



# Office of the Anti-Discrimination Commissioner

*Celebrating Difference, Embracing Equality*

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9 June 2009

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office, National Circuit  
Barton ACT 2600

Attention: Father Frank Brennan AO, Committee Chair

Dear Father Frank Brennan AO,

**Re: Submission to the National Human Rights Consultation**

Please find attached a submission from my office, the Office of the Anti-Discrimination Commissioner in Tasmania, to the National Human Rights Consultation Secretariat.

If you have any queries regarding this submission, please do not hesitate to contact Catherine Edwards, Complaints Manager.

Yours Sincerely,

Sarah Bolt  
Anti-Discrimination Commissioner

# **How should human rights be protected and what rights should be included?**

## **1. Existing schemes of Anti-Discrimination legislation could be improved**

From an anti-discrimination perspective, anti-discrimination legislation at a federal level, only prohibit discrimination on a few grounds (such as sex, sexual harassment, family responsibilities, marital status, race, age, disability). There are many rights to non-discrimination that are not covered in federal and state legislation that should be e.g. see *Anti-Discrimination Act 1998* (Tas) (the Tasmanian Act) which is quite comprehensive and prohibits discrimination on a number of grounds (20) in a range of public areas of life.

At present, if a complaint of discrimination on the basis of sexual orientation against a Commonwealth agency is made to the Australian Human Rights Commission (AHRC), the complainant will have limited remedies compared to complaints on the aforementioned grounds i.e. there is no power to remit the matter to the Federal Court and the AHRC can only make a report to Parliament under the *Human Rights and Equal Opportunity Act 1986*.

If Federal anti-discrimination laws are to be streamlined for consistency as part of enhancing the protection of human rights, then the legislation should be modelled on best practice i.e. adopting elements from different statutes that ensures the broadest protection against discrimination.

There is also the issue of different States affording different levels of protection against discrimination. For example, if you live in South Australia you have significantly less rights under anti-discrimination legislation than in a number of States including Tasmania. In South Australia, the *Equal Opportunity Act 1984* only prohibits discrimination on the basis of disability, race, marital status, age, sex, sexuality and pregnancy. There is clearly merit in harmonising anti-discrimination laws to ensure equal rights for all, regardless of where you live in Australia.

## **2. Enhance protection for disadvantaged groups**

Another way to improve human rights would be to ensure the right to legal representation amongst disadvantaged groups. For example, in Tasmania there is no legal advocate who can assist humanitarian entrants with legal matters, including lodging discrimination complaints and pursuing matters to the Anti-Discrimination Tribunal. Many humanitarian entrants are not fully aware of their rights, or how to seek redress, and may come from countries where there is a fear of authority and therefore grievances are not addressed.

In order to ensure the right to equality before the law, a legal advocate for humanitarian entrants would be required.

Similarly, many complainants who lodge complaints at this office who cannot afford legal representation may be disadvantaged through the process due to a lack of access

to free legal advice/representation. This inequity is often more apparent once a complaint is referred to the Anti-Discrimination Tribunal for inquiry, because the process becomes legalistic and this can entrench or be a significant power imbalance if only one party is legally represented.

It is recommended that there be greater access to legal representation by economically disadvantaged members of the community to improve human rights. It is noted however that Tasmania has a Disability Discrimination Legal Advocate who is attached to the Launceston Community Legal Centre.

### **3. Enact a Human Rights Charter**

Notwithstanding that Australia is a party to a number international treaties, including the *International Covenant on Economic, Social and Cultural Rights*, not all of these rights have been enshrined in domestic law, which leaves Australia in breach of International Law (for example, only in 2009 has the Federal Government decided to implement legislation providing for paid parental leave).

A Human Rights Act or Charter is needed to clearly set out fundamental human rights that ought to be protected, namely civil and political rights [including full protection against non-discrimination] and economic, social and cultural rights. Enshrining these rights in one Act will make these rights easier to understand and promote, and will ensure a specific human rights focus to Australian law.

### **4. Rights to include in a Human Rights Charter**

A Human Rights Charter should be consistent with the rights contained in international conventions to which Australia has already ratified, such as the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

The right to life, which is a fundamental right in a democratic society such as Australia, should commence from birth to take into account the rights of women to make decisions in their best interests. It is noted also that this is consistent with Australia's obligations under the *Convention on the Elimination of all Forms of Discrimination Against Women*.

In addition, there is much debate on the topic of euthanasia, sometimes described as the 'right to die with dignity'.

In principle the Office of the Anti-Discrimination Commissioner (the office) agrees that this right should be included in a Charter of Human Rights, but it should be subject to proper medical checks and balances to prevent abuse e.g. approval by 2 medical practitioners and be overseen by an ethics committee.

