

## **Submission to the National Human Rights Consultation Committee**

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

**by email: 'humanrightssubmission@ag.gov.au'**

### **Introduction**

The Employment Law Centre of WA (Inc) (**ELC**) is a community legal centre that has provided free, confidential employment law advice, education, representation and referrals to thousands of vulnerable, non unionised employees in Western Australia since 2001. ELC focuses on issues such as unfair dismissal, unlawful termination, discrimination, underpayment of entitlements, breach of contract, equal opportunity and occupational safety and health.

The National Human Rights Consultation Committee (**Consultation Committee**) is inquiring into human rights in Australia. This submission makes particular reference to:

- a) the human rights which ELC considers should be protected and promoted;
- b) the reasons why ELC does not consider that human rights are currently sufficiently protected; and
- c) changes which ELC considers necessary to improve the protection of human rights in Australia.

ELC's submission focuses on aspects which are most relevant to employees in Western Australia.

### **1. Human rights that should be protected and promoted**

Civil, political, social, economic and cultural rights are interdependent and interrelated. They should all be protected and promoted.

ELC considers that, in the employment law context, the following rights are particularly important:

- a) the right to equality and freedom from discrimination;
- b) the right to work; and

c) the right to an adequate income and social security.

## **2 Human rights in Australia is currently not sufficiently protected**

Human rights are not new to Australia. Australia is a signatory to various international covenants on human rights, including the UN's two principal human rights covenants: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These covenants identify the fundamental human rights that should be guaranteed for all people. However, as conventions, they do not have force of law. To make them effective the parliament must enact domestic laws that mirror the international obligations. Without specific Australian legislation embodying the provisions of the international covenants, breaches remain lawful in Australia.

Australians currently enjoy the recognition and protection of some of their human rights through specific legislation at a federal level, such as the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth) and *Sex Discrimination Act 1984* (Cth). In the employment context, for example, under the *Workplace Relations Act 1996* (Cth), employers must not terminate the employment of an employee due to a range of reasons including the person's race, religion and sex. There is also limited protection in the Constitution, at common law and through some legislation at a state level (such as the *Equal Opportunity Act 1984* (WA) in Western Australia).

However, not all human rights have been embodied in domestic legislation. There is no single law that declares the human rights to which all Australians are entitled or that aims to protect those rights. Without a Human Rights Act, we are left with an ad hoc array of common law, statutory and constitutional rights.

ELC submits that this is unsatisfactory. The effect of an ad hoc approach to human rights protection is that particular human rights issues are well addressed whilst others 'slip through the cracks'. It is also difficult for the vast majority of the Australian population to know and understand which human rights are protected. As such, human rights violations which have not been specifically addressed by legislation may remain lawful and unacknowledged.

The framers of our Constitution chose not to implement a Bill of Rights similar to that established in the United States of America. Whilst ELC acknowledges the ability of parliamentary democracy to defend some human rights, we also consider former High Court Justice, the Hon Michael Kirby AC CMG's observations of Parliament to be relevant. Mr Kirby once observed that we cannot leave it to parliament alone to

pass a bill in response to a human rights violation as and when it is required<sup>1</sup>. He further commented that unless legislation has powerful supporters, involves political or special interests, is headline grabbing or looks after popular majority interests, it will often not attract precious parliamentary time.

Even where human rights are deeply embedded in common law principles and given effect by judges, we note that the legislation can sometimes easily override them.

For example, consider the suspension of the *Racial Discrimination Act 1975* (Cth) by the Howard Government in 2007 in order for the Federal Parliament to push through the controversial Northern Territory Intervention measures. These measures included a quarantining of welfare payments that could be applied solely on the basis of the welfare recipient's race. ELC submits that this example illustrates that an Act designed to protect the human rights of Australians can be easily overridden, enabling a violation of human rights.

In ELC's view, the Australian Government should take steps to actively protect and promote human rights in a single legal instrument.

### **3 Changing the law to improve the protection of human rights in Australia**

We submit that a Human Rights Act should be introduced to enshrine human rights in legislation and aid the existing protection of human rights afforded by the three arms of Government.

Whilst ELC acknowledges that often human rights protections provide no solutions for human rights issues, we consider that Australian society is racially, religiously and culturally diverse. There is a need to state the basic values that the community accepts as being held in common which may not have existed at the time when the Constitution was being implemented.

