



## SUBMISSION TO THE NATIONAL HUMAN RIGHTS CONSULTATION

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### ABOUT THE COMBINED COMMUNITY LEGAL CENTRES GROUP (NSW) (CCLCG)

The Combined Community Legal Centres Group (NSW) Inc (CCLCG) is an incorporated association consisting of, and representing, the network of 39 community legal centres (CLCs) throughout NSW.

These CLCs provide legal advice, information and education to people from a wide range of communities, focusing on the disadvantaged and those with special needs. A full list of NSW CLCs is available from the website <http://www.nswclc.org.au/cles.html>.

There are twenty “specialist” and nineteen “generalist” legal centres in NSW.

Specialist centres work in particular areas of law, such as

- disability discrimination
- tenancy
- domestic violence
- environment

Combined  
Community  
Legal Centres’  
Group (NSW) Inc  
[www.nswclc.org.au](http://www.nswclc.org.au)

c17, 99 Jones Street  
Ultimo NSW 2007  
Tel: 02 9212 7333  
Fax: 02 9212 7332  
ABN: 22149415148

- social security
  - consumer credit;
- or with particular sections of the community, for example
- women
  - indigenous communities
  - refugees
  - older people
  - young people.

Specialist centres service all of NSW, usually through the provision of phone advice, but also through rural outreach programs, regular community education programs in regional areas, and the provision of training and back-up advice for CLC workers from generalist centres.

Generalist legal centres, on the other hand, provide legal advice to people living within a particular geographic area. For example Western NSW CLC (Dubbo) provides advice to people in the greater west of NSW, Shoalcoast CLC (Nowra) provides advice to people living on the south coast of NSW, and Inner City Legal Centre (Darlinghurst) provides advice to people living or working in the Sydney CBD/Darlinghurst/Bondi region.

Statistics tell us that the five most common type of inquiries that CLCs in NSW are dealing with are:<sup>1</sup>

1. Government pensions/benefits/allowances
2. Family or domestic violence orders
3. Child contacts or contact orders
4. Tenancy
5. Credit and debt owed by client

CLCs not only provide legal advice and assistance, but also encourage and enable people to develop skills to be their own advocates. Centres work towards achieving systemic change through community legal education, and through law and policy reform. CLCs also take on test cases and class actions, which may or may not be funded by the NSW Legal Aid Commission.

The CCLCG, as the peak body, is frequently involved in submissions to government and other inquiries about human rights–related issues that affect CLC clients, for example recently making a submission on the NSW Domestic and Family Violence Strategic Framework (to the NSW Office for Women) and contributing to a submission on Freedom of Religion and Belief (to the Australian Human Rights Commission).

CLCs employ qualified staff including solicitors, social workers and community legal educators. We also have volunteer solicitors, barristers, law students and others working with us to extend our legal services. Many centres provide legal advice over the telephone and hold interview and advice sessions after business hours.

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<sup>1</sup> From Top Ten Problem Types, period 01/07/2007 to 30/06/2008, generated from Community Legal Service Information System (CLSIS), provided by Manager CLC Funding Program, Legal Aid Commission of NSW, 2009.

## **WHY THE CCLCG IS MAKING A SUBMISSION**

The CCLCG is a member of the National Association of Community Legal Centres (NACLC), which is also making a submission to this consultation. The CCLCG has decided to provide further information to the Consultation Committee, from the particular perspective of CLCs in NSW, particularly given that NSW does not have any comprehensive human rights protection at the state level. Many individual CLCs will also make submissions to this consultation, in which they will relay the circumstances of individuals in need of greater human rights protection in Australia.

CLCs and their peak bodies have thought it important to respond to this Consultation, as a provider of legal assistance, and on behalf of their clients, because many of the issues faced by CLC clients are human rights issues.

