Human Rights Protection for All

SCALES submission to the
National Human Rights Consultation

15 June 2009

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Acknowledgement

SCALES would like to acknowledge the assistance of Dave Filov our Human Rights Secondee from Allens Arthur Robinson in the preparation of this submission. Without Allens Arthur Robinson's generosity and Dave's hard work this submission would not have been possible.

List of Abbreviations

AHRC	Australian Human Rights Commission
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on Elimination of Discrimination Against Women
CERD	Convention on Elimination of All Forms of Racial Discrimination
CLC	Community legal centre
CPR	Civil and political rights
CRC	Convention on the Rights of the Child
ESCR	Economic, social and cultural rights
HRA	Human Rights Act
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
RDA	*Racial Discrimination Act 1975* (Cth)
SCALES	Southern Communities Advocacy and Legal Education Service Inc
UN	United Nations
UNHRC	United Nations Human Rights Committee
VRO	Violence restraining order

About SCALES

The Southern Communities Advocacy, Legal and Education Service Inc. (***SCALES***) is an independent not for profit community legal centre (CLC) and the site of the Murdoch University Law Clinic. SCALES is a CLC and a Clinical Legal Education Program through Murdoch University. Founded in April 1997, SCALES was established by Murdoch University in partnership with the local community. The main office is located in Rockingham, with staff offices in the Law School building at Murdoch University's South Street campus.

From a staff of 3 people in 1997, SCALES now employs 11 people in 15 positions with the equivalent full time staff level of 8.5 staff members. In the current financial year of 2008/2009 SCALES is funded by 8 recurrent sources. Most funding at SCALES is utilised to ensure that the Law Clinic is adequately resourced to be able to offer the best learning opportunities for our law students while still offering a comprehensive service to the community.

SCALES helps people with a variety of legal problems by providing free information, referrals, advice, casework, representation, community legal education, policy and law reform to low income people living in the Kwinana and Rockingham areas of south-metropolitan Perth. This area covers a population of over 100,000 people and is one of high need of legal services due to socio-economic indicators of disadvantage.

Client services are provided in a number of areas of law including civil law matters, consumer credit and debt, criminal (Children's Court and Magistrates Court), domestic violence (restraining orders, criminal injuries compensation, child protection, liaison with police), equal opportunity matters, family law in matters relating to children, immigration (refugee and asylum seeker matters), motor vehicle accidents (property damage and infringements), tenancy (public and private tenants), welfare rights (Centrelink matters) and victims of crime.

SCALES is also a clinical teaching facility in conjunction with the Murdoch University School of Law. Supervisors teach Clinical Legal Education (CLEd) and Advanced Clinical Legal Education as elective units in the Bachelor of Laws Degree. SCALES is proud to be the first legal clinic in Western Australia and is currently the only CLEd program of its kind in Western Australia. Law students enrolled in the CLEd work at SCALES and learn what lawyers do by doing it themselves under the careful supervision of the SCALES legal practitioners.

Through the clinical process students become aware of the importance of ethical legal practice and a human rights approach to the practice of law in the community. In addition students develop communication skills, learn the importance of ethical practice, realise the importance of law reform and community development and improve their proficiency in practical skills.

The innovative work of the SCALES staff has been recognised by a number of awards including the National Human Rights and Equal Opportunity Human Rights Law Award in 2002, Premier's Award for Community Services 2002, Department of Consumer and Employment Protection Consumer Awards for Consumer Protection by an Organisation 2007, Murdoch University Vice Chancellor's Award for Excellence in Enhancing Learning 2007 as well as a National Carrick Institute Award for Outstanding Contribution to Student Learning.

Introduction

SCALES is honoured to be able to make this submission. We believe that the National Human Rights Consultation represents an important opportunity for Australia to be heard on the issue of human rights. For too long, governments have told us that human rights are not worth discussing. We have been told that they "are sufficiently protected in Australia", that "things are much worse in the rest of the world" or that we "should not be directed by those in Geneva or New York". However, this is not the real story.

For us at SCALES the real story is the young person who comes to us because they want to vote but can't because they are one of the growing number of children and young people that are homeless in this country. Or the Aboriginal mother who wants to keep her house so that she can care for her dying relatives because life expectancy among Aboriginal people is still 25 years less than the Australian population as a whole. Or the asylum seeker who is a minor, on his own in a new country and locked up without regard to his mental health.

In making this submission we have tried to draw as much as possible on the actual experience of our clients, relating many of the stories we hear everyday. What we can tell you without a shadow of a doubt is that we all need better protection of human rights, not just to better protect those most vulnerable in our community, but to build and strengthen our community as a whole.

We have also argued that we should better protect human rights in order to honour the international commitments Australia has made over a number of years, with the signing of all the major treaties. For Australia this is an admirable record, but only if it is done in good faith and the obligations the treaties are met. Signing these treaties has helped our international standing but currently they mean little more that empty diplomatic gestures because they have not been implemented into domestic law.

But the most important reason to better protect human rights in Australia is for the *people* of Australia, so that everyone can live in the understanding that simply by being human we have an inherent dignity, which as a community we are committed to respecting and promoting.

List of Recommendations

Recommendation 1

Australia should implement into domestic law the obligations of all of the international human rights treaties it has ratified.

Recommendation 2

The minimum of human rights that must be protected by Australia are all of the rights that appear in the ICCPR and the ICESCR.

Recommendation 3

A constitutionally entrenched Bill of Rights should be implemented to provide the highest standard of human rights protection.

Recommendation 4

In the absence of constitutional change, Australia must enact a Human Rights Act aimed at establishing a human rights dialogue between the legislature, executive, judiciary and the Australian community.

Recommendation 5

A Human Rights Act should be entrenched to prevent it being easily amended and to demonstrate the significance and importance of human rights to the Australian people.

Recommendation 6

A Human Rights Act should set out absolute and non- absolute rights. A Human Rights Act should permit non-absolute rights to be limited in defined circumstances, taking into account certain factors.

Derogation should only be permitted in defined exceptional circumstances with appropriate safeguards expressed in the Human Rights Act.

Recommendation 7

A Human Rights Act should impose obligations on the executive arm of government and its related departments, agencies, bodies and public officials. Private entities who exercise public functions should also be obliged to comply with a Human Rights Act. These are collectively known as "public authorities".

Recommendation 8

If possible, a Human Rights Act should be fully implemented at Commonwealth and State levels.

Recommendation 9

Entities who are not public authorities should be given the option to decide whether they wish to subject themselves to the same obligations imposed on public authorities under a Human Rights Act.

Recommendation 10

A full range of judicial and non-judicial remedies should be provided in a Human Rights Act to assist individuals whose rights have been breached.

A specialist Human Rights Tribunal be created to hear and resolve disputes in an informal and cost effective manner.

Recommendation 11

A Human Rights Act include a provision which requires the Australian governments to respond to and give effect to decisions and recommendations from United Nations Treaty Bodies.

Recommendation 12

A joint specialised Parliamentary Committee be established (or an existing one given the power) to scrutinise all legislation for compatibility with the rights appearing in a Human Rights Act.

Recommendation 13

Public authorities be required to amend their policies to make them compatible with a Human Rights Act. Annual audit and reporting obligations to the AHRC should be imposed on all public authorities.

Recommendation 14

An adequately resourced education campaign be undertaken to educate the general public and providers of public services.

The primary and secondary school curriculum be amended to include human rights as a core component.

Recommendation 15

The AHRC be given the power to:
(a) Examine all Australian legislation for compliance with the rights set out in a Human Rights Act;
(b) Investigate alleged breaches of a Human Rights Act on its own motion;
(c) Intervene in litigation where human rights issued are raised.

Funding for the AHRC be increased to provide it adequate resources to deal with its strengthened role.

Recommendation 16

Government funding for access to justice, including legal and non-legal providers, be increased.

Part 1 – Which Human Rights should be protected and promoted?

Australia's obligations under international treaties

Australia has played a developmental role in the drafting of every major international treaty to date.[1] Australia is a signatory to and has ratified all the primary international treaties dealing with human rights. As a party to these treaties Australia is bound to implement them domestically, yet only the CERD and CEDAW have major parts of them formally incorporated in domestic law. Other conventions have only been partially implemented – these include the CAT and CRC.

As a general position, SCALES believes that Australia should fulfil its obligations under ***all*** of the treaties that Australia has ratified and formally implement them by making them domestic law. SCALES believes that it is somewhat hypocritical that a State party which has:

- had heavy input into every major international treaty;
- become a signatory and ratified those treaties; and
- become obliged under the terms of those treaties to domestically implement them,

has failed to implement the terms of those treaties specifically into domestic law.

Recommendation 1

Australia should implement into domestic law the obligations of all of the international human rights treaties it has ratified.

However, SCALES would also like to acknowledge that as a starting point there are some rights that in the Australian context it is very important to protect. These rights include civil and political rights (CPR) as well as economic, social and cultural rights (ESCR) as appear in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) respectively. This is discussed in more detail below.

Indivisibility of Human Rights

International law provides that civil, political, economic, social and cultural human rights are universal, interdependent, interrelated and indivisible.[2] SCALES agrees that human rights are indivisible and interdependent. Whether they relate to civil, political, economic, social or cultural issues, SCALES believes that human rights are inherent to the dignity of every human person.

[1] Human Rights Law Resource Centre Ltd, Human Rights Law Resource Manual, September 2006, Ch 1, 5, available http://www.hrlrc.org.au/resources/manual/

[2] Lynch, P and Knowles, P, *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre Ltd, 2009, 45.