## **5. Who should be obliged to protect human rights in a Human Rights Charter?**

A strong argument could be mounted that everybody should be obliged to protect human rights under a Human Rights Charter and not just government bodies, as human rights are so fundamental to our existence in a democratic society:

- E.g. if a person in a nursing home complains of neglect and inhumane treatment and it is not Government owned, they would have no recourse if non-Government bodies were not obliged to act in a manner consistent with human rights. The rights of elderly people are becoming a big issue in an aging population and hence their rights warrant full protection.

However, if there is a concern regarding costs should a Charter apply to everyone, then a Charter could apply to Government bodies only, but be given a broad definition as per s 4 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*, where the definition of a public authority includes private entities performing public functions on behalf of government. A definition such as this is particularly important in a time of increasing levels of privatisation of essential Government services.

It is noted that the Victorian Charter also has an 'opt in' clause which allows private entities to 'opt in' and be subject to the Charter which could be adopted in a Commonwealth Charter.

## **6. Suggested features to a Human Rights Act or Charter:**

- A specific Parliamentary Committee be established to ensure that new Bills introduced to Parliament comply with the Charter. Members of the Committee should either have expertise in human rights issues or call upon human rights experts (such as the AHRC or other similar bodies) to assess whether a law is compatible with established human rights as per the Charter. Currently many anti-discrimination laws allow discrimination if it is done in accordance with legislation, so this would mean more thought will be given to human rights when developing laws, which might minimise the level of lawful discrimination and human rights breaches occurring in the community. Problems that have arisen with the Family Law Act, sedition laws, mandatory detention laws and the NT Intervention laws could be minimised in future if this approach were adopted.
- Parliamentary Sovereignty should be maintained, but if a Bill is incompatible with the Charter Ministers should make a public statement that the Bill or legislation does not comply with the Charter and give a statement of the reasons for non-compliance. This way it holds Parliament to account for making laws that are contrary to human rights. If there is no good reason for making the law, it will reflect badly and may lead to a change of Government.
- The Judiciary should be required to interpret laws in a manner consistent with any human rights Charter. There is a suggestion that the Judiciary report to the Government if legislation is not able to be interpreted consistently with human rights. The office is of the view that there is a basis to argue that this approach is unconstitutional and breaches the fundamental principle of separation of powers between the Judiciary and the Legislature. The office agrees with the AHRC comments and recommendations:

*“The Australian Constitution prevents a court exercising federal jurisdiction, such as the High Court, from making an order that does not directly affect any person’s rights,” Ms Branson said. Ms Branson said the roundtable agreed that this concern could be addressed by taking the courts out of the notification process.*

*“Instead, an independent body such as the Australian Human Rights Commission could keep a watch on cases and notify the Parliament through the Attorney-General if a court were unable to interpret the legislation in a way that was compatible with the Human Rights Act,” she said.*

*“This would ensure that Parliament was be notified of significant cases in which a court was not able to interpret legislation consistently with human rights. Of course, having been notified, Parliament would retain the final say about whether the law should be changed.” [Catherine Branson is the President of the AHRC].*

The roundtable statement concerning the constitutional validity of an Australian Human Rights Act can be found at: <http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html>

- Individuals should have a direct right of action to the courts (perhaps via a human rights body like the AHRC to encourage efficient resolution of complaints) if they believe their human rights have been breached. If there is no recourse to the courts then it will be impossible to enforce the protection of human rights and people will be less inclined to act in a manner consistent with human rights if their actions cannot be scrutinised by the legal system.
- The Executive – Government policy should also be developed in accordance with a human rights Charter.
- Government departments, through their Ministers should report to parliament on their procedures and safeguards for protecting human rights in their decision making processes as part of an obligation under a Human Rights Charter.
- There should be mechanisms to ensure public education of human rights contained in any Charter and the AHRC should be given further powers to deliver this. For maximum impact, human rights education should be mandatory for children of primary school age.

## **7. Are some rights absolute?**

There is a very strong basis to argue that civil and political rights as set out in the *International Covenant on Civil and Political Rights* and the Universal Declaration on Human Rights are fundamental and absolute (for example, freedom from torture, freedom of association etc) stemming from the inherent rights and dignity of human kind. These rights are imperative to a civilised, democratic society to which Australia seeks to belong and should be incorporated into a Human Rights Charter in order for them to be enforced.

## **8. Are there circumstances in which human rights should be suspended?**

This office is of the view that human rights should only be suspended in limited, defined circumstances, such as in a public emergency. In this regard the office supports Part II, Article 4 of the *International Covenant on Civil and Political Rights*, to which Australia has ratified in relation to the circumstances in which these rights can be derogated from (with exceptions). To provide a recent example, whilst the swine flu pandemic is imminent, people can be lawfully detained in their homes to protect the greater public health, which would otherwise infringe freedom of movement.

This office recommends that the wording in Article 4 of the *International Covenant on Civil and Political Rights* be incorporated into a Charter of Rights.