There has been much comment made by opponents of a Human Rights Act, that such an instrument would be a “lawyers’ picnic”, with the implication that lawyers want to make money from their clients, or their clients’ opponents, by pursuing human rights claims in the court. However, our member centres provide legal advice and assistance free of charge. They have no shortage of work, and no need to drum up a new area of work. And yet, we argue passionately for greater protection of human rights in Australia, including greater protection in law. As the NACLC submission states, the notion of a charter resulting in a “lawyers’ picnic” disregards and disrespects the gravity of the issues faced by people who are denied fundamental human rights.

Furthermore, despite the efforts of the Consultation Committee, the CCLCG is concerned that this National Human Rights consultation process has not reached many people in Australia who may benefit from greater respect and protection of human rights. CLCs have conducted some community outreach about the Human Rights Consultation, however CLCs have limited resources and have not been specifically resourced to respond to this consultation. This means that the limited resources of CLCs and their representative bodies are diverted from service delivery and their other work in order to respond. The CCLCG requests that the Consultation Committee’s report include a comprehensive explanation of who was consulted and how, including what efforts were made to reach people who may not have access to information provided via the internet, newspapers and television/radio.

### **Term of Reference 1: WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?**

The CCLCG welcomes the Australian Government’s statement in the National Human Rights Consultation’s Terms of Reference that it is committed to the promotion of human rights.

As is so apparent in the work of CLCs with the community and clients, human rights are interdependent, interrelated and indivisible and must all be protected. It is our firm view that economic and social and cultural rights should be recognised, protected and promoted, as well as civil and political rights.

From CLCs’ client work, human rights which stand out as being in urgent need of greater protection and promotion in Australia include:

- The right to personal security (in freedom from violence / sexual assault)

- The right to be free of gender based violence
- The right to safe and secure housing
- The right to equality and freedom from discrimination (including on the grounds of religion, race, gender, sexuality and disability)
- The right to education (including for children in rural and remote areas, and people with disabilities)
- The right to an adequate standard of living; and
- Minimum standards of care in detention and care facilities (eg, aged care, disability care, immigration detention)

The CCLCG also wishes to specifically mention those rights which are necessary to be able to pursue the protection of other human rights: for example, right to a fair hearing (including access to legal advice and representation, and a public hearing), public participation in decision-making, freedom of speech and the right to peacefully assemble, and access to information.

However, these are but a small sample of essential human rights. As a minimum, the Australian Government should respect, protect and promote domestically, those rights and freedoms that Australia has already agreed to protect as a State Party to International conventions. These rights and freedoms include those contained in the:

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

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

Australia should also give consideration to providing additional assurances or protections to people within its jurisdiction, which are not yet the subject of explicit agreement at the international level. For example, the CCLCG is supportive of the recognition, protection and promotion of a right to a sustainable environment. The national constitutions of over 100 countries recognise a right to a clean and healthy environment and/or the state's obligation to prevent environmental harm.<sup>2</sup> Environmental protection is directly relevant to human rights,

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<sup>2</sup> Earthjustice, *Environmental Rights Report on Human Rights and the Environment* (2005) 37 <[http://www.earthjustice.org/our\\_work/issues/international/human\\_rights/](http://www.earthjustice.org/our_work/issues/international/human_rights/)> at 19 May 2009, as quoted in *Protection of Human Rights and Environmental Rights in Australia*, Environmental Defenders Office, 21 May 2009. For example, East Timor's Constitution (Section 61) states that:

1. Everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations
2. The State shall recognise the need to preserve and rationalise natural resources.
3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.

and directly affects people's lives, in terms of health, shelter, and the ability to maintain culture and an adequate standard of living. Climate change is causing deaths and involuntary migration<sup>3</sup>. In Australia, Indigenous peoples are likely to be disproportionately affected by climate change: in addition to other hardships, some Indigenous Australians face having to move from their traditional lands due to climate change.<sup>4</sup>

## **Term of Reference 2: ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?**

In short, no, human rights are not currently sufficiently protected and promoted.

There is existing Federal and state legislation, common law developed by the courts, elements of the Australian Constitution, and various protection mechanisms (e.g. the Australian Human Rights Commission, and the Ombudsman), which demonstrate Australia's concern with, and endeavours to protect human rights. Furthermore, we are pleased that Australia has submitted to human rights treaty monitoring, and the current Australian government is working cooperatively with international treaty-monitoring bodies.