The Universal Declaration of Human Rights, created before the ICCPR and ICESCR, includes a comprehensive range of both CPR and ESCR in a single instrument without making any distinction between them.[3] The Secretary General of the UN in 2003, Kofi Annan, said that:

> Human rights - whether they are civil, political, economic, social or cultural - are universal and by forging unity and determination in their defence you can set an example of common progress for the broader international community.[4]

SCALES believes Australia now has an opportunity to set an example of common progress for the international community.

SCALES believes that ESCR are not fundamentally different from CPR. SCALES agrees with the UN that categorising ESCR and CPR is artificial and self defeating.[5] The enjoyment of many rights is dependent on or contributes to the enjoyment of other human rights.[6] The following client examples demonstrate this:

Gary's Story

SCALES helped Gary, a young man who sought our assistance in registering to vote. The difficulty was that he was homeless and as such could not provide an address for the electoral roll. His right to vote, a CPR, means little when he is effectively barred from exercising it due to the fact he has no protection of his right to adequate housing, an ESCR. Furthermore, Gary's lack of adequate housing also impinges on his right to privacy and a home life, as he is forced to live his life publicly in the streets.

Duy's Story

Duy was being held in immigration detention in such circumstances that it had a very negative impact on his mental health. As we assisted him in his asylum case his health deteriorated. Finally, as the date of his Refugee Review Tribunal came closer we tried to get him released so he could prepare mentally for his appearance before the Tribunal. This request was declined making a mockery of both his right to the highest standard of mental health and a fair hearing or equality before the law.

SCALES believes that categorising rights as CP or ESC makes little sense and further demonstrates that ESCR should be protected and promoted by Australia. CPR such as the right to freedom of

[3] Office of the United Nations High Commissioner for Human Rights, Frequently Asked Questions on Economic, Social and Cultural Rights (Fact Sheet No. 33), 7, available http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx.

[4] Lynch, P and Knowles, P, above n 2, 44.

[5] Office of the United Nations High Commissioner for Human Rights, above n 3, 8.

[6] Lynch, P and Knowles, P, above n 2, 44.

expression can only be fully enjoyed if there is also a right to education, a right to adequate housing and a right to work or access social security.

International Covenant on Civil and Political Rights

The ICCPR sets out the fundamental CPR that derive from the inherent dignity of human beings and are the basis of freedom, justice and peace. SCALES submits that CPR are better known and are protected by all countries that have some form of human rights protection. As such, it goes without saying that Australia should protect all the rights contained in the ICCPR.

International Covenant on Economic, Social and Cultural Rights

The ICESCR sets out the basic ESCR necessary to live with human dignity.

Although SCALES recommends that Australia should give domestic recognition to all of the treaties it has ratified, SCALES believes that given Australia's present record in domestically implementing treaties that this is highly unlikely. SCALES submits that at a bare minimum, the protection of CPR and ESCR will allow individuals to live with decency and dignity.

For example, Indigenous Australians need more than simply racial discrimination protection in order to improve their situation. Protection of cultural rights as well proper respect for the rights to adequate housing and health are an important part of the development of Indigenous Australia.

The Vienna Declaration of 1993 states:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect ***all*** human rights and fundamental freedoms. [emphasis added][7]

Australia was a party to the Vienna Declaration but as yet has not complied with its duty under it to "promote and protect all human rights". SCALES believes Australia now has the opportunity to begin to fulfil its duty by including ESCR in a Bill of Rights or HRA.

Recommendation 2

The minimum of human rights that must be protected by Australia are all of the rights that appear in the ICCPR and the ICESCR

Why should the full range of ESCR be protected?

SCALES believes that ESCR are essential for people to live a dignified life and reach their full potential as human beings. SCALES sees every day the growing incidences of human rights violations in Western Australia. The denial of ESCR is prevalent in dealing with our clients problems. Central to

[7] United Nations General Assembly, *Vienna Declaration and Programme of Action*, A/CONF 157/23, 12/07/93, available http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument

our clients concerns, who come from backgrounds of financial hardship and disadvantage, are ESCR such as:

- access to adequate housing;
- the right to adequate food and clothing; and
- the right to the highest available standards of physical and mental health.

SCALES' experience is that when our clients talk of human rights, they predominantly talk of ESCR. It often comes as a shock to our clients when it is explained to them that the rights they think have are not protected by law. From SCALES experience, the general assumption of most in the community appears to be that everyone thinks they already have the rights we know as ESCR.

The denial of ESCR can have extremely adverse effects. For example, eviction (denying the right to adequate housing) can result in homelessness, the loss of livelihood and social networks and have negative psychological effects.

The denial of ESCR can also lead to violations of other human rights. For example, failing to protect a woman's right to adequate housing can make her more vulnerable to domestic abuse.

Tiffany's Story

SCALES recently assisted a client who wished to transfer from one area of public housing to another. The reason was that her ex-partner had many family members that were living in the area who were abusing her in public whenever she saw them. Despite the existence of a violence restraining order her ex-partner's family were approaching her daily to abuse her and accuse her of causing the break-up. She was told that the waiting list for a priority transfer could be as long as two years.

The denial of a right to education can lead to difficulties in finding work, taking part in political activity or exercise their freedom of political expression.

Zac's Story

SCALES assisted a young man who was excluded from the local high school due to actions of some of his associates. His exclusion lasted two months while he appealed the decision and was allowed to return. He failed the exams that he sat the week after he returned to school despite his best efforts to study the material at home.

SCALES submits that some of the biggest human rights issues in Australia relate to ESCR. This is reason enough to provide ESCR with some form of protection and was one of the reasons that the WA Consultative Committee recommended the inclusion of ESCR (albeit not all ESCR) in a proposed Human Rights Act for WA.[8]

[8] Consultation Committee for a Proposed Human Rights Act, *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act,* November 2007, 76.

SCALES notes the very recent comments of the UN Committee on ESCR in its Concluding Observations for Australia. The Committee stated that it:

> ...regrets that the [ICESCR] has not yet been incorporated into domestic law[9]

Amongst other things, the Committee noted with concern:

- the lack of legal framework for the protection of ESCR;
- that the AHRC has limited competency and lacks adequate human and financial resources;
- that Australia's anti-discrimination legislation does not provide comprehensive protection against all forms of discrimination;
- the high unemployment rates indigenous people, asylum seekers, migrants and people with disabilities;
- that the poverty rates in Australia remain high despite Australia's economic prosperity; and
- that the incidence of homelessness has increased over the last decade.[10]

SCALES also notes and agrees with the Committee's recommendation that Australia:

> ...enact comprehensive legislation giving effect to all economic, social and cultural rights uniformly across all jurisdictions...[11]

SCALES believes Australia should not be put off by the fact that only a small number of developed countries protect ESCR. The inclusion of these rights is not unprecedented and, although not many, there are other politically similar jurisdictions who have included in their human rights protection measures some form of ESCR.[12] SCALES therefore believes that Australia is in a unique position to demonstrate to the international community that ESCR are just as important as CPR.

Protecting human rights, but ESCR in particular, will also help to promote Australia's reputation as a good international citizen. In particular, if Australia wants to obtain a seat on the UN Security Council, SCALES submits that as a minimum our domestic laws should recognise and protect the ICCPR and ICESCR. Comprehensive protection of ESCR will also avoid having to argue for their protection by using the overlaps between CPR and ESCR.[13]

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[9] United Nations Economic and Social Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, E/C.12/AUS/CO/4, 22 May 2009.

[10] Ibid.

[11] Ibid.

[12] For example, South Africa's Bill of Rights is notable for its protection of ESCR. Also the HRA UK includes the right to education.

[13] For example, the right to adequate housing (an ESCR) has been argued as a part of the right to life or the right to family and privacy (both CPRs). This is demonstrated by the case of *Mullin v Administrator, Union*

Constant pressure and community support to include ESCR

SCALES submits that if ESCR are not included in a Bill of Rights or HRA, there will always be a constant push to include them. SCALES notes that Australia was one of the countries that pushed for the inclusion of ESCR in a single binding instrument when the ICCPR and ICESCR were being drafted.[14] It seems only logical then, given Australia's stance internationally, to give legislative protection to ESCR alongside CPR.

SCALES submits there is already overwhelming community support in Australia for the inclusion of ESCR. In its report to the Western Australian government for a proposed Human Rights Act for WA, the Consultative Committee outlined that:

- One of the strongest themes to emerge from the consultation was the broad community support to include ESCR;
- Of the 159 submissions dealing with the issue of what rights should be protected, 79% indicated that ESCR should be protected;
- 88% of respondents to a public opinion survey either "strongly supported" or "supported" human rights legislation protecting ESCR; and
- 77% of disadvantaged people surveyed indicated that ESCR were the most important to them.[15]

Although the Committee fell short of recommending a full inclusion of those rights contained in the ICESCR, it recommended that the following ESCR be protected by a Western Australian Human Rights Act:

- The right for everyone to attain the highest attainable standard of physical and mental health;
- The right to an education;
- The right to have access to adequate housing;
- The right to take part in cultural life; and
- The right not to be deprived of property other than in accordance with the law on "just terms".[16]

Territory of Delhi [1981] 2 INSC 516, in which the Supreme Court of India said that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing ones self in diverse forms, freely moving about and mixing and commingling with fellow human beings (at 528).

[14] Lynch, P and Knowles, P, above n 2, 41.

[15] Consultation Committee for a Proposed Human Rights Act, above n 9, 64.

Similarly, when the ACT conducted its consultation prior to the introduction of the *Human Rights Act 2004* (ACT), its Consultative Committee recommended that the rights contained in the ICESCR be incorporated into the Act, stating that the "...perceived difficulties with the implantation of such rights are overstated."[17]

In its 12 month review of the operation of the *Human Rights Act 2004* (ACT), the Department of Justice and Community Safety recommended that the ACT Government should explore support for the direct enforceability of specific rights, such as rights to health, education and housing and should revisit the question of the inclusion of all ESCR as part of the five year review.[18] Again, although the report fell short of the full inclusion of ESCR, a pattern emerges as to the core ESCR that have broad community support.

