the Victorian Department of Human Services (DHS) and is in the process of negotiating similar arrangements with other government departments for the coming years. The 'incubator' model involves a number of departmental staff (16 in the case of DHS), receiving scholarships to complete ACHRE's Graduate Certificate in Applied Human Rights and then being supported to implement a human rights based approach to their work. The incubator represents a way of building capacity into government departments by skilling people to become 'human rights champions' within an organisation and by establishing knowledge and capacity which is supported and sustained.

In the first half of 2008, ACHRE conducted training for the Department of Sustainability and the Environment (DSE), the goal of which was to empower a range of departmental staff to effectively apply the Victorian Charter of Human Rights and Responsibilities in their work. Over a number of months ACHRE worked with close to 800 DSE officers in urban, regional and rural sites across the state, whose roles were varied and included receptionists, clerical staff, complaints officers, human resources managers, policy officers, forestry officers, environmental protection managers and Koori forestry officers. The program development commenced with a series of focus groups, run by ACHRE staff in collaboration with DSE officers, to define the nature of the training required. This collaborative process allowed for the dynamic development of scenarios and case studies to be used in the training that invoked 'real-life' situations that DSE officers had been involved in wherein they had to make decisions around whether Charter protected rights may be challenged by the Department's work (Branigan et al, 2009).

Point 14 – Public authority commitment to human rights is being shown in Victoria to go beyond legal compliance. Public authorities are eager to engage with the ways in which a human rights approach can inform their practice and accomplish better lives for the people for whom they provide services.

In another important document about how community organisations are responding to the Victorian Charter of Rights and Responsibilities (VCOSS, 2008b) a series of excellent examples relate how public authorities are adapting policies and the delivery of services that are designed to be both Charter compliant and on accomplishing a human rights-based approach (VCOSS, 2008b). The document demonstrates how translating the legislation into practice can alter how organisations and staff operate, bringing change right the way down to everyday interaction. Ultimately this changes lives for the better and is responsive to people who use services, especially where they and their advocates and allies are enabled to participate in decision-making and where people are supported to express their hopes, dreams and wishes.

Point 15 – The presence of legislation mobilises social action at local levels amongst public authority personnel and the rights bearers who use their services.

It is also very important also to understand how public authorities are responding to the implementation of the Charter. Although a Victorian Local Governance Association (VLGA) study (Cauchi *et al*., 2009) shows a rather slow overall response by the 79 Victorian local authorities in seeking to become Charter compliant, it also found outstanding examples in some local authorities of what might be achieved by the application of a human rights-based approach. The study found that the commitment from councillors who championed a human rights approach and formulated strategies targeting groups that were disadvantaged, led to more focused approaches to the implementation of a human rights culture across departments capable of challenging disadvantage in the community. Strategies based on local consultation, though often taking a longer time, were more likely to garner support from the community who mobilised around new initiatives.

Point 16 – Evidence indicates that with leadership and commitment, a human rights-based approach can transform organisations, provide clarity for their mission, acuity to their policies and a working philosophy for staff. This transforms their own organisations as well as their engagement with the public.

Moreover those authorities taking human rights seriously were also likely to have addressed internal issues around employment rights and human rights training for their own staff and to have entered into negotiations with contractors to provide rights-based services even where they did not have public authority status. The VLGA study has led to a preliminary draft 'milestones tool' and some procedural indicators to be further tested in 2010 which are designed to support local authorities in both achieving Charter compliance and developing a culture of rights within their organisations.

Point 17 – The leadership of public authorities can have wider effects on those organisations which are not public authorities but who are contracted to provide services on their behalf. In this way the human rights-based approach can be adopted by such contractors in their tender applications and change the ways they provide their own services.

In a short space of time the Victorian Charter of Human Rights and Responsibilities has mobilised many public authorities to implement actions to become compliant but, also, to develop a culture based upon a human rights. These activities are beginning to sift down to the everyday level in ways that affect everyday interaction and the fulfilment of rights. This is fundamentally important as it means that all engagement by public authorities and their employees is couched in ways that make rights visible, where actions are organised for the fulfilment of rights and, ultimately, where there is pursuit of redress where rights are infringed.