Nevertheless, the CCLCG believes that human rights are not currently sufficiently protected, promoted, or even recognised, in Australia, or in our state of New South Wales.

There is no comprehensive statement of rights in Australian law that sets out the minimum standards for the protection of human rights. The current laws, and other measures, are ad hoc, leaving gaps in the legal protection of human rights. Many of the rights that most Australians take for granted have no legal protection or are recognised on an ad hoc basis. For example, the right to vote, freedom of expression on most matters, the right not to be arbitrarily detained and the right to join a union or have access to collective bargaining are not clearly protected by law. These rights, and the ability to enforce them against the State, are fundamental to the maintenance of an accountable and vibrant democratic society.

Australia has only partially incorporated its international human rights obligations into domestic law. For some treaties, individual complaints to the international treaty body can be made about a State party's compliance with human rights obligations. However, this mechanism is inaccessible for the vast majority of CLC clients, and even where the UN Human Rights Committee has found that Australia has violated its international human rights obligations, the Australian government has not necessarily acted to remedy the violation.<sup>5</sup>

While human rights are openly discussed in Australia, there is an inadequate culture of respect for human rights. Human rights protections that exist are not currently free from interference from political manoeuvring and unreasonable government action.

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<sup>3</sup> The Global Humanitarian Forum estimates that climate change today accounts for over 300,000 deaths throughout the world each year. By 2030, the annual death toll from climate change will reach half a million people a year. ('Human Impact Report: Climate Change – The Anatomy of a Silent Crisis', Global Humanitarian Forum, 2009. Available at: <http://www.ghf-geneva.org/>)

<sup>4</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission, 2009, e.g. pp115-118, p 135, pp229-299. This Report includes two case studies on the impact of climate change on Indigenous people: one looking at the Murray-Darling region, and one at the Torres Strait.

<sup>5</sup> E.g. *A v Australia (560/1993) UN Human Rights Committee*, an individual complaint about mandatory indefinite immigration detention; and: *Young v Australia (941/2000) UN Human Rights Committee*, an individual complaint about discrimination against a same-sex couple.

The lack of protection of human rights is not just a theoretical discussion in Australia: there are many examples where human rights in Australia have not been protected in practice. Better protection of human rights in law should help to prevent, and / or remedy these violations of human rights.

Current and / or recent concerns about human rights issues in Australia include:

- The expansion of police powers in NSW, in a manner which infringes upon human rights, supposedly in the name of security for the wider-public and for visiting dignitaries. Recent examples include the *APEC Meeting (Police Powers) Act 2007 (NSW)*, the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (re Covert Searches), and the *Crimes (Criminal Organisations Control) Act 2009* (Anti-Bikie Legislation).<sup>6</sup>
- Unacceptably high levels of homelessness. As the *Engaging in the Debate* report<sup>7</sup> summarises:

Homeless people are often subjected to various human rights violations that can curb their ability to live life with dignity. There are at least 100,000 homeless people in Australia,<sup>8</sup> and more than 300 people are turned away each day from assisted housing services because of a lack of capacity.<sup>9</sup> The groups with the highest turn-away rates are families with children (63%), people suffering from mental illness (54%), and people with intellectual disabilities (33%).<sup>10</sup>
- Unacceptably high levels of domestic violence in Australia, particularly against women, with inadequate provision of support services.
- Unacceptably low life expectancy for Indigenous Australians (currently 17 years below that of the rest of the population)<sup>11</sup>
- Blanket welfare quarantining in some Aboriginal communities, in violation of the right not to be discriminated against on the basis of race (part of the Northern Territory Emergency Intervention).
- Mandatory detention policy applying to asylum seekers arriving by boat, with additional concerns as to:
  - the express provision for indefinite mandatory detention in some cases (e.g. stateless failed asylum seekers), without charge or conviction for any crime, in violation of the rights to liberty.
  - The extended detention of children in immigration detention. Although there have been changes in immigration policy and practice since the Rudd government came to office, the migration legislation has not been sufficiently amended, and there are still children being held in inappropriate conditions on Christmas Island.