In Tasmania, of the 407 submissions received by the Tasmanian Law Reform Institute when it conducted the Tasmanian consultation, 94% supported the enactment for a charter of rights and responsibilities.[19] In terms of ESCR, the Institute recommended that rights relating to:

- work and just conditions;
- food;
- clothing;
- housing;
- health;
- education; and
- a safe environment,

be added to the CPR that would be protected.[20]

The bare minimum of ESCR to be included

SCALES notes that our preference is to have all ESCR protected by a Bill of Rights or HRA. However, SCALES submits that if the Federal Government decided not to include all ESCR in a Bill of Rights or HRA, at the very minimum the following ESCR should be included:

- Right to adequate housing;

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[16] Ibid, 116.

[17] Department of Justice and Community Safety, *Human Rights Act 2004:* Twelve-Month Review Report, June 2006, 37.

[18] Ibid, 49.

[19] Bailey, P, The *Human Rights Enterprise in Australia and Internationally*, 2009, LexisNexis Butterworths, 206.

[20] Ibid.

- Right to education;
- Right to highest possible standard of health care;
- Right to access social security; and
- Right to take part in cultural life.

Based on SCALES experience, SCALES submits that these are the most prevalent ESCR that require protection in Western Australia. However, SCALES notes that the danger of listing certain ESCR may mean that Parliament intended not to protect the excluded ESCR. SCALES warns that a piecemeal recognition of human rights would be inconsistent with the basic human rights principles outlined above,[21] and would mean that Australia would still not be complying with its obligations under the treaties. This also means that the treaties would be ineffectively implemented.

Dealing with arguments against the inclusion of ESCR

It is often argued that the main reasons for not including ESCR are in human rights legislation are:

- ESCR will mean a large increase in costs and resources;
- The courts should not be dealing with issues raised by ESCR;
- There will be a flood of litigation;
- ESCR will create a lawyer's picnic; and
- The winners will be criminals and lawbreakers.

Increase in costs and resources

SCALES submits that the cost of including ESCR would be minimal. Much of what is already available in the community in the areas of ESCR, such as health, welfare and education, could immediately be made available in rights bearing form with little change in cost.[22] This is a small price to pay for the empowerment of those who need to invoke those rights.[23]

SCALES also points out that protection of CPR requires infrastructures such as a functioning court system, prisons respecting minimum conditions, legal aid and so on.[24] Therefore any cost and resource implications in protecting ESCR can be equally applied across the entire range of human rights that Australia has agreed to protect. However, as mentioned above, much of this is already available (for example, a functioning court system), demonstrating again the minimal cost and resource implications of implementing protection of human rights in Australia.

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[21] See above under the heading 'Indivisibility of Human Rights'.

[22] Bailey, above n 19, 92.

[23] Ibid.

[24] Office of the United Nations High Commissioner for Human Rights, above n 3, 9.

SCALES submits that Australia is a rich country and should have no problem in adequately resourcing the protection of ESCR. Parties to the ICESCR have undertaken to take steps, to the maximum of their available resources, to progressively achieve the full realisation of the rights recognised in the ICESCR.[25] This is known as 'progressive realisation'. The ICESCR therefore recognises that the implementation by States Parties of ESCR may be constrained by the limits of their available resources. This means that if Australia was to legislate and protect ESCR, it does not immediately have to provide homes for all of the homeless or access to food and clothing for all the needy.[26] It does, however, impose an immediate obligation to take appropriate steps towards the full realisation of ESCR. This means that Australia must take "deliberate, concrete and targeted"[27] steps towards meeting the obligations imposed by the ICESCR. Therefore SCALES submits that while some spending is required, it should not be a problem for a country as wealthy as ours.

Guidance in relation to resources and interpreting ESCR can also be taken from South Africa. In the *Treatment Action Campaign Case*[28] (which concerned access to antiretroviral drugs) the South African Constitutional Court held that:

> All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights.[29]

Example

Currently there is no protection of the right to adequate housing in Western Australia. This means that tenants can be evicted despite the fact this eviction will mean homelessness. Much of this is due to the very high cost and limited supply of private housing.

In the context of public housing in Western Australia this leads to a substantial drain on public resources because once a person is evicted they simply go onto the bottom of the wait list for public housing. The bureaucracy needed to administer a wait list of this size is enormous, as the average wait time is close to 9 years. If we had legislative protection for the right to adequate housing, landlords may decide to balance the risk of homelessness against their financial gain. This means it may be possible to come to an arrangement with a tenant whereby they would not be evicted to homelessness, thus relieving pressure on public housing.

[25] Art 2(1) of ICESCR.

[26] See an explanation of progressive realisation in *CESCR General Comment 3: The nature of States parties obligations*, 14/12/90, available http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument

[27] Office of the High Commissioner for Human Rights, *CESCR General Comment 3: The nature of States parties obligations*, 14/12/90, available http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument

[28] *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271.

[29] *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, 38.

Outside of the scope of the Courts

A common argument against the inclusion of ESCR is that courts should not be dealing with the human rights issues raised by ESCR. Those who argue this say that because ESCR are so vague they transfer to judges subjective control over what are really political choices.

This argument cannot be substantiated. It has been the role of courts since their inception to interpret the law. Legislative protection of human rights will make human rights part of the law. Thus the judiciary will be doing what it has always done – interpret the law. Furthermore, judicial function also involves the exercise of a range of discretions and is not limited to the technical application of legal rules. SCALES sees no problem and has faith in allowing the courts to do the job they have always done.

SCALES notes that there already are legal concepts currently applied by the courts that transfer to judges subjective control over what might be considered political choices. The concept of 'reasonableness' is a prime example, along with concepts of equity. The interpretation of family law legislation is also a good example of where judges are already making decisions that are largely based on social policy.

Flood of litigation

Research has proven that the introduction of human rights legislation in other jurisdictions has not seen a marked increase in the amount of litigation.[30] While the Australian examples (the ACT and Victoria) do not include ESCR, SCALES submits that the situation would not be different if they were included. This is because so many ESCR, as discussed under the heading Indivisibility of Human Rights, are intrinsically linked.

Lawyer's picnic

This argument can be dispensed with quite simply - if human rights lawyers wanted to be wealthy, they would not be practicing in human rights. This is borne out by the experience in Victoria where the vast majority of human rights matters run under their *Charter of Rights and Responsibilities* have been run with the assistance of pro bono solicitors and barristers.

Winners will be criminals and lawbreakers

Those who argue that criminals will be winners if Australia had human rights protection need only look to the statistics to see that their argument is unsubstantiated. SCALES asks those who put forward this argument to think about all of the other western countries in the world who have human rights protection and asks them – "Are the criminals and lawbreakers winners in those countries?" The answer is obviously no.

Much like the answer rebutting arguments claiming a flood of litigation, reviews of human rights legislation have shown only minor increases in criminal cases referring to human rights provisions. For example, Justice Connolly was reported in the ACT twelve month review as saying:

[30] See for example the reports of the ACT, Victoria and the UK on the minimal increases in litigation due to the implementation of human rights protection.

> The *Humans Rights Act* has certainly not had a revolutionary impact on the practice of criminal law in Canberra. There has not been a flood of litigation and magistrates and judges have not been overwhelmed by masses of English, New Zealand or European jurisprudence on equivalent human rights statutes.[31]

In fact, the report states that the courts and tribunals had been the least affected by the *Human Rights Act 2004* (ACT).[32] The ACT director of Public Prosecutions stated that:

> ...the enactment of the *Human Rights Act 2004* (ACT) has not been the enactment of a 'Rogues Charter'. There have been no more acquittals or technical defeats for the prosecution than before the Act, nor an express reliance on the Act in ways that are different from the common law.[33]

Similarly, the UK's five year review of its human rights legislation concluded that the Act had "no significant impact on criminal law, or on the Government's ability to fight crime."[34]

The WA Consultative Committee in its report for a proposed WA Human Rights Act also concluded that:

> On the information presently available to us, we do not see a WA Human Rights Act as likely to undermine the proper conduct of the criminal justice system.[35]

Again, while these jurisdictions do not protect ESCR, SCALES submits that there would not be a significant increase in criminal cases referring to ESCR. This is because, given the nature of criminal matters, it is more likely that CPR would be referred to.

[31] Department of Justice and Community Safety, above n 17, 11.

[32] Ibid.

[33] Richard Refshauge SC, "Impact of Criminal Law and Procedure", cited in *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act,* above n 8, 56.

[34] UK Department for Constitutional Affairs, cited in *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act*, above n 8, 56.

[35] Consultation Committee for a Proposed Human Rights Act, above n 8, 56.

Part 2 – Are these Human Rights currently sufficiently protected and promoted?

Current Human Rights protection in Australia

SCALES notes that it is well known that Australia's current protection of human rights, both domestically and internationally, is limited. The protection provided under the Australian legal system:

- by the Constitution;
- through specific legislation such as the *Racial Discrimination Act 1975* (Cth); and
- by the common law,

is inadequate. It is also common knowledge that there is no comprehensive federal law that sets out fundamental human rights.