## **9. What happens when two rights conflict under a Human Rights Charter, how should the conflict be resolved?**

Many rights may co-exist together without causing a conflict. However, when two rights conflict, how that conflict is resolved may depend on the nature of the right asserted.

One example of two rights operating simultaneously arises in the inciting hatred provisions of the Tasmanian Act. Section 19 strikes the balance between the (implied) constitutional right to freedom of speech (see s 55 of the Act<sup>1</sup>) and the human right to not be seriously denigrated or ridiculed because of your race, sexual orientation, disability or religious belief/activity. Essentially s19 allows someone to publicly express their views on those attributes, in a scholarly and academic way, provided it meets the test in s 55 and does not incite hatred against a group of people because of whom they are or who they are attracted to. See also Article 20 of the *International Covenant on Civil and Political Rights* which prohibits incitement to discrimination.

Further, most civil and political rights, such as the right to peaceful assembly, freedom of thought and religion, and non-discrimination on the ground of race are unlikely to conflict with any other human right.

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<sup>1</sup> The provisions of section 19 do not apply if the person's conduct is –

(a) a fair report of a public act; or

(b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

(ii) any purpose in the public interest.

This office strongly supports Article 18, point 3 of the *International Covenant on Civil and Political Rights*, and believes that such terms could be included into a Human Rights Act:

*“Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.*

Similar terms are contained in Article 29 of the *Universal Declaration of Human Rights* and are equally supported:

- *Everyone has duties to the community in which alone the free and full development of his personality is possible.*
- *(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*
- *(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.*

Some illustrations where conflicts between two asserted rights can be resolved consistent with UN Conventions:-

*Could a person raise religious or cultural rights as a defence to a complaint of disability discrimination by a person who has a guide dog?*

If a taxi driver refused to transport someone with a guide dog on the basis of a religious belief then this will infringe the rights of people with a disability who use guide dogs, and their right to access public transport free from discrimination.

*Could a medical professional refuse IVF treatment to same sex couples or a lesbian woman citing personal or religious beliefs about the sexual orientation of parents?*

Again, medical professionals provide services to the public and are obliged to provide services free from discrimination on the basis of sexual orientation. A refusal to provide medical services in these circumstances will infringe the right to non-discrimination.

The role of determining whether human rights have been breached under a Charter should be resolved by a competent Court or Tribunal, as is the case under Anti-Discrimination legislation.

## **10. How would a Commonwealth Charter operate in relation to State laws?**

Pursuant to s 109 of the Australian Constitution, a Commonwealth Charter would prevail over State laws where there is an inconsistency between a State law and the

Charter, and where the Charter intends to cover the field. If it is an ordinary Act of Parliament it would apply in the same way as Commonwealth legislation and the usual Constitutional rules would apply.

Another issue that is worth noting arose from the case of *Commonwealth of Australia v Anti-Discrimination Tribunal (Tasmania)* [2008] FCA 104:

[http://www.austlii.edu.au/cgi-](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2008/104.html?query=Nichols)

[bin/sinodisp/au/cases/cth/FCAFC/2008/104.html?query=Nichols.](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCAFC/2008/104.html?query=Nichols)

This case involved a complaint of disability discrimination under the Act against Centrelink. The complainant complained about the lack of accommodations made for his disability (i.e. by providing a chair) when he was using the customer service centre. The Full Court of the Federal Court found that the State Anti-Discrimination Tribunal (Tas) does not have jurisdiction to receive federal jurisdiction because it is not a Court of the State and panel members do not have tenure. This was an interesting case because the AHRC would have had jurisdiction to deal with the matter, only it was not possible for the complainant to refer the matter there as he was dying. Kenny J was critical of the Commonwealth in pursuing such a straightforward matter that could have easily been settled between the parties.

Part of this decision came down to the interpretation of s 4 of the Act which states: *“This Act binds the Crown in the right of Tasmania and, so far as the legislative power of Parliament permits, in all its other capacities”*.

This case raises issues of access to justice in relation to the interplay between State and Federal laws. One way to resolve this issue is to ensure that State legislation is drafted in such a way as to expressly bind the Commonwealth and for State Tribunals to ensure that members have tenure and other features associated with being a Court are met. It is acknowledged that this may be beyond the scope of this Committee.

It would also be important to ensure that a Commonwealth Charter of Human Rights be drafted as broadly as possible to apply to State based activities. Where any gaps exist, States that have not done so already should introduce Human Rights Charters.

## **11. Conclusion**

In addition to the suggestions made for improving human rights, this office strongly supports a legislative model that allows enforcement of rights through the Courts, in order to bring about meaningful, substantive social change in the area of human rights. A Charter of Human Rights will also support and strengthen some of Australia’s existing obligations under various international treaties, particularly where Australia has not introduced domestic laws in accordance with international law.