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<sup>6</sup> The CCLCG's concerns with the *APEC Meeting (Police Powers) Act 2007 (NSW)* are detailed in the report: Snell, L., *Protest, Protection, Policing: The expansion of police powers and the impact on human rights in NSW*, Combined Community Legal Centres' Group (NSW) and Kingsford Legal Centre, 2008.

<sup>7</sup> Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009, p38.

<sup>8</sup> Australian Bureau of Statistics, *Australian Census Analytic Program - Counting the Homeless – Australia 2006*, 2050.0, vii.

<sup>9</sup> Australian Institute of Health and Welfare 2008, *Demand for SAAP accommodation by homeless people 2006–07: a report from the SAAP National Data Collection*, SAAP NDCA report Series 12. Cat. no. HOU 186. Canberra.

<sup>10</sup> Philip Lynch, 'Human rights personal not political', (2008) 402 *Lawyers Weekly*, 16–8

<sup>11</sup> Amnesty International Report 2008, 56: statistics relate to 2007, quoted in Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009, p4.

- Anti-terrorism laws which infringe upon the right to a fair trial (e.g. limiting the right of presumption of innocence, the right to legal representation (of one's choice), and the right to examine witnesses against a defendant). Anti-terrorism measures have eroded human rights (particularly civil liberties) in Australia. There has been inadequate attention to the protection of the community in a way which does not breach human rights.
- Significant gaps in anti-discrimination law (e.g. on the basis of religion).
- Human rights implications of climate change.

### **Term of Reference 3: HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?**

The CCLCG is supportive of measures that will:

- protect fundamental human rights, promote human dignity and address disadvantage;
- improve protections for Australians who are marginalised or disadvantaged;
- improve public service delivery and accountability, and enhance transparency and responsiveness;
- contribute to the development of a human rights culture in Australia and enhance public awareness of human rights.<sup>12</sup>

Greater protection of human rights in Australia should involve a range of measures, including:

1. Overarching protection in legislation (a Human Rights Act)
2. Strengthening existing legislation
3. Possible future constitutional bill of human rights
4. Constitutional amendments regarding Indigenous peoples and race
5. Reform of parliamentary process
6. Creating a human rights culture
7. Addressing systemic disadvantage and poverty
8. Engagement with Treaty-bodies

#### **1. Overarching protection in legislation (a Human Rights Act)**

Comprehensive human rights protection in law is desirable, and is strongly supported by the CCLCG. We also note that the United Nations Committee on Economic, Social and Cultural Rights<sup>13</sup> and the United Nations Human Rights Committee<sup>14</sup>, in their recent Concluding Observations on Australia's human rights compliance, recommended that Australia enact comprehensive legislation giving de facto effect to all of the ICCPR and the ICESCR provisions, uniformly across all jurisdictions in Australia.

Human rights need to be legally recognised in order for them to be protected and promoted. To this end, the CCLCG recommends that the Australian Government introduce comprehensive human rights legislation to ensure that human rights in Australia are given world class protection and that all federal and state laws and policies are consistent with these rights. We will refer to such comprehensive human rights legislation as a "Human Rights Act". However, the CCLCG is not seeking to endorse any particular model of human rights act or charter in this

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<sup>12</sup> Four points quoted from Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009.

<sup>13</sup> May 2009, available at <http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc>

<sup>14</sup> April 2009 available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>

submission. Rather, the CCLCG wishes to highlight some of the essential ingredients that a Human Rights Act should contain.

### ***Accessible to those who need protection***

As suggested in the Human Rights Law Resource Centre's *Engaging in the Debate* Report:

A Federal Charter would be particularly significant for Australia's economically and socially disadvantaged or marginalised people. Such vulnerable people are more likely to deal with public services,<sup>15</sup> and are more likely to suffer violations of their human rights than people in majority groups, or people with the means to protect their own interests.<sup>16</sup>

The consolidation of all human rights into a single, simplified document would also strengthen existing human rights and make these rights more accessible for people in Australia. This would provide a measure of certainty by enhancing people's understanding as to which human rights they are entitled.