Any legislation that does exist in Australia does not fully implement Australia's obligations under the relevant treaty. For example, while the *Racial Discrimination Act 1975* (Cth) (RDA) purports to be the implementation of the CERD, it falls far short of fully implementing the protections. The RDA relies on a complaints mechanism and places only limited responsibility on government to ensure that systemic and institutional racism is not allowed. Worse still, the limited protection provided by the RDA can be easily amended, repealed, restricted or suspended. There is no better example for this than the Northern Territory Emergency Response legislation, which suspended the operation of the RDA. In contrast the CERD sets out a comprehensive framework for State parties to take action to eradicate racism.

Likewise, it is often said that the 'best interests of the child' provisions[36] within the *Family Law Act 1975* (Cth) (FLA) implement the 'best interests' provisions of the CRC. However, the best interests of the child as contained in the CRC *includes* the child's right to participation. That is, it includes the child having a say in decisions that affect them and this applies to children of all ages (wherever their capacity permits). Furthermore, there is a responsibility to support younger children in exercising this right of participation. However, under the FLA the concept of best interests falls far short of this. Judges and court appointed independent children's lawyers (many of whom have never even met the children whose best interests they represent) often make decisions without meaningful participation of the child in question.

The inadequacy of Australia's protection of human rights has also been identified by the UN on many occasions. In 2001, the UNHRC in its Concluding Observations stated that:

> ...in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the [ICCPR], there remain lacunae in the protection of Covenant rights in the Australian legal system.

[36] See s 60CA of the *Family Law Act 1975* (Cth).

> There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.[37]

Furthermore, the UNHRC as recently as April 2009 expressed concern that:

> ...the [ICCPR] has not been incorporated into domestic law and that [Australia] has not yet adopted a comprehensive legal framework for the protection of Covenant rights at the Federal level, despite recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law...[38]

SCALES submits that these comments and the lack of domestic protection demonstrate the deficiency of human rights protection in Australia. However, the best way to demonstrate the effect of this deficiency is to look more closely at the issues facing real people everyday.

SCALES' experience of the deficiency of Human Rights protection

Rather than repeating the theory and arguments to demonstrate lack of human rights protection in Australia, SCALES thought it would be more appropriate to provide the Consultation Committee with real life examples of the current deficiency of human rights protection. Below (in the shaded boxes) are stories of our clients, the problems they face and how better protection of human rights could make a difference. While each of these stories is based on real client experiences, these are not their real names and some details have been changed. Outlined below are some groups within our client base which are particularly adversely affected by the lack of human rights protection in Australia.

Children and Young People

The rights of children and young people are woefully under-protected in Australia. Consider for example, such CPR as freedom of movement and association which are limited by a raft of measures from curfews and banning notices to move-on powers and license restrictions. A recent inquiry by the National Youth Commission has found the number of young homeless people in Australia has doubled in the last two decades, leaving more than 36,000 Australians under the age of 25 without stable accommodation.[39] SCALES also notes the number of children on care and protection orders across the country has steadily risen in the last ten years.[40]

As mentioned above, the 'best interests of the child' includes a right to participation. However, young people are systematically excluded from constructive participation in legal processes affecting them. The 1997 report by the Australian Law Reform Commission (ALRC) and Human Rights and Equal Opportunity Commission (HREOC) found that there is a "consistent failure" by institutions of

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[37] UNHRC Concluding Observations, Australia, 24/07/2000, A/55/40, 506.

[38] United Nations Economic and Social Council, above n 9, 8.

[39] National Youth Commission, *Australia's Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness,* 2008, available http://www.nyc.net.au/files/Australias_Homeless_Youth.pdf

[40] Australian Institute of Criminology, http://www.aic.gov.au/stats/victims/juveniles.html, accessed on 10 June 2009.

the legal system to consult with and listen to young people about matters that directly affected them.[41] The report also highlighted the 'punitive approach' to young people in many juvenile justice systems, and court processes that actively exclude young peoples' participation.[42]

John's Story

SCALES helped a young man who had left his home because of the threats and violence of his mother's boyfriend. Finally when the boyfriend threatened our client with a knife he fled and as he left further threats were made. We assisted him in applying for a violence restraining order to protect him from his mother's boyfriend.

When the young man appeared in court the magistrate refused to believe his evidence, despite the fact there was nothing to contradict it. The boyfriend could have presented evidence or challenged the claims of the young man but had chosen not to – yet the magistrate refused to grant the restraining order without 'corroboration' of call outs to police at that address or witness statements.

It is general practice that when a person presents unchallenged evidence to a court it is accepted, however in John's case the Magistrate simply would not believe him. Under the current system, there are few avenues for appeal as this finding is one of credibility and not easily appealable. However, if Australia had a domestic protection for human rights which protected the right to non-discrimination and equality before the law, there would be further protections for this young man.

Universality means that children and young people hold all the same human rights as the broader community (within the limits of their evolving capacities). In addition, there are some rights that they hold due to the fact that they are children and in need of particular support and sometimes protection. For example, children have a right to be free from work, abuse, exploitation or neglect and they should only be detained as a measure of last resort. Unfortunately, our record on the detention of children and young people is not good. From mandatory sentencing to immigration detention, there have been and continue to be many children who are imprisoned arbitrarily and unnecessarily.

Safa's Story

Safa was a young girl who fled her home country due to persecution and came with her family to seek protection in Australia. She and her family were detained in an immigration detention centre. During her time in immigration detention she witnessed things a child should not witness including two suicide attempts numerous fights. However, the worst was when she watched as people sewed their lips together or starved themselves on hunger strikes. She developed a nervous condition and began to suffer from depression. Throughout this time she kept asking her mother, "What have we done wrong? Why are they keeping us here?"

[41] Australian Law Reform Commission, *Seen and heard: priority for children in the legal process,* 1997, [1.30], available http://www.austlii.edu.au/au/other/alrc/publications/reports/84/ALRC84.html

[42] Ibid.

Protection of human rights in Australia which protected the rights of children and families, the right to be free from arbitrary detention and the right to the highest attainable standard of healthcare would have enabled us to argue more successfully for the release (and adequate treatment) of Safa. Under the current system the right to detain arbitrarily, under s 189 of the *Migration Act 1958* (Cth) trumps a child's right to their own 'best interests', as it did in the case of *B v Minister for Immigration.*[43] In that case the Full Family Court found that it was in the children's best interest to be released but the High Court of Australia ruled that its welfare jurisdiction did not extended to ordering the release of children from immigration detention.

Aboriginal and Torres Straight Islanders

The fact that the rights of indigenous people in Australia are not properly protected is self-evident. Compared to other Australians, indigenous people have poor health and education, are over-represented in the criminal justice system, and are targeted for measures such as welfare quarantining. These are just a few examples but the list is endless and clearly demonstrates the point. It also shows, more strongly than in any other area, that the claims of those who do not want protection of human rights in Australia in the form of a Bill of Rights or HRA that the existing system's efforts to protect rights sufficiently are hollow. The case of *Kruger v Commonwealth of Australia*[44] further demonstrates why the current system will never be sufficient to properly protect the rights of indigenous people within the current Australian context. In *Kruger* the plaintiffs argued that certain rights existed here in Australia, however the High Court rejected their arguments. The rights they sought to have implied in the Constitution included due process of law in the exercise of the judicial power of the Commonwealth (regarding their removal from family), equality before the law, freedom of movement and association and freedom from laws authorising genocide, or having the effect of the destruction in whole or in part, of a racial or ethnic group.

The recent rolling back of Native Title rights, implicit in the Northern Territory Intervention measures further illustrates the need for better protection of indigenous rights. The existence of the RDA did little to protect those rights as it was simply suspended for the purposes of these measures. These measures, like so many before it including the removal of children, the compulsory labour and the curfews limiting movement have been imposed on Aboriginal people denying them the basic right of self determination. It is SCALES' view that the right to self determination, including full and properly resourced participation mechanisms must be guaranteed at law in Australia. SCALES submits that formal protection of human rights in a Bill of Rights or HRA is an opportunity to do this.

Carmel's Story

Carmel is Aboriginal and the mother of four children. She is trying to keep them all in school. The oldest Josh was excluded from the local high school where his brother and sister attend so Carmel now has to drive him to another school 9km away. Carmel is also struggling to feed her family. In order to pay the rent she didn't pay some traffic fines which resulted in her losing her driver's licence. In order to get Josh to school she drove without a licence and is now facing more fines she

[43] *B v Minister for Immigration* [2003] FamCA 451, 251.

[44] *Kruger v Commonwealth* ("Stolen Generations case") [1997] HCA 27.

cannot pay. Eventually she risks imprisonment which is routinely given in WA for driving without a licence offences (where they are third or fourth offences). Such a sentence would mean that she would lose her accommodation and her children might go into State care, not to mention four children would lose their mother.

In determining whether to impose this sentence on Carmel the court can take into consideration the fact that she has children, but only in a very narrow sense. If there was proper protection of human rights in Australia it would be possible for SCALES to provide the court with evidence about the impact of Carmel's imprisonment on her right to family and of the impact it would have on the rights of her children. Protection of human rights would allow the court to make a decision that is better for the family and the broader community because it would allow them to consider *all* of the relevant factors.

Jennifer's Story

Jennifer is also the mother of a big family and has just split from her abusive husband whose behaviour has lead the Departing of Housing seeking the eviction of the family from their home. Jennifer has applied for every private rental she can afford; some are pleasant on the phone but when she arrives with her children she is refused the property. She is very worried that if evicted she and her family will face homelessness and she is terrified that this will mean that her children are removed from her care.

Under the current system, there is no law that says the Department of Housing is required to take into account Jennifer's difficult circumstance. Similarly, the court in determining the eviction notice can only look at whether there has been a breach of the lease and if it is serious enough to warrant eviction. If Australia had a Bill of Rights or HRA which protected the right to adequate housing, the right to privacy and protection of the family, the Department of Housing would be required to consider the effect of homelessness on the rights of the family and balance that against the hardship to the Department in determining whether or not to evict Jennifer and her family. Furthermore, having formal protection of human rights would most likely mean that Jennifer would not end up in the court system, saving everybody the time and money.