We consider that there is substantial value in making human rights values clear through a Human Rights Act. Firstly, it would serve as a teaching tool for all Australians and migrants entering Australia as to their rights and responsibilities. Secondly, it would allow the different arms of government to clearly understand the importance of human rights. One way that the Act can achieve this aim is by giving courts a rights-based interpretation of the legislation. Where lawmakers seek to introduce and implement new laws which are inconsistent with the fundamental human rights in the Act, the court can draw attention to the inconsistency and

---

<sup>1</sup> An Australian Charter of Rights – answering some of the critics (2008) 31 Aust Bar Rev 149

urge lawmakers to reconsider the proposed law in light of the inconsistency. Therefore, whilst a Human Rights Act may not necessarily provide a solution to a human rights issue, it can offer a basis for counter-arguments to be made based on the dignity of the individual. As Mr Kirby noted, the impact on an individual or family is usually the first thing that gets lost when government faces hard decisions, especially concerning resources<sup>2</sup>.

Those unsupportive of a Human Rights Act argue that there is no need for Australia to change its institutions and adopt a charter of rights. In response, we agree with Mr Kirby's statement that a country, such as Australia, which has seen such serious injustices contrary to fundamental human rights – to women, to Aboriginals, to Asian people, to homosexuals, to religious minorities and others – can hardly maintain that there is no need for the democratic lawmaker to have an occasional stimulus based upon fundamental principles of equality and basic human rights.

ELC further agrees with Mr Kirby's comments that if we had a principle of equality and non-racism in our Constitution, or even in a statutory charter, we may never have needed decisions in *Mabo*. A statement of basic rights, constantly before parliament and the citizens, could encourage legislation that is respectful of the fundamental human dignity of all citizens<sup>3</sup>.

### **3.1 Act or Bill of Rights?**

ELC considers that an ordinary Act of Parliament would be the most appropriate approach to take in protecting and promoting human rights in Australia.

The Victorian Charter of Rights, the ACT Human Rights Act, the United Kingdom Human Rights Act and the New Zealand Bill of Rights Act are all ordinary Acts of Parliament. Although a constitutionally entrenched Bill of Rights would be more difficult to change than an ordinary Act of Parliament, ELC submits that by making human rights law difficult to change, Parliament sends a message about the fundamental importance of human rights. That said, an ordinary Act of Parliament offers flexibility as it can be more easily amended in accordance with changing attitudes to human rights. An ordinary Act of Parliament would mean Parliament would be free to expand the scope of the operation of a Human Rights Act in future.

---

<sup>2</sup> An Australian Charter of Rights – answering some of the critics (2008) 31 Aust Bar Rev 149

<sup>3</sup> An Australian Charter of Rights – answering some of the critics (2008) 31 Aust Bar Rev 149

### **3.2 Who should be bound?**

ELC considers that, at a minimum, public authorities (including all entities exercising functions of a public nature) should be bound by a Human Rights Act. Except to the extent that private entities are carrying on public functions, ELC submits that initially a Human Rights Act should not apply to everyone in the community, including individuals in their private relations, businesses and non-profit organisation. The scope of coverage of a Human Rights Act should be reviewed at a later stage.

### **3.3 How should the rights be protected?**

Courts exercising federal jurisdiction should be required to interpret federal laws consistently with human rights and to be empowered to strike down inconsistent legislation (to the extent of any inconsistency).

ELC's view is that a court's ability to interpret whether a law is incompatible with human rights should be unfettered. A law is either compatible or it is not.

Where a law is intended by Parliament to restrict human rights, a declaration of incompatibility should be included in the Bill which acknowledges breaches which could occur. Furthermore, the Bill should only be able to be passed with a two thirds majority of Parliament.

ELC considers that only the High Court, Federal Court and State Supreme Courts exercising federal jurisdiction should be able to declare that laws are incompatible with human rights. A law that is declared to be incompatible with human rights should be invalid, to the extent of any inconsistency.

### **3.4 What should happen if a person's human rights are breached?**

ELC submits that disputes about breaches of human rights should be resolved through a 2 tier system. The first tier would be conciliation through the Human Rights and Equal Opportunity Commission. The second tier, for people who claim more serious breaches of human rights that cannot be conciliated by a HREOC Commissioner, should be proceedings in the Federal Court or State Supreme Court exercising federal jurisdiction. Australians should be able to apply to the Court with the breach of their human rights as the basis of their claim. There should be a procedure whereby lower courts and tribunals can refer human rights matters to the Federal Court or State Supreme Court.

#### **(a) Remedies**

Where there has been a serious breach of human rights, courts should be empowered to make any orders they see fit (including pecuniary orders for breaches, where appropriate, compensation orders, injunctions and damages). It is clear from the experience of other jurisdictions with Human Rights Acts (such as New Zealand and the United Kingdom), this

will not lead to floodgates being opened. It is unacceptable to have rights protected in law without a means to enforce them.