A Human Rights Act should be accessible to those who need protection, in terms of education about the Act, and the individual enforcement mechanisms available. Education should be in accessible formats, including availability in community languages. The Human Rights Act must allow, and provide for, representation by advocates for people who need or want assistance with lodging a complaint, court proceedings, or other actions under the Human Rights Act.

### ***Coverage***

A national Human Rights Act should provide rights to all persons present in Australia whether lawfully or otherwise (with the exception of some political rights, such as the right to vote).

Although they are "legal persons" non-human entities, such as corporations, should not be able to claim human rights protection under a Human Rights Act.

The rights and freedoms in a Human Rights Act should be enforceable against:

- governments, government agencies and departments;
- statutory authorities;
- any organisation receiving public funding or performing services of a public nature;
- corporations; and
- incorporated associations.

It is essential that people still receive human rights protections afforded by a Human Rights Act even if the government has contracted out of (privatised) the delivery of a service. The CCLCG agrees with the approach of specifying functions that "are taken to be of a public nature". This should be a non-exhaustive list, and should include:

- (a) the operation of detention places and correctional centres;
- (b) the provision of any of the following services:
  - (i) gas, electricity and water supply;

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<sup>15</sup> Former National Native Title Tribunal Deputy President Fred Chaney, 'Conflict Over Aim of Human Rights Legislation', *The West Australian* (Perth), 4 May 2007, 6.

<sup>16</sup> Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009.

- (ii) emergency services;
- (iii) health services (including by public, private and community organisations);
- (iv) education (including by public, private and community organisations);
- (v) public transport; and
- (vi) public housing.

The CCLCG does not agree that religious organisations, which fall into the above categories, should receive a blanket exemption from complying with human rights obligations (e.g. from anti-discrimination principles). Rather, in the event that the right to freedom of religious practice and belief is at odds with another fundamental right or freedom, we advocate for a transparent determination process by an appropriate human rights or anti-discrimination body.

The CCLCG acknowledges that a phase-in period for corporations and incorporated associations to be bound by the Human Rights Act may be required.

A Human Rights Act should not be limited in its operation to federal government and the federal sphere. It should also bind the states and territories, so as to provide protection for residents without Human Rights Charters / Acts at the state / territory level. It should also apply at the local government level.

There could be provision for any state or territory human rights laws to operate concurrently, to the extent that they are not inconsistent with the federal law. In the alternative, if a federal Human Rights Act only applies to the federal government and federal public services, we submit that the Federal Government should encourage the state governments, such as NSW, to implement complementary human rights protection (and legislation) at the state level. A federal comprehensive Human Rights Act would provide a valuable model for such state legislation.

### ***Real enforcement mechanisms at individual and systemic levels***

A Human Rights Act must include real enforcement mechanisms at individual and systemic levels.

A Human Rights Act should place obligations on all three branches of government. It should<sup>17</sup>:

- Prohibit actions by governments, public authorities, and corporations, that violate the human rights of individuals (or collective rights).
- Require Parliament to formally consider the impact of bills (draft legislation) on protected human rights;
- Require the executive arm of the government to respect human rights in implementing laws, drafting subordinate legislation, forming policy, making decisions, and delivering services;
- Require courts to interpret laws consistently with human rights principles, wherever possible.
- In the event that a court is unable to interpret and apply legislation consistently with protected rights, the Court should be empowered to declare the law inconsistent with protected human rights. A formal public response from Parliament should be required;

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<sup>17</sup> Some of these points are paraphrased from: Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009, p4

- Require all public authorities to develop a plan for the protection and promotion of human rights (note: support and resources would be required);
- Provide for the human rights auditing of public authorities by a human rights watchdog, such as the Australian Human Rights Commission.
- Provide for the review of existing laws (Federal and state) by an expert review and advisory committee, or the Australian Human Rights Commission (additionally resourced). Parliament should be required to give further consideration to laws identified by this body as failing to comply with human rights obligations.