Refugees and Asylum-seekers

The vilification of asylum seekers that tainted and continues to colour Australian public life is a perfect example of why there needs to be better protection of human rights for all people within the jurisdiction or power of Australia. Asylum seekers are people whose only crime is to flee persecution and mistreatment to seek safety in one of the wealthiest countries in the world. The treatment they received here (and continue to receive) is one that denies their basic human dignity and undermines the very idea of a democratic rule of law here in Australia. Democracy relies on the idea that when it comes to liberty the State will only interfere with that right in the most extreme and necessary circumstances. Yet under our migration regime we routinely lock up those who have committed no crime and pose no risk to the community.

Margaret's Story

Margaret came to Australia 10 years ago to visit her sister from her home in Africa. While she was here security forces in her own country came to her home, dragged her husband out the front door and shot him in front of her children. Her children fled the home and from Australia Margaret made arrangements for them to leave the country. Fearing for her own life she applied for protection here in Australia.

Due to a lack of funds she was unable to get any assistance and she missed her Refugee Review Tribunal date. Margaret was subsequently refused a protection visa, but too afraid to return to her country she stayed in Australia unlawfully. Over the next ten years she worked consistently and she became a leader in her church giving hours and hours each week to do community work. Margaret then fell ill and went to the hospital where she was diagnosed with cancer. Despite this, she was still reported to the Department of Immigration who under s 189 moved to detain her.

While the current Government's policy on detention would mean that Margaret would not be detained, the underlying legislation remains unchanged. This means that there is no real protection for people like Margaret from unnecessary detention. Formal recognition of human rights that includes protection against arbitrary detention would protect people like Margaret from unnecessary hardship.

Ali's Story

Ali is a 16 year old boy who was detained in Immigration Detention. During that time he was kept in a room separate from the other detainees as he was a minor.

Reports from psychologists from the Department for Community Development (DCD) said he was suffering from post traumatic stress disorder and a co-morbid major depressive disorder. DCD psychologists held the opinion that the detention environment was contributing to his illness. After 5 months in detention Ali deliberately harmed himself. Despite the reports and self harm, the Secretary of the Department of Immigration stated he did not believe there was any need to consider any alternative accommodation for Ali. Ali's older brother, living in Australia on a temporary protection visa, commenced family court proceedings seeking parenting orders for his brother. These were opposed by the Minister for Immigration. Finally, Ali was found to be a refugee by the RRT and was released having spent over 2 years in detention.

Had there been in place proper legal protection of human rights, there would have been many ways in which the decision to detain Ali in these conditions could have been challenged. Ali's right to family, right to education and right to humane treatment while being detained have all been breached, not to mention his right to freedom from arbitrary detention. The legacy of Australia's treatment of refugees and asylum seekers shows that protection from arbitrary detention is not enough – other rights (including ESCR) need to be protected to ensure that no other asylum seeker is treated that way again.

Sal's Story

Sal was detained in Port Hedland with his family. He developed an infection in his eye. His father asked for treatment but was told that they did not have the appropriate medicine as it was very expensive.

Finally a doctor saw Sal and said that he must be taken to Perth for treatment immediately. Three months later he was flown to hospital in Perth, who prescribed drops that had to be administered twice a day. Once he returned to Port Hedland he was given the drops until they ran out and was then told he could not be given more medicine. Sal lost the sight in one eye due to his condition which also spread to his other eye. Sal's family were eventually found to be refugees.

The suffering and disability that our immigration detention system has inflicted on Sal and his family is indefensible. The legal framework which supported these immigration practices remains in place, so there is nothing stopping a return to these practices. A Bill of Rights or HRA would put in place some safeguards to ensure that no matter what the political expediency, individuals and families are never again treated in this way.

Victims of Domestic Violence

SCALES sees everyday the failings of the current system with regard to sufficiently protecting people experiencing domestic violence. SCALES believes that the introduction of a Bill of Rights or HRA will allow the balance to shift in favour of protection of life and bodily integrity. In the UNHRC decision of *Fatma Yildirim (deceased) v Austria,*[45] a woman being threatened by her husband whom she had left, had advised the police of his threats to kill her and various assaults and harassment. She had obtained a VRO –but the Austrian authorities had failed to detain her husband. Mrs Yildirim was fatally stabbed by her husband. The UNHRC considered the failure to detain Mr Yildirim as a breach of the State party's due diligence obligation to protect Mrs Yildirim saying "the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity".

Maria's Story

Maria was being threatened by her husband after she left him. The threats got worse and included him throwing things at her in the street. Maria went to the police and applied for a VRO against her husband.

At the first hearing he told her that if she went ahead with the application he would kill her. Maria got an interim order. She told the police about the threat but they said that as there were no witnesses so they couldn't do anything. The next day Maria was found dead in her home – she had been killed by her husband after he broke in while she slept.

Currently the legal system is only able to weigh the risk of the threats and the likelihood they will be carried out against the rights of the perpetrator. If there was proper protection of human rights it would be possible to argue that in deciding how to deal with a perpetrator the rights of the person

[45] *Fatma Yildirim (deceased) v. Austria* (Communication 6/ 2005), UNHRC.

threatened and also the family should be considered. For example, the right to life could be considered along side security of the person and right to privacy and family life.

Homeless and Low Income Earners

Every week SCALES, in collaboration with Mallesons Stephens Jacques, offers legal advice to those using the Genesis homelessness drop-in centre run by the Salvation Army in Perth. Through this service we see many people who are homeless and this affects many other areas of their life.

Brad's Story

Brad has been homeless for 2 years. He was evicted from a house due to non-payment of rent and even though he has now paid all of the unpaid rent his landlord placed him on a tenancy database which means that he could not access any other rental properties. He has put his name down for state housing, however, he has been told it will be at least another year before they can house him due to the waiting list. His health is now beginning to deteriorate.

Under the current system in Western Australia, tenants can be placed on a database and it is very difficult to get them off. There is no consideration of the impact of this decision on the person's right to adequate housing, to privacy and a family life or any of the other rights it effectively denies. A Bill of Rights or HRA would allow these issues to be considered and balanced against the landlord's right to list them on the database.

In the case of *Stankova v Slovakia*[46] the European Court of Human Rights held that the eviction of a woman from public housing in circumstances where the public authority had not ensured that she had adequate alternative housing constituted a violation of the right to respect for private life and the home. In the face of underinvestment by governments in public housing, a legal system that requires that a person's human rights be balanced against the economic concerns of governments would have a far reaching and dramatically positive effect on many of our clients.

Raising complaints with the UN

As mentioned in Part One under 'Australia's obligations under international treaties', for an international treaty to be legally binding in Australia, it must be incorporated into domestic law. SCALES has also already noted Australia's poor record of implementation.[47] Often an individual has no domestic recourse because Australia has not domestically implemented the terms of an international treaty it has ratified. In these cases, their only recourse is to take their complaint to the UN through one of the many committees or treaty bodies that oversee implementation of the treaties.

This process takes time and requires a lot of effort, including legal and human rights expertise that is difficult to get. It often results in a clear decision from the treaty body that a person's rights have

[46] *Stankova v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

[47] See Part One under 'Australia's obligations under international treaties'.

been breached. For example, in *Brough v Australia*[48] the UNHRC found that Australia had breached art 10 of the ICCPR. In its findings the UNHRC stated that the complainant was "...entitled to an effective remedy, including adequate compensation."[49] Although the decision was considered "landmark" by many, the Australian Government did not accept that view.[50] Furthermore, the Australian Government did not consider monetary compensation or another remedy of that nature appropriate.[51] *Brough's* case clearly demonstrates one major flaw in the current system of human rights protection in Australia – that the Australian government does not respect the decisions of the UN treaty bodies.

Mohammad's Story

Mohammad and his family were detained for many years in Immigration Detention centres, first in Derby and then Port Hedland. After a long and involved legal process they were found to be refugees and released. The time they spent in detention had a lasting negative effect on the family, in particular the children, who continue to suffer the effect today.

The UNHRC found that the detention of this family was in breach of article 9(1) of the ICCPR and stated that compensation should be paid,[52] however, the Australian government has yet to respond to these recommendations.

A Bill of Rights or HRA would mean that Mohammad could have first dealt with his problems domestically and would probably have been saved the trouble of having to voice his concerns to the UN. SCALES believes it would also create a greater respect for the legal system in Australia because individuals would know their human rights are protected.

[48] *Brough v Australia* (Communication 1184/2003), UNHRC.

[49] *Brough v Australia* (Communication 1184/2003) UNHRC, [11].

[50] *Response of the Australian Government to the views of the Committee in Communication No 1184/2003 Brough v Australia*, www.ag.gov.au/www/agd/rwpattach.nsf/VAP/...no+**1184_2003**+**Brough**.../4Communication+no+**1184_2003**+**Brough**+v+Australia.doc, [23].

[51] Ibid, [12].

[52] *D and E v Australia*, CCPR/C/87/D/1050/2002, 9 August 2006.

Part 3 – How could Australia better protect and promote Human Rights?

Who should be protected?

Before discussing how Australia could better protect and promote human rights, it is important to ascertain who it actually is that should be protected.

SCALES submits that only humans should benefit from a HRA. Human rights are rights which arise out of shared humanity and from the fact that all persons are human beings. SCALES believes that all humans are born free and equal in dignity and rights. As such, SCALES believes human rights are not applicable to corporations.