ACHRE therefore believes there is incontrovertible evidence that the effects of the introduction of a national charter of human rights will have benefits far beyond cases that reach the courts and will fundamentally contribute to the accomplishment of social policy objectives because of the impact on everyday decision-making in public authorities. Although not a panacea in itself it will shift the emphasis of social policy initiatives and provide a framework upon which to judge outcomes. ACHRE therefore concurs with the following estimation,

> '*While a Human Rights Act would not be a cure-all for all human rights abuses in Australia, it would raise the benchmark and would ensure the consideration of human rights at crucial times. It does not need to be about a complex, costly legal process - it's about a shift that places importance on dignity and equality in all settings', (*Amnesty International, 2009*)*.

In introducing this submission the proposition was made that the adoption of a national human rights act would accomplish a much clearer mechanism through which the Australian ideal of a 'fair go' could be accomplished. George Williams points out that in relation to the consultation for the Victorian Charter that

> '*Many people wanted to see their human rights better protected to shield themselves and their families from the potential misuse of government power. For*

> *even more people, however, the desire for change reflected their aspiration to live in a society that strives for the values that they hold dear, such as equality, justice and a 'fair go' for all. The idea of a community based upon a culture of values and human rights is one that we heard again and again during our consultations'*, (Williams, 2006: p.892).

We believe that in the paragraphs above we have demonstrated the ways in which a national charter might contribute to accomplishing the ideal of a 'fair go'. However it is also true that the weight of public opinion and existing values should inform this debate for without public support legislation is less likely to succeed.

In his review of the consultation process undertaken prior to the implementation of the Victorian Charter of Rights and Responsibilities George Williams also provides evidence from public surveys which indicate that the majority of the population thought Australia already had had a Bill of Rights and, when faced with the fact that such a bill did not exist, around 70% of people in two independent surveys indicated their support for such legislation.

Point 18 – Public support for a national human rights act has been shown in independent surveys, to be high.

It is also important in our view that the approach of the consultation process in Victoria is noted. Williams describes it as follows:

> *'We believed that the way to get people involved was not through the media, but to meet with people in their communities in small groups and to work through their local and peak community organisations. In fact, we believed that the media would only be likely to polarise the issue and further alienate people by focusing the debate not on education and governance, but on controversial issues like abortion. Our process sometimes involved what we called 'devolved consultation' whereby we worked with other bodies, such as the Youth Affairs Council of Victoria, to assist us to reach people with special needs, such as homeless People'*, (Williams, 2006: p. 889).

The emphasis on engagement with the consultation groups around the resolution of the *issues they faced* and the potential of human rights legislation to address such issues empowered them to have a strong voice in that consultation process. And whilst the present consultation has engaged the public in a wide-ranging series of meetings it has perhaps not targeted these sufficiently to disadvantaged communities. Moreover it is our view that the questions asked in the present consultation in which written submissions are requested, favours those with more

detailed and technical knowledge and those with the time and computing technology to respond. ACHRE suggests respectfully that these issues are taken into account in the assessment of the consultation submissions.

Whatever, it is the view of ACHRE that the weight and focus of public policy and the existing values in Australia in themselves provide an incontrovertible case for a national human rights act.

Additional to this we have provided evidence of how rights become more visible where public authorities use clear charter rights to respect and fulfil those rights at the everyday level of service provision. This has the potential to challenge inequality and, over time, to contribute substantially to the accomplishment of social justice.

A human rights-based approach contributes to the diligence of enforcement at the everyday interactional level in pursuing complaints and, ultimately, in cases brought before the courts.

The adoption of human rights legislation not only heightens awareness of public authority duty-bearers but also increases the autonomy of rights-holders and their advocates to pursue outcomes they have chosen. This produces more efficient use of resources in service provision, increases satisfaction with the input and accomplishes a better life quality based upon principles of social justice and a fair go for people in Australia.

ACHRE believes on the basis of the arguments set out in this response to the national consultation that there is a positive and incontrovertible case for the adoption of a national human rights act in Australia.

ACHRE further believes that no technical or constitutional impediments to the adoption of national legislation are of sufficient weight to offset the positive case for adopting a national human rights act.