It should be unlawful for a public authority:

- to act (or fail to act, or propose to act) in a way that is incompatible with a human right (a substantive obligation); or
- in making a decision, to fail to give proper consideration to a relevant human right (a procedural obligation).

### ***Complaints mechanism***

A Human Rights Act should also provide for a series of complaints mechanisms, enabling affected individuals, their representatives, or Human Rights organisations acting on behalf of individuals or groups of individuals, to challenge:

- laws, policies, and practices that breach human rights; and
- decisions / actions / inactions in a particular case, that breach human rights.

At the judicial level, the remedies available should include injunctive and declaratory relief. Affected individuals or communities should also be able to seek damages in respect of a breach.

An existing litigious dispute should not be required, before a party can challenge a law as being inconsistent with human rights protected under the Human Rights Act.

The CCLCG does not believe that the potential for an increase in litigation on human rights issues justifies inaction. An increase in litigation would be worthwhile if the outcome is greater protection of human rights, or remedying breaches of human rights. A small increase in litigation could correlate to a significant increase in the recognition and respect for human rights.

### ***Other***

The Human Rights Act should contain a savings provision (such as section 5 of the Victorian Charter), to clarify that rights are not to be abrogated or limited just because they are not listed in the Act.

Careful drafting should help ensure an appropriate balance between the rights of accused criminals (or convicted criminals), victims, and the community.

The CCLCG submits that the majority of civil and political rights should be non-derogable, even in a national emergency. These should be identified in the Human Rights Act. Any limitation of human rights for national emergency reasons should be clearly identified and strictly time-limited.

The “Right to life” should be included in a Human Rights Act, as an essential civil and political right. We recommend that Parliament expressly state that the “Right to life” should not be used to restrict access by women to safe and legal abortions.

## **2. Strengthening existing legislation**

As well as an overarching Human Rights Act, detailed legislation on specific areas is also needed. For example, anti-discrimination legislation, criminal law, evidence law etc, which can operate concurrently with the overarching Human Rights Act. This may include strengthening and extending existing laws.

For example, there is specific federal legislation targeting discrimination, such as the *Racial Discrimination Act 1975 (Cth)* and the *Sex Discrimination Act 1984 (Cth)*. However, gaps remain, even in terms of protection against discrimination (e.g. protection against discrimination on religious grounds is grossly inadequate in most jurisdictions). Furthermore, the remedies available under anti-discrimination legislation are weak, and there is little required in terms of systemic change, or positive measures to promote equality. We therefore recommend that the government review the entire anti-discrimination framework in Australia with a view to the adoption of a single comprehensive anti-discrimination act.

More specifically and without waiting for a comprehensive review of all discrimination provisions, we recommend that the government move immediately to implement the recommendations of the 2008 Senate committee inquiry into the *Sex Discrimination Act*. In addition, each of the anti-discrimination acts should be amended to provide the opportunity to make a complaint of discrimination under more than one ground, and to allow for intersectional complaints involving more than one ground.

Native title law and process is also in need of further reform, to ease the burden on native title claimants. Problems with the current native title regime are detailed in the Australian Human Rights Commission’s Native Title Report 2008<sup>18</sup>.

## **3. Future constitutional protection of human rights**

We note with regret, that the Terms of Reference for the consultation seek to exclude discussion about a constitutionally entrenched bill of rights.

As stated above, we call on the Federal Government to enact comprehensive human rights legislation, as an essential step in the protection and promotion of human rights in Australia, as we would not like to see the full protection and promotion of human rights in Australia delayed any further. However, we recommend public discussion about constitutional models of human rights protection occur in the future, possibly after a settling-in period with a Human Rights Act has taken place.