Citizens and non-citizens

SCALES believes that a HRA should protect and promote the rights of all individuals who are subject to Australia's jurisdiction. It should not distinguish between citizens and non-citizens. SCALES believes that a person does not surrender their rights by arriving in a country where they are not recognised as a citizen. This is consistent with the position of the UNHRC which, with respect to the ICCPR, stated that rights:

> ...apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.[53]

Constitutional protection of Human Rights

Although the terms of reference prohibit it, SCALES believes that constitutional protection is the most appropriate form of domestic protection of human rights. This is because a constitutionally entrenched Bill of Rights would operate to circumscribe the law making powers of Parliament and ensure that Parliament does not have the authority to make a law or authorise an action which will lead to a breach of a right contained in a Bill of Rights (except to the extent that that right is limited by the Bill of Rights). A constitutionally entrenched Bill of Rights would therefore provide more complete protection of human rights in Australia.

A constitutionally entrenched Bill of Rights would also demonstrate Australia's commitment internationally to upholding and enforcing human rights. It would also not be vulnerable to amendment by subsequent acts of Parliament, providing security of protection of human rights to Australian individuals.

However SCALES also recognises that a HRA in the form of a dialogue model (such as that set out in the Victorian and ACT Acts) is an appropriate interim measure. SCALES believes that in time, this would allow a human rights culture to develop in Australia, increasing the understanding of what formal recognition of human rights can do to protect those most vulnerable in the community. Once

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[53] Office of the High Commissioner for Human Rights, *General Comment 15:The position of Aliens under the Covenant,* 11/4/86, available http://www.unhchr.ch/tbs/doc.nsf/0/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument

this understanding has taken root with the Australian people, a move to a referendum and constitutional entrenchment could take place.

Recommendation 3

A constitutionally entrenched Bill of Rights should be implemented to provide the highest standard of human rights protection.

Human Rights Act

As discussed above, SCALES supports the introduction of a HRA in the form of a dialogue model as an interim measure before Australia can move forward to constitutional change. Although SCALES would prefer to see a stronger HRA that would allow courts to invalidate legislation that breaches or is inconsistent with human rights, at this time SCALES believes the best way forward is for Australia to enact a HRA similar to what is already in place in the ACT, Victoria, the UK and New Zealand.

SCALES believes that a HRA for Australia can be successfully drafted using the already working models in place in the ACT, Victoria, the UK and New Zealand. SCALES submits that a properly drafted HRA would:

- promote a culture of respect for human rights within the Government which would flow on to the broader community;
- provide wide-ranging protection of human rights;
- strive to make policy and decision makers take human rights into account when making policy and decisions;
- preserve parliamentary sovereignty by giving Parliament the final say (that is, allowing Parliament to pass laws that contravene the rights set out in a HRA);
- provide suitable remedies for individuals whose rights have been breached; and
- provide a commitment to an adequately resourced education campaign.

Recommendation 4

In the absence of constitutional change, Australia must enact a HRA aimed at establishing a human rights dialogue between the legislature, executive, judiciary and the Australian community.

Entrenching the Human Rights Act

SCALES believes that the protection of human rights is a significant issue of national importance. Australians would be proud to live in a country that respects, protects and promotes human rights. As such, SCALES submits that the HRA should not be allowed to be easily amended.

Whilst SCALES recognises one of the advantages of a HRA (as an ordinary piece of legislation) is that it can be easily amended to adapt to changes in societal values, the fact a HRA can be easily amended also means it can be amended for the wrong reasons. SCALES believes that any changes in

societal values which lead to emerging human rights principles can be ably dealt with by the current framework of human rights. For example, SCALES believes that the right to a healthy environment (an emerging human rights principle), falls within the scope of the right of everyone to the highest attainable standard of physical and mental health.[54]

SCALES therefore submits that a HRA should be entrenched to prevent it from being amended by the ordinary majority of Parliament. Whilst SCALES recognises there are constitutional issues with Parliament imposing a procedural restraint on itself,[55] SCALES believes that entrenching the HRA would send a clear message of the importance of human rights to all Australians and the international community.

Although a provision entrenching a HRA would be legally ineffective, a perfect example in the *Flags Act 1953* (Cth) already exists. Section 3(2) of that Act states that the Australian flag can be changed "if, and only if" the change is approved by a majority of voters at a referendum. While nothing legally prevents Parliament from changing the *Flags Act* and therefore the Australian flag, SCALES submits it is not something that would be done without consulting the Australian people. SCALES submits that the same importance should be afforded to human rights in Australia.

Recommendation 5

A Human Rights Act should be entrenched to prevent it being easily amended and to demonstrate the significance and importance of human rights to the Australian people.

Key features of a Human Rights Act

SCALES would like to see the following key features in a HRA:

1) Contain a catalogue of rights based on all of the international treaties Australia has obligations under. This is SCALES first preference. However, as already noted in Part One, the very minimum SCALES would accept is a catalogue of rights based on those appearing in the ICCPR and the ICESCR.

2) Provide that certain rights cannot be restricted or limited and allow limitation of other rights in defined circumstances (see 'Limitations' below for more detail).

3) Bind all public authorities and private enterprise engaged in performing public functions (see 'Public authorities and private entities performing public functions' below for more detail).

4) Every new bill tabled in Parliament must be presented to Parliament with a Human Rights Compatibility Statement, outlining whether and how the bill is compatible or not compatible with the rights set out in the HRA. This provides transparency to the Australian people.

[54] See Art 12(1) ICESCR.

[55] Limiting the capacity of Commonwealth Parliament would be contrary to sections 1, 23, 40 and 58 of the *Constitution*.

5) Provide individuals whose rights have been violated the right to challenge the validity of a decision (see 'Remedies for breaches of rights in a Human Rights Act' below for more detail).

6) The courts and tribunals be required to interpret legislation consistently with the human rights set out in a HRA. In doing so, the courts should be given the power to have regard to relevant international human rights jurisprudence.

7) Where the court finds it cannot interpret a law in a way that is consistent with the rights in a HRA, the AHRC be empowered, at the request of a party to the proceeding or on its own motion, to notify the Attorney-General of a finding of inconsistency.[56]

8) The Attorney-General be required to table this notification in Parliament at the first opportunity. The Government be required to respond to the notification within 6 months.[57] This process would ensure that Parliament is notified of inconsistencies in legislation with a HRA. It will then be up to Parliament as to whether that law is amended or not, preserving parliamentary sovereignty by leaving the final say with Parliament.

9) Require that Australia respect and give effect to any decisions by UN Treaty Bodies (see 'Respect for international jurisprudence' below for more detail).

Limitations

SCALES notes that the enjoyment of many human rights can be limited and recognises that in reality, rights can conflict. Limitations may be required where other concerns take precedence, such as the enjoyment of another right or competing community concerns such as public emergencies. For example, the recent quarantining of individuals due to the swine flu outbreak is an example of limiting an individual's right to freedom of movement due to an overarching concern for public health.

SCALES submits that a HRA should:

- express the rights that are absolute and non-absolute;
- provide that absolute rights must not be limited in any way;
- provide that non-absolute rights can be limited in defined circumstances, taking into account certain factors such as the nature of the right and considerations of necessity and proportionality.[58] By analysing limitations, broader public interests will be taken into account and weighed against rights; and

[56] SCALES notes that this is the approach suggested by the AHRC and has been deemed constitutionally valid by a meeting of distinguished constitutional and human rights lawyers (see 'Constitutionality issues' below).

[57] Ibid.

[58] This draws on the Siracusa Principles which were the result of a conference on the limitation and derogation provisions of the ICCPR. See UN Commission on Human Rights, *The Siracusa Principles on the Limitation and*

- only permit derogation in defined exceptional circumstances which are subject to specific safeguards.

Recommendation 6

A Human Rights Act should set out absolute and non- absolute rights. A Human Rights Act should permit non-absolute rights to be limited in defined circumstances, taking into account certain factors.

Derogation should only be permitted in defined exceptional circumstances with appropriate safeguards expressed in the Human Rights Act.

Constitutionality issues

There has been some debate as to the constitutionality of a Human Rights Act in the form of a HRA, with some commentators suggesting that certain features of a HRA model may be unconstitutional.[59]

SCALES notes that any constitutionality issues with a HRA have been effectively dealt with. Earlier this year, the AHRC convened a meeting of Australian constitutional and human rights lawyers to discuss constitutional implications of a Human Rights Act for Australia. The attendees unanimously concluded that a Human Rights Act for Australia can be drafted in such a way that it would be constitutionally valid.[60]

Who should a Human Rights Act apply to?

A HRA should impose obligations on the institutions of government in protecting and promoting human rights. This includes the executive arm of government and its related departments, agencies, bodies and public officials. It also includes those bodies or agencies who perform a public function or deliver a public service.

Public authorities and private entities performing public functions

Defining a public authority will play a fundamental role in determining which governmental and non-governmental organisations have obligations imposed on them by a HRA. SCALES submits that a public authority should include, but is not limited to, the following:

- government ministers;

Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: http://www.unhcr.org/refworld/docid/4672bc122.html

[59] As identified by some commentators reviewing the Hon Michael McHugh AC QC paper, *'A Human Rights Act, the courts and the Constitution',* paper presented at the AHRC on 5 March 2009, available http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh_2009.html

[60] Australian Human Rights Commission, *Constitutional validity of an Australian Human Rights Act*, accessed 11 May 2009, available http://www.hreoc.gov.au/letstalkaboutrights/roundtable.html

- government departments and other entities (established by statute) that perform functions of a public nature;
- public officials, including all public sector employees (this would also include members of the police force); and
- any entity whose functions are or include functions of a public nature (this would include private entities who perform public functions (for example, Swan Transit, a private operator of public transport in Western Australia).