In the final part of this response we summarise answers to the Consultation questions based on the evidence presented above.

4. Response to the consultation questions

In paragraph 3 of this response the evidence has been set out for the positive reasons to adopt a national human rights act in Australia. The arguments that have been made above provide clear evidence for responses to the national consultation questions. These responses are set out in summary points in the following paragraphs.

4.1 *Are human rights currently sufficiently protected and promoted*?

No. The present system of common law and responsible government is a blunt instrument in the protection and promotion of rights:

- Only a handful of the most extreme cases reach the courts
- The relationships between rights and the common law are not clear to the majority of the population
- Judgements seldom draw upon the internationally recognised rights set out in the ICCPR and ICESCR to which Australia is party and such international rights are not applicable unless given domestic legislative effect
- Change is slow and by precedent only
- There are examples which question whether government always acts responsibly and commonwealth and state governments may fail to assess the implications of new laws from a human rights perspective.

A second tier of reasons why the present situation is untenable is the preoccupation with legal cases:

- The court is the final arbiter in cases which have not been resolved further down the system,
- To be resolved further down the system requires a 'visible victim', the 'recognition of what rights are infringed', and a 'commitment to pursue redress'
- Many 'victims' remain invisible. This means the response to fulfilling their rights is never addressed much less cases brought where their rights are infringed. There can be no diligence of enforcement without a visible victim.
- The present system does not provide clarity over how public authority personnel can respect rights and actively seek to fulfil them. The positive role around accomplishing rights in practice is not prioritised. Instead the adversarial approach in courts of law preoccupies the debate.
- There is, further, too little engagement between human rights-based approaches and the social policies aimed at equality and social justice.

4.2 *Which human rights (including corresponding responsibilities) should be protected and promoted?*

Under the Constitution, where the Commonwealth legislation legitimately covers the whole field on any subject matter, State legislation on the same subject matter will be invalid. This inevitably means that ICCPR which forms the basis of both the Victorian and ACT human rights legislation should be a minimum requirement for national act. Furthermore, simply on the grounds of equality between states the minimum requirement for the new act should accord with state legislation already in place.

However, ACHRE asserts that the case for the adoption in domestic human legislation of the ICESCR has been demonstrated above as being intrinsically vital to contemporary social policy objectives and to achieving a 'fair go' for all those living in Australia. This is so because: Australia already recognises the ICESCR; since human rights are interdependent it makes little sense to implement ICCPR to the exclusion on related economic, social and cultural rights; and, most importantly, the response by public authorities to implementing economic, social and cultural rights alongside civil and political rights will mobilise local communities around initiatives that have the potential to transparently transform the aspiration of a fair go for all, into a living reality.

The national act adopted should set out rights that are absolute and clearly state those that are not absolute and how any limitations can be legitimately applied. Amongst rights additional to those in ICCPR and ICESCR it is proposed that some mechanism be adopted to establish a framework for intergenerational issues, most notably climate change, the ageing population and in relation to the links between displaced populations, migration and Australia's responsibilities to these groups.

4.3 *How can Australia better protect and promote human rights?*

- Providing a clear set of principles which are widely known to all those resident in Australia and which are clearly set out in a national human rights act,
- Adopting a system of 'dialogue' between the three arms of government organised in such a way as to maintain parliamentary sovereignty whilst at the same time contributing to 'democracy' through open and transparent debate,
- Guidance on developing a culture of rights as well as guidance on legal compliance,
- The development of wider education and awareness initiatives around human rights for all people in Australia and especially for all students across primary, secondary and tertiary levels, as well as for public authorities,
- Improved public service delivery by adoption of the human rights act principles to guide strategy, policy and practice,

- Making sure that those who are most marginalised and most vulnerable are seen, their voices heard and that they participate in decisions about their own future,
- Promoting a culture of human rights locally through community groups, local advocacy initiatives and by supporting groups who seek to use a human rights-based approach to challenge exclusion and disadvantage,
- Making sure there is a system of law making and government policy adoption which is human rights compliant,
- A widening of the responsibilities and resources of the Human Rights Commission with particular attention to the implementation and monitoring of the act.

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