The CCLCG submits that a constitutionally entrenched ‘bill of human rights’ has the capacity to provide a stronger framework than a statutory human rights charter. A fundamental aspect of protecting human rights is to ensure that they are free from political or arbitrary interference. A Human Rights Act (i.e. legislative protection), subject at any time to alteration by a particular

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<sup>18</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission, 2009.

government, is not free from such interference, and does not, therefore, provide sufficient protection. A Human Rights Act may, however, provide a good opportunity for culture-change about human rights, and allow a transition period in which the population becomes more comfortable with the idea of a constitutional ‘bill of human rights’.

#### **4. Constitutional amendments regarding Indigenous peoples and race**

Indigenous peoples’ rights should be recognised, protected and promoted and the CCLCG supports the concept of recognition of Aboriginal and Torres Strait Islander peoples in the Australian Constitution (**Constitution**).

The CCLCG submits that a referendum should be held to delete section 25 of the Constitution. This section is only relevant if / when people of “any race are disqualified from voting at elections ...”.

The CCLCG submits that a referendum should be held to delete or amend section 51(xxvi) of the Constitution. Section 51(xxvi) enables the Commonwealth Government to make laws for “the people of any race for whom it is deemed necessary to make special laws”. The *Hindmarsh Island case*<sup>19</sup> left it open for this section of the Constitution to be used to support a law which is racially discriminatory (detrimental). This section therefore appears to contravene human rights set out in international agreements that Australia has signed on to, such as Article 1 of the *Convention on the Elimination of all forms of Racial Discrimination*, or Article 7 of the *Universal Declaration of Human Rights* which states:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Section 51(xxvi) should be deleted, or amended so as to be compatible with human rights principles. This should occur whether or not a Human Rights Act is incorporated into the Constitution.

The CCLCG recommends government funding, and a sufficient lead up period, for extensive education and awareness raising prior to public referenda on the above issues.

#### **5. Reform of parliamentary process**

We submit that reform of the parliamentary process for scrutiny of bills could lead to better protection of human rights, particularly in NSW.

The NSW Attorney-General, John Hatzistergos claims human rights are adequately protected by a dialogue between parliament and the people, and that the people have the opportunity to make their opinions known to their MPs or to Parliamentary inquiries / committees when draft legislation is being considered for introduction. Mr Hatzistergos states “...presently people can approach their local MPs, make submissions or testify before parliamentary committees during the law-making process”<sup>20</sup>.

However, in reality, there is limited opportunity for dialogue between the general public and MPs on the majority of bills. Only a limited number of bills are referred to committees which

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<sup>19</sup> *Kartinyeri v Commonwealth* [1998] HCA 22

<sup>20</sup> From “Rights devil is in the detail”, *The Weekend Australian*, 4-5 April 2009, p25.

accept submissions and testimony from the public. Further, this process of public inquiry is inaccessible to a large part of the community, due to lack of awareness and understanding of the issues and the process to examine such issues.

Furthermore, some controversial pieces of legislation with human rights implications have been rushed through parliament, seemingly with the express purpose of limiting parliamentary or public debate on the merits of the public policy / legislation. For example, the CCLCG is concerned by a trend whereby laws relating to police powers are rushed through NSW Parliament, e.g. the *APEC Meeting (Police Powers) Act 2007 (NSW)*, the *Law Enforcement (Powers and Responsibilities) Amendment (Search Powers) Act 2009* (re Covert Searches), and the *Crimes (Criminal Organisations Control) Act 2009* (Anti-Bikie Legislation). The *APEC Meeting (Police Powers) Act 2007 (NSW)* was passed by the NSW Parliament the day before the NSW Legislative Review Committee provided its report. The Committee's report raised numerous concerns about the bill's impact upon human rights.<sup>21</sup>

This practice should end. Unless there is a genuine national emergency, there should be a minimum period of time allocated for any bill before parliament that has human rights implications. This period should allow for thorough analysis by a committee tasked with reporting on human rights implications (e.g. the NSW Legislative Review Committee), public comment / dialogue, and analysis and formal response by MPs / parties to the committee's findings. Currently in NSW, even where the Legislative Review Committee raises concerns that a bill infringes upon "personal rights and liberties", the Parliament is not required to respond to the committee's questions or recommendations. Nor are members of parliament required to respond to issues raised by constituents in the 'dialogue' process.