SCALES submits that a HRA should also specify functions that are of a "public nature". Section 40A(3) of the *Human Rights Act 2004* (ACT) is a good place to look for guidance. It provides that the following functions are of a public nature:

- the operation of detention and correctional facilities;
- the provision of any of the following services:
    - gas, electricity or water;
    - emergency services;
    - public health services;
    - public education;
    - public transport; or
    - public housing.

SCALES submits that public authorities should be required to observe both a substantive and procedural obligation. This is presently the case in both the ACT and Victoria.[61] The substantive obligation would require a public authority act in a way that is compatible with a HRA, while the procedural obligation would require a public authority to give proper consideration to relevant human rights in its decision making and implementation of legislation. A procedural obligation will encourage proper consideration of human rights in the administration of government.

Recommendation 7

A Human Rights Act should impose obligations on the executive arm of government and its related departments, agencies, bodies and public officials. Private entities who exercise public functions should also be obliged to comply with a Human Rights Act. These are collectively known as "public authorities".

[61] See section 40B of the *Human Rights Act 2004* (ACT) and section 38(1) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).

States and Territories

SCALES submits that a HRA should apply equally to all of the State and Territory governments. A HRA binding all levels of government in Australia would ensure consistency in human rights compliance across the nation, meaning that an individual would receive the same treatment regardless of what jurisdiction they find themselves in. SCALES submits that human rights are an issue of national importance and believes this is the only way of having equal and non-discriminatory protection for every individual in Australia.

Recommendation 8

If possible, a Human Rights Act should be fully implemented at Commonwealth and State levels.

Opt in for private entities not performing public functions

SCALES supports section 40D of the *Human Rights Act 2004* (ACT) which allows entities who are not public authorities to request that they be subjected to the obligations of public authorities under that Act. Similar to those entities who claim to be "green", SCALES believes that private entities who bring themselves within the ambit of a HRA would benefit from being viewed as human rights friendly organisations. SCALES submits that this would further help to foster a culture of human rights in Australia.

Recommendation 9

Entities who are not public authorities should be given the option to decide whether they wish to subject themselves to the same obligations imposed on public authorities under a Human Rights Act.

Remedies for breaches of rights in a Human Rights Act

The current framework

The requirement to provide an effective remedy as part of a State's obligations in relation to particular human rights is found in many human rights conventions.[62] Given that cases to the UNHRC can only be brought only once all domestic remedies have been exhausted, the primary responsibility for compliance with human rights treaties lies within Australia's domestic legal system.[63]

Australia's attempt at providing effective remedies for those human rights violations protected under current law is weak at best. Currently, an aggrieved party has no immediate right to take civil action against the wrongdoer.[64] Instead, they first have to lodge a complaint with the AHRC, who

[62] Human Rights Law Resource Centre Ltd, above n 1, Ch 3, 15.

[63] Ibid.

[64] Ibid, Ch 3, 19.

then undertakes an inquiry and conciliation process.[65] If the matter remains unresolved at the end of this process, the party may take action in the Federal Court. It is the Federal Court who has the power to award remedies such as damages. Taking action in the Federal Court is both costly and time consuming, and is not suited to clients like ours – the marginalised and disadvantaged.

Australia's deficiency in providing effective remedies has also been recognised by the UNHRC. In its Concluding Observations in 2000, the UNHRC noted that "[t]here are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the *Covenant* have been violated."[66] More recently, in its Concluding Observations of 2009, the UNHRC stated that Australia "should...provide effective judicial remedies for the protection of rights under the [ICESCR]."[67]

Options under a Human Rights Act

SCALES submits that a combination of both judicial and non-judicial remedies in a HRA would be most appropriate for aggrieved persons seeking to challenge decisions. Possible remedies include:

- lodging a complaint with an independent body such as the AHRC;
- using the internal procedures of the violating public authority;
- using dispute resolution; and
- redress through the court and tribunal system.

Given many of those seeking to use a HRA to protect their rights are likely to be disadvantaged in some way, it is important that there are real cost effective options available to them. SCALES submits that more emphasis should therefore be placed on non-judicial remedies as these are tend to be inexpensive, informal, accessible, efficient and less stressful.

SCALES submits that a HRA should provide aggrieved persons a free standing cause of action for a breach of human rights. Without one, an aggrieved person would have to first establish another cause of action and then link that with a human rights argument.[68] This would make it difficult for aggrieved persons to make claims and would therefore prevent individuals from bringing proceedings at all.[69] This means that the breach would still remain and would render a HRA futile as it was not able to provide complete protection of a person's human rights.

[65] Ibid, Ch 3, 20.

[66] Ibid, Ch 3, 21.

[67] United Nations Economic and Social Council, above n 9, [8].

[68] Lynch, P and Knowles, P, above n 2, 124.

[69] Ibid.

SCALES submits that courts and tribunals should have a broad power under a HRA to provide such remedies as are just and appropriate in the circumstances. This would provide courts and tribunals maximum flexibility in providing an appropriate remedy which could include:

- making a declaration;
- ordering an award of compensation;
- restitution;
- injunctions; or
- a formal apology.

Where legal action is required, SCALES submits that an appropriate tribunal such as a specialist Human Rights Tribunal be created. The Human Rights Tribunal could provide an informal and inexpensive forum for aggrieved persons to bring their complaints.

Recommendation 10

A full range of judicial and non-judicial remedies should be provided in a Human Rights Act to assist individuals whose rights have been breached.

A specialist Human Rights Tribunal be created to hear and resolve disputes in an informal and cost effective manner.

Respect for international jurisprudence

As outlined by the examples in Part Two in 'Raising complaints with the UN', Australia has had adverse findings made against in relation to human rights but has done nothing to implement the UN's recommendations in those cases. SCALES submits that disregarding the decisions of the UNHRC is another reason why Australia should give formal recognition to human rights. Any regime put in place should compel the Australian Government to fully respond to and wherever possible give effect to decisions from the United Nations Treaty Bodies. After all, these are obligations that Australia has committed itself to internationally.[70] If they are to mean anything at all they have to be implemented domestically and respected internationally. SCALES also believes that by placing this obligation on the Australian governments, Australia will be able to further demonstrate that it is a suitable candidate for a seat on the UN Security Council.

Recommendation 11

A Human Rights Act include a provision which requires the Australian governments to respond to and give effect to decisions and recommendations from United Nations Treaty Bodies.

[70] As provided by the ICCPR and ICESCR.

Non legislative options to further protect and promote Human Rights

SCALES believes that the introduction of a HRA alone is not enough to protect and promote human rights in Australia. A range of other measures, outlined below, will need to be adopted alongside a HRA to further promote human rights and create a culture of respect for human rights amongst the Australian community.

Changes to the law making process

As mentioned above in 'Key features of a Human Rights Act', every new bill tabled in Parliament must be presented to Parliament with a Human Rights Compatibility Statement, outlining whether and how the bill is compatible or not compatible with the rights set out in the HRA.

SCALES submits that further to this legislative requirement in a HRA, a joint specialised human rights Parliamentary Committee be created to scrutinise all legislation (including subordinate legislation) to ensure its compliance with the rights appearing in a HRA.

The committee should, on its own volition, be permitted to review any legislation it wants to for compliance with a HRA. The committee should report its findings on a yearly basis. The committee could also assist with responses to inconsistencies raised by the AHRC.

Recommendation 12

A joint specialised Parliamentary Committee be established (or an existing one given the power) to scrutinise all legislation for compatibility with the rights appearing in a Human Rights Act.

Changes to Government policy and decision making

The introduction of a HRA would require changes to government policy and decision making to bring them in line with the principles of a HRA. Public authorities will need to think about human rights when creating policy and in making decisions.

In addition to public authorities amending their policies to make them compatible with a HRA, public authorities should be required to undertake annual auditing on their policies to ensure they conform to the obligations set out in a HRA. Public authorities should also be required to report their audit results to the AHRC annually. Such requirements will mean greater accountability and an increase in transparency for public authorities.

Recommendation 13

Public authorities be required to amend their policies to make them compatible with a Human Rights Act. Annual audit and reporting obligations to the AHRC should be imposed on all public authorities.

Education is the key

In daily dealings with our clients and in conducting our research in making this submission, it became more and more obvious that a mass education programme is required to educate the Australian public on human rights. SCALES respectfully submits that the Committee need only look to some of

the submissions published on the NHRC website which demonstrate a lack of understanding of human rights amongst the community.

Most people think that their rights are adequately protected, yet in a survey of our clients almost all complained of human rights problems they or others they know have faced. The problem is that people such as our clients are just not aware of what rights or protections they have. Furthermore, the disadvantaged and marginalised who will have equal access to the protections offered by a HRA may not understand it. This is because often those from a disadvantaged background are more likely to have lower literacy. Without a proper education campaign, the very people a HRA is seeking to protect most will remain disadvantaged.

SCALES believes that a properly resourced education be implemented to educate all individuals in Australia on what are human rights, how they are protected, and what people can do if they believe their rights are infringed. A properly resourced education campaign will also remove the common misconceptions people have about human rights and help to further foster a culture of human rights amongst individuals in Australia.

Education in schools

SCALES submits that human rights should be included as part of the framework of the core curriculum. State Governments should provide clear directives to their respective education departments that human rights form part of the core curriculum.

SCALES believes that children should learn from a young age the basics of human rights. Education should start from as young as year 1 and then continue each year until the end of high school. Educating children from a young age will help create an understanding and respect for human rights that children can take away from the classroom and eventually apply in the community.

The AHRC presently possesses the responsibility for producing the materials relating to human rights education. SCALES submits that this responsibility should still sit with the AHRC and be slightly expanded in terms of the amount of material that would be required (that is, for each year of education).

