



Mental Health  
Coordinating Council

# National Human Rights Consultation

**June 2009**

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### **The Mental Health Coordinating Council**

MHCC is the state peak body for non-government organisations (NGOs) working for mental health throughout NSW representing the views and interests of over 200 NGOs. Member organisations specialise in the provision of services and support for people with a disability as a consequence of mental illness. MHCC provides leadership and representation to its membership and seeks to improve, promote and develop quality mental health services to the community.

Facilitating effective linkages between government, non-government and private sectors, MHCC participate extensively in public policy development. The organisation consults broadly across all sectors in order to respond to legislative reform and sits on National, State (NSW) and State Government Department (NSW) committees and boards in order to affect systemic change. MHCC manages and conducts research projects and develops collaborative programs on behalf of the sector, and is a registered training organisation, delivering mental health training to the workforce.

### **The National Human Rights Consultation**

MHCC congratulate the Government and the Attorney General, Robert McClelland for initiating a national inquiry into human rights and for providing an appropriate time-frame for the community to participate fully in consultative processes across the country. This has enabled the matter to be given the serious consideration it deserves. It has been clear to us from the plethora of articles in the media and academic journals, and attendance at consultations, seminars and workshops in NSW that the community engaged very positively with the process.

We thank the National Consultation Committee for inviting us to provide a submission. To undertake this task we have attended many workshops, seminars, forums and public debates in NSW and consulted widely with our membership and the broader mental health community sector including facilitating a mental health consumer forum on human rights with the help of the Public Interest Advocacy Centre (PIAC). This submission represents our position informed by the personal stories as told by consumers, carers, advocates and mental health professionals working in public and non-government settings.

MHCC present as part of this submission de-identified case studies to provide rich qualitative examples of instances where human rights have been violated and where protection was not available. We do this to provide support for the introduction of a Human Rights Act (HRA) in Australia.

The sector in which MHCC operates provides us with a unique opportunity to gain insight into the lived experience of people with disability as a consequence of mental illness who interface with mental health services and the law. These people frequently are unable to access the services they need, and are challenged by the disability they endure, exacerbated by the stigma and discrimination that further limits their social inclusion.

In this submission we present our position through a lens primarily focusing on the absence of the economic, social and cultural rights that people with mental health issues experience.

It has been said by some critics that: *a charter of rights serves only minorities, especially those maligned and feared in a society* (Robertson, 2009),<sup>1</sup> and that the majority are protected. We believe this to be a mistaken view. However, even if this was the case, a test of a truly democratic society is the dignity and respect with which it treats its most despised members

### **Terms of Reference**

In a statement that human rights belong to us all, the National Consultation terms of reference includes a commitment to the promotion and protection of human rights and the recognition of equality. We commend these assertions. However, we do not support the limitation set by its terms of reference restricting consideration to a statutory model only.

We acknowledge the difficulty in amending the Australian Constitution which would necessitate a referendum. However, the absence of opportunity to consider a constitutional model is a weakness in the consultative process. Moreover, it has not deterred criticism that the statutory model (which in our view will not protect human rights as effectively as a constitutional model) will none the less give an unelected judiciary powers to dictate to an elected parliament.

In any event, as the Constitution stands it does not protect human rights and urgently requires review. For example and in particular section 51 xxvi (in relation to making special laws for people of any race) should be amended since it enables the Commonwealth Government to contravene Article 1 of the Convention on the Elimination of all forms of Racial Discrimination and Article 7 of the Universal Declaration of Human Rights (UDHR), both international agreements that Australia is signatory to. This was tested in the *Hindmarsh Island* case as the High Court concluded that whilst the relevant Act was racially discriminatory that it was not unconstitutional.<sup>2</sup>

MHCC suggest that the statutory model under discussion will only serve as a preliminary stage to protecting and promoting human rights. Our preference is that the process is step one towards establishing a constitutionally entrenched bill of rights in Australia (as successfully occurred in Canada). A HRA will require reciprocating state legislation in all states (except ACT & Victoria that have state charters in place), putting people's human rights at variance as a result of geography.

Whilst supporting a statutory charter, we would have welcomed discussion on other models that might be considered. However, our understanding is that the Federal Government will be able to overrule State legislation by the use of external powers, as the Howard Government did in amending Industrial Relations legislation. However, any heavy handed approach rarely leads to harmony between governments who need to be creating a collaborative environment in order to preserve the best interests of all its citizens equally.

Nevertheless, a statutory charter is a positive first move towards a cultural shift that we believe will bring about a natural progression towards eventual constitutional change. A statutory charter will provide a way for courts to interpret statute and set standards to aspire to. It will help us frame the kind of society we want to become and for our children and grandchildren to live in, in the future.

### **The Debate**

Most Australians like to think that they live in a democracy in which their human rights are protected. However, we are largely dependant on the goodwill of the parliament to exercise restraint under political pressure. Rights that the community: *[t]ake for granted frequently have no legal protection or are recognised on an ad hoc basis* (PIAC, 2008).<sup>3</sup>

A few rights exist in the Australian Constitution including the right to vote (which in fact is an responsibility as well as a right in Australia); the right to trial by jury for some offences; limited protection of religion; and an implied right to political communication.<sup>4</sup>

Similarly some rights are protected in federal and state laws prohibiting discrimination on certain grounds, i.e. race, sex, disability and age; and there is some degree of child protection; and some common law protection has been established. Nevertheless, rights such as freedom of expression; the right not to be arbitrarily detained and the right to join a union are just some examples not clearly protected under NSW law.<sup>5</sup> As our system operates, rights can be interfered with at whim, with changing political and economic environments and pressures such as the perceived 'threat' of terrorism after 9/11 as in *Immigration v Dr. Hanef*, 2007, who was denied 'natural justice', (Article: Dr. J. Scutt., barrister and human rights lawyer. 31/07/07).

There are many recent examples where Federal Government failed to recognise human rights in a effort to exert other competing rights. For example: *The Northern Territory National Emergency Response is a package of changes to welfare provision, law enforcement, land tenure and other measures, introduced by the Australian Federal Government under John Howard in 2007, nominally to address claims of rampant child sexual abuse and neglect in Northern Territory Aboriginal communities. The intervention's main logistical operation conducted by a force of 600 soldiers and detachments from the ADF. The package was the Federal Government's response to the Territory Government's publication 'Little Children are Sacred', but implemented almost none of the report's recommendations.*<sup>6</sup> The response was widely criticised by Indigenous child welfare organisations, medical and mental health professionals but none the less received bipartisan parliamentary support. The Rudd Government continues to support the response, though did make some adjustments to its implementation.

MHCC sought advice from The Public Interest Advocacy Centre (PIAC) regarding the recognition and protection that Common Law provides. The advice given was that they do not consider: *[t]he common law as being a strong champion for human rights as parliament has clear authority to remove these rights without obstruction* (p.6).<sup>7</sup>

We offer a segment from an article in the Sydney Morning Herald (15/12/08) by Brian Burdekin AO who describes our sentiments so precisely. Burdekin was Special Advisor on National Institutions to the UN High Commissioner for Human Rights, and was for 18 years Federal Human Rights Commissioner of Australia, and advisor to former PM and the Federal Attorney General. He is generally considered to be the leading international expert on human rights institutions.

*It is extraordinary that any lawyer..... can seriously contend that the common law and democratically elected parliaments are adequate to protect human rights.*

*The much vaunted common law developed functional rules for protecting property, commerce and contract - but from the perspective of the most vulnerable, disadvantaged and marginalised in our community - including the homeless, the mentally ill, indigenous peoples and those with multiple disabilities - the common law was, and still is, an abject failure. Indeed, as we demonstrated in these inquiries, far from being part of the solution, the law was frequently part of the problem.*

*As for the "sovereignty" of Parliament, democracy is extremely important, but from a human rights perspective, it embodies an inherent paradox. Our elected leaders are there because they have proved their willingness to respond to the priorities of the majority. The vulnerable groups just mentioned are all minorities - and in most cases not politically powerful, or even influential. The idea that a government representing*

*the majority of our elected representatives is generally benevolent may seem appropriate in 2008, but recent history demonstrates its unreliability.*

*When we revealed the "inconvenient truth" that more than 500,000 of our fellow Australians were affected by serious mental illness, but at least 240,000 were receiving no treatment, neither the common law nor statute protected these people. The scandalous violations of their rights (including hundreds of deaths) were largely the result of government omission, neglect or indifference.*

*There is abundant evidence that deficiencies inherent in the common law and democracies premised on majority rule mean the most vulnerable in our community do need greater legal protection. The Government is to be commended for according all Australians the opportunity to influence this decision with the announcement of a national human rights consultation panel.*

Despite many attempts by those who oppose a National Charter to present the public with evidence of the negative impact a Human Rights Act has had in countries such as the UK,<sup>8</sup> it is clear that over the ten years that the charter has been operational in the UK that: *the Human Rights Act has proved of particular benefit to law-abiding citizens, protecting them from unfair and insensitive civil servants* (Robertson, 2009).<sup>9</sup>

Whilst many undemocratic regimes have HRA Acts, Bills or Charters (such as Zimbabwe, or the Soviet Union under Stalin), have not protected the human rights of citizens under their jurisdiction, there is little evidence that in democracies such as Canada; the UK or in Australian states that have Acts (ACT & Victoria) that these have been retrogressive moves.<sup>10</sup> Contrary evidence has emerged that services have improved, that parliaments have taken on board human rights considerations as part of the norm in reforming legislation and that citizens are more engaged with political processes (Lynch, 2009).<sup>11</sup>

The idea that introducing a HRA would lead to a deluge of litigation has proved unfounded as has the concern that this would result in a 'free for all' for lawyers to benefit financially and to shift power of the judiciary over parliament. As experienced in Victoria, neither has proved true.<sup>12</sup> However, in Victoria the Act has no ability to provide compensation for human rights violations. Robertson (2009) suggests that damage claims could be capped at a particular level to be symbolic rather than an incentive for litigation, which we support.<sup>13</sup>

Our view is that over the period of consultation on a HRA there has been significant misrepresentation in the media by those opposed to a HRA about lawyers who might engage in human rights matters ( i.e. Janet Albrechtson, *The Australian*, 14/01/09). Similarly, Bob Carr, ex NSW Premier and strong advocate for maintaining the status quo, calls any attempt to legally protect human rights in a piece of legislation as leading to a *lawyer's picnic*, arguing that: *codifying rights will lead to a frenzy of litigation which will only benefit those bloodsucking lawyers* (S. Rimmer. ANU, President of Australian Lawyers for Human Rights, *Canberra Times*, 27/01/09). Our experience has shown that professionals dealing with such cases have a strong social conscience and generally work in the human rights field as employees of government or non-government agencies or work pro bono for their clients. These are not the lawyers the media refer to who operate in the corporate sector charging high fees.

This argument holds little credibility in our view and merely perpetuates popular myths about legal professionals. In any event how do proponents of the argument that parliament truly represents public interest suppose that politicians will deal with individual cases of discrimination, if not through the courts?

In a joint submission to the Committee on the impact of the HRA in the ACT, Professor Andrew Byrnes of the University of New South Wales and Professor Hilary Charlesworth, Kim Pham and Gabrielle McKinnon from the Australian National University, observed that: *[d]espite fears that the HRA [Human Rights Act] would lead to a large increase in unmeritorious litigation, the HRA has had a relatively minor impact in the courts. To date, the HRA has been referred to in a total of 50 cases (2007).*<sup>14</sup>

In the main, charters in an Australian context are reported to have had a positive impact on the degree of informed debate in parliaments: *[c]omprehensively expanding the parameters of public policy analysis to include the transparent assessment of laws against a human rights framework* (Robertson, 2009).<sup>15</sup>

The Hon Michael Kirby, Australian ex Justice of the Supreme Court in his *Reflections on Law Reform and the High Court* (2009)<sup>16</sup> writes that the: *[d]efects in the institutional parliamentary procedures .....are a further reason to consider the Australian Charter of Rights, such as has been enacted in the Australian Capital Territory and in Victoria.* He suggests that under the statutory model that the parliament has the right to reject the courts' judgement. Therefore there is little to fear in the potential power of the courts, indeed judges already interpret existing legislation, they are trained to interpret law with fidelity whatever their personal reservations and such powers have not caused our democracy many problems to date. Indeed, the guiding principle for interpreting law is to give effect to the parliament's intentions, it is not an invitation to ignore parliament (Prof. S. Rice. OAM, Director of the Law Reform and Social Justice, ANU. Online Opinion, 05/05/09).

Robertson (2009) states that: *[f]ar from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens.*<sup>17</sup> Our system already relies on the judiciary appointed and not elected so as to maximise political independence, which protects us against a government's misuse and abuse of power. However, it could be said that in Australia (unlike the UK) the appointment of judges is frequently clouded by political agendas. Under a HRA in the UK, the judiciary is guaranteed independence by giving their selection to an expert panel, rather than politicians, this is a change we recommend as an essential ingredient to any new system put in place.<sup>18</sup> Robertson (2009) reports since the HRA has been operational in the UK that democratic governance has markedly improved with politicians paying more attention to matters previously ignored. Similarly public servants are less likely to act unpredictably or unfairly. This has proved highly beneficial to those who might otherwise have been neglected, discriminated against, or treated with disrespect by the bureaucracy and service providers.<sup>19</sup>

Concern regarding misuses of judicial power is further weakened by considering the model enacted in the ACT and Victoria based on the UK Act which only allows for judges to interpret legislation, and issue a 'declaration of incompatibility' if it fails to be consistent with the Human Rights Charter. Parliament maintains its power, although it does morally obligate the parliament to at least review the law, but it cannot be forced to stamp it out, as is possible in the United States under their constitutional model.

We understand that the HRA in the UK has led to vast improvements that primarily affect disadvantaged people such as those with mental health disability, as well as protecting every citizen from unfair and discriminatory practices. What has become evident after a decade of education and experience is a cultural shift in community attitudes and work practices permeating public services that has led to more positive outcomes for people with disability.

Studies have shown (McGarrity, 2009)<sup>20</sup> that many people in Australia believe that their human rights are protected because Australia is a signatory to the UN Declaration of Human Rights handed down in 1948. Australia played such a significant role in lobbying for a binding declaration and for developing many of the articles including ensuring that social and economic rights were included.

The UN declaration set a benchmark for the human rights movement for 60 years, setting standards for civilized societies to measure their level of humanity embedded in their system, and yet Australia (unlike all other democratic signatories) has taken no steps to entrench those rights in the legislation. It is a matter of shame that Australia has the third largest number of complaints upheld by the Human Rights Tribunal under the International Covenant on Economic, Social and Cultural Rights (ICESCR) which has little significance unless rights are enforceable at a local level.<sup>21</sup>

Dworkin (1990) said that: *[d]emocracy is not the same thing as majority rule, and that in a real democracy liberty and minorities have legal protection in the form of written constitution that even parliament cannot change to suit a whim or policy.*<sup>22</sup>

### **National Human Rights Consultation Questions**

The National Human Rights Consultation has asked the community to consider three questions which MHCC aims to answer briefly. We answer them in a different order, as we believe our argument is best expressed in this way.

- 1. Are human rights sufficiently protected and promoted?**
- 2. How could Australia better protect and promote Human rights?**
- 3. Which Human Rights and responsibilities should be protected and promoted?**

#### **1. Are human rights sufficiently protected and promoted?**

Unlike other democracies including all those that are signatories to the UN Declaration of Human Rights 1948, the Australian Government offers its citizens no legal assurance that they may not be subject to a number of infringements to their human rights (Robertson, 2009).<sup>23</sup>

Many say that the system works well. Paul Kelly in the Weekend Inquirer, 13/12/08, cites Bob Carr: *[g]enuine protection of human rights springs from the values of society.* Kelly maintains that: *Trying to codify values with a view to asking judges to make declarations about them, to intimidate politicians will be divisive, ineffective, damage Australia's judiciary and inflame public hostility, giving the next generation of Pauline Hansons new grievances to cultivate.* This view surrounding shared beliefs and values does not stand up to scrutiny.

There are many instances in which citizens have clearly been subject to human rights violations. Indeed some have been subject to torture and inhumane practices. For example, children arbitrarily detained for long periods in detention camps; Cornelia Rau, mental health consumer detained by the Immigration Department and Vivian Solan were proof of unaccountable bureaucracy. Likewise, David Hicks, Australian citizen held in Guantanamo Bay without trial was denied his right to support from his government. During the fevered period post 9/11, the Federal Government passed no less than 26 bills dealing with security and terrorism, and more followed subsequently. *This period saw the most draconian provisions far beyond previous notions of the rule of law* (Steketee, National Affairs Editor, The Weekend Inquirer, 27/12/08). Other have experienced attempts to curtail freedom of speech and meet with who they like (recent attempts to prevent motorbike gangs from gathering); others have increasingly had their right to privacy as a result of the increasing prevalence of inconsistent workplace policy surrounding compulsory drug and alcohol testing for employees which the AIRC and CFMEU considered: *unjust and unreasonable* (Bull, MHCC Conference Symposium, 2009).

In summary MHCC argues that Australia needs a HRA for the following reasons adapted from and identified in Williams (2004).<sup>24</sup>

- To recognise and protect universal rights not protected by Australian law
- To enhance our democracy by setting out and protecting rights that attach to Australian citizenship
- To protect the rights of minorities including non-citizens
- To give legal rights to those otherwise powerless to advocate for their social, economic and cultural needs
- To bring Australia in line with every other western democracy
- To meet the obligations we have voluntarily assumed to incorporate into our legal instruments
- To put rights above politics and above arbitrary governmental action
- To enhance government policy making, and administrative decision making
- To help educate Australians about human rights and their system of government
- To promote tolerance and understanding and contribute to a culture of respect for human rights.

The case studies that we present later in this submission graphically depict how human