## 6. Creating a Human Rights Culture

We believe that as a clear statement of the rights and responsibilities of people in Australia, a Human Rights Act would serve an important educative function, and contribute to a culture with a greater awareness of, and respect for, human rights, within government and throughout the community.

However, creating a culture of respect for human rights is not simply a matter of enacting a law or amending the Constitution. Much would depend on how public bodies under a Federal Charter responded to their obligations, whether people were educated about their rights, and whether sufficiently-funded public bodies existed to promote the aims of the Charter and respect for human rights generally.<sup>22</sup>

The CCLCG calls for a comprehensive, funded, plan for human rights education / training. The lack of a systematic approach to human rights education in Australia was recently noted by the United Nations Human Rights Committee in its Concluding Observations on Australia's implementation of the ICCPR.<sup>23</sup> As well as providing education for the general public, we would like to see targeted education / training for people in power (e.g. politicians,

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<sup>21</sup> Snell, L., *Protest, Protection, Policing: The expansion of police powers and the impact on human rights in NSW*, Combined Community Legal Centres' Group (NSW) and Kingsford Legal Centre, 2008, p29.

<sup>22</sup> Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009, p4.

<sup>23</sup> United Nations Human Rights Committee, April 2009, available at <http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO5-CRP1.doc>

police, public officials, magistrates and judges, lawyers, teachers, employers) and people involved in service delivery.

We note that the *Engaging in the Debate* report<sup>24</sup> states:

Reviews of human rights instruments in other jurisdictions have consistently concluded that human rights laws, together with an approach to service delivery that emphasises human rights, can:

- (i) enhance transparency in government decision making at all levels;
- (ii) promote more flexible, responsive and individualised public and social services; and
- (iii) assist in developing more effective social inclusion and poverty reduction strategies.

A requirement for administrative decision-makers to give proper consideration to relevant human rights (a procedural obligation) should assist in establishing a human rights culture in government administration.

A human rights approach in public service delivery has the potential to greatly assist community legal centre clients, particularly in terms of interaction with key Government Departments, both commonwealth (such as Centrelink, and the Department of Immigration & Citizenship), and state (such as the NSW Police Force, and the NSW Department of Housing).

We anticipate that clients' experience of interaction with Government Departments would improve, in terms of respect and dignity. Also, with a human rights approach, we anticipate that solutions to individual situations could be found more promptly, without escalation or prolonged hardship.

## **7. Addressing systemic disadvantage and poverty**

Many human rights violations stem from poverty and lack of access to essential resources and services.

We call on the Federal Government to allocate more resources to assist people in times of need (e.g. housing services, free legal assistance, accessible health services) and to empower people to overcome disadvantage.

The availability of legal assistance and representation are critical aspects of the promotion, protection and enforcement of human rights. Adequate funding for community legal centres, legal aid, the Australian Human Rights Commission, and other human rights and community organisations is essential to ensure the protection of human rights (not only the right to equality before the law, but also the human rights which these providers of specialised assistance can assist people to protect). If there is a Federal Human Rights Act, the above-mentioned organisations will require adequate resourcing to assist people to access their rights under the Act.

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<sup>24</sup> Lynch, P., & Knowles, P. *The National Human Rights Consultation: Engaging in the Debate*, Human Rights Law Resource Centre, Victoria, 2009, pp5-6. Footnotes contained within this quote from the Engaging in the Debate report have not been replicated here.

## **8. Engagement with Treaty-bodies**

The Government should continue to engage with treaty-monitoring bodies, and should consider, and act upon, critical comments, with a view to improving human rights protection in Australia.

Thank you for the opportunity to provide comments.

Yours sincerely,

Roxana Zulfacar  
Advocacy and Human Rights Officer  
The Combined Community Legal Centres Group (NSW) Inc