Obviously teachers will find it difficult to teach about human rights unless they know about it themselves. Therefore SCALES submits that human rights should be an essential component of a relevant first year unit in tertiary teaching courses that all teaching students should be required to undertake. Teachers presently teaching should be provided the relevant training as a priority so that education in human rights can start as soon as possible.

Education for the general public

Successful education of the general public about human rights is paramount in order for a HRA to start having a positive effect in the community. Human rights belong to everyone and a human rights education campaign should be considered equally as important as non-smoking, drink driving and speeding campaigns.

As stated above, education for the broader community is essential to provide those people who are likely to benefit from a HRA an opportunity to understand what exactly it is a HRA could and would do for them. Human rights education should therefore be:

- accessible to all individuals in Australia, especially those in rural and remote areas;
- made available in a number of different languages;
- appear in different formats (for example, print, radio and television); and
- appropriate for individuals of all ages.

SCALES suggests the following ways for the general community to be educated on human rights:

- establish a free telephone advice line;
- provide flyers/brochures at service counters of public authorities;
- require staff at public authorities to bring human rights to the attention of those accessing them;
- launch a print media, radio and television campaign (similar to what is presently seen for other community concerns such as road safety); and
- run free community forums.

SCALES would also like to suggest specific campaigns targeting the marginalised and disadvantaged. This is important as these people are more likely to rely heavily on public authorities who will be subject to the obligations of a HRA. Specific attention should be given to educating those who use homeless shelters, drop-in centres, and charity organisations as these people may not be reached by more mainstream campaigns.

Education for public authorities and providers of public services

In order for public authorities to achieve compliance with the substantive and procedural obligations a HRA would impose,[71] all staff must be required to participate and successfully complete human rights focused training. This is crucial as staff of public authorities will effectively be implementing a HRA on a day to day basis.

Human rights trained staff providing services to the community will improve public service delivery and provide security to users of those services in knowing that there human rights are being respected.

Recommendation 14

An adequately resourced education campaign be undertaken to educate the general public and providers of public services.

[71] See 'Public authorities and private entities performing public functions' above.

The primary and secondary school curriculum be amended to include human rights as a core component.

Strengthen to role of the AHRC

SCALES submits that effective protection and promotion of human rights will not happen unless the role of the AHRC is strengthened. Currently, the AHRC is responsible for:

- advising the Federal Government on human rights issues;
- inquiring and conciliating unlawful discrimination complaints;
- conducting research into human rights issues; and
- developing human rights education programmes.[72]

As Australia's only independent statutory human rights body, SCALES submits that the AHRC should be given the power to:

- examine all Australian legislation (including subordinate legislation) for compliance with a HRA;
- investigate alleged breaches of the rights contained in a HRA; and
- intervene in litigation where human rights issues are raised.

With regard to investigative powers, SCALES believes that the AHRC should be given similar powers to those currently possessed by the Australian Securities and Investments Commission. That is, the AHRC should be given the power to initiate its own investigations into violations of a HRA. The AHRC should also be given the power to enter premises and seize documents. Having these powers will demonstrate the importance of the obligations imposed on public authorities by a HRA and lead to culture of compliance in public authorities.

Obviously if the AHRC is to be given a strengthened role it will need to be adequately resources – both physically and financially.

Recommendation 15

The AHRC be given the power to:
(a) Examine all Australian legislation for compliance with the rights set out in a Human Rights Act;
(b) Investigate alleged breaches of a Human Rights Act on its own motion;
(c) Intervene in litigation where human rights issued are raised.

Funding for the AHRC be increased to provide it adequate resources to deal with its strengthened role.

[72] See section 11 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

Access to justice

Broadly speaking, access to justice is a concept that involves "bringing people to an understanding of the law, and helping them to develop their capacity to take advantage of that understanding."[73] SCALES believes that access to justice is a human right in itself and agrees with the Attorney-General that access to justice is "fundamental to upholding human rights."[74] In particular, access to justice is essential in complying with equality before the law and the right to a fair hearing, rights that would be protected under a HRA.

For SCALES access to justice means providing people access to legal advice and representation. Many issues which end up in court costing everyone (including the taxpayer) time and money could have been resolved had the person simply got some good legal advice in the first instance. Without access to this assistance people such as our clients do not know what options they have to deal with their issues. As a result, unfavourable decisions may be made against them resulting in injustice and hardship.

Mark's Story

In 2007 SCALES set up a "duty lawyer" system to assist people with tenancy matters in the local Magistrates' Court. Prior to this service, many tenants would not have bothered to attend court at all, leading to adverse decisions being made against them. These adverse decisions, such as orders for payment to "make good" premises or eviction, can lead to wider social issues such as poverty and homelessness.

One case in point is that of Mark, a young man whose landlord was seeking an order for over $2000 to cover what was described as "necessary cleaning and repairs to the property." After a discussion with the SCALES duty lawyer, Mark's youth worker was called who was present at the inspection of the premises when Mark signed the lease. It became obvious that the "necessary cleaning and repairs to the property" the landlord was claiming were repairs that were needed before Mark had taken possession. SCALES was able to prove this to the court and the order sought was not granted. This was all because Mark attended court and spoke with our duty lawyer. Had he not attended, it is highly likely that the order would have been made, placing significant financial stress on him and an adverse listing on a tenant database that would prevent him from finding new accommodation.

SCALES notes that access to justice is not just about the provision of legal assistance. Interpreters and translators play a crucial role in providing many of our clients with equality before the law. Thus, access to interpreters and translators is another way of providing access to justice.

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[73] Murray Gleeson, 'Access to Justice' (speech delivered at the 2006 National Access to Justice and Pro Bono Conference, Melbourne, 11 August 2006), available http://www.hcourt.gov.au/speeches/cj/cj_11aug06.pdf

[74] Robert McClelland, 'A New Federalism – increasing collaboration to bridge the gaps in access to justice' (speech delivered at the 2008 National Access to Justice and Pro Bono Conference, Sydney, 15 November 2008), available http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/Speeches_2008_15November2008-NationalAccesstoJusticeandProBonoConference

Morteza's Story

SCALES recently assisted Morteza in obtaining a protection visa. At the RRT hearing, Morteza produced documents in another language which assisted his claims. The RRT required us to translate these documents at a significant cost of around $3000. SCALES explained to the RRT that the reason we had not previously provided translated copies of the documents was due to cost. Without the funding to do so, SCALES got the documents translated.

Had SCALES not paid for the translation, the RRT may not have granted Morteza a protection visa. This would have meant that our client would have been treated unequally before the law. Access to a translator/interpreter at the hearing would have prevented the significant cost of the translation being borne by SCALES, money which could have been used to assist another client. Access to a translator would have provided our client with adequate access to justice.

To provide adequate access to justice and ensure compliance with the right to equality before the law, SCALES submits that increased funding for community legal centres and legal aid providers is required. This would allow community legal centres to meet the ever growing demand for assistance for those who are unable to afford it.

Recommendation 16

Government funding for access to justice, including legal and non-legal providers, be increased.

SCALES also believes that education of law students has a large part to play. As part of Murdoch Law School's clinical legal education program, SCALES suggests that clinical legal education plays a key role in access to justice throughout Australia. Clinical legal education develops a range of skills by exposing law students to legal practice including a number of alternative methods of dispute resolution. It also allows students to 'experience' legal practice in areas where it is most needed encouraging a sense of greater ethical accountability.[75] This develops within law students a sense of social responsibility and a commitment to pro bono and social justice work which lasts throughout their career.

Benefits flowing from protection of Human Rights

SCALES believes that many benefits would flow from having legislative protection of human rights. These are outlined below.

Better government policy

As outlined above in 'Changes to Government policy and decision making', the introduction of a HRA would require changes to government policy to make it consistent with human rights.

These changes would improve the quality of government policy and lead to better decisions by government decision makers. Anyone dealing with government (and therefore public authorities)

[75] Evans, A and Hyams, R, 'Independent Evaluations of Clinical Legal Education Programs' (2008) 17 Griffith Law Review 52.

would know that their human rights are being respected, helping to foster a greater understanding, culture and respect for human rights among the broader community.

Changes to policy will also promote improved public service delivery. Those working in public authorities will need to change their practices and therefore take different approaches to problems bearing in mind the principles of human rights. By giving weight to human rights principles, decision makers may find solutions to problems where previously there was not one.

Fostering a culture of Human Rights

As has been mentioned throughout this submission, the introduction of a HRA would help to foster a greater culture of human rights amongst the Australian community. A culture of human rights in the community would lead to greater respect for one another and hopefully, in time, reduce the need for people to raise human rights as an issue when dealing with public authorities.

Better treatment for the marginalised and disadvantaged

Protection of human rights is essential for the marginalised and disadvantaged. These people are the ones most likely to rely on public authorities for public services and are therefore at greater risk of having their rights infringed. They are also more likely not to possess the requisite legal knowledge or resources to enforce their legal rights.

By providing protection of human rights SCALES hopes to one day see a reduction in the numbers of people who are disadvantaged.

Domestic redress for complaints (save on air fares)

As discussed above in 'Raising complaints with the UN', presently Australians only have recourse to the UNHRC where their human rights have been breached. There following problems are associated with this:

- the UNHRC meets in Geneva and New York – a long way from Australia;
- there is no domestic judgment that would deal with human rights issues that the UNHRC can refer to; and
- it demonstrates to those aggrieved that their own country's legal protections are clearly inadequate, reducing the aggrieved person's confidence in the legal system.

By creating a HRA, aggrieved persons will be given the opportunity to raise their concerns in their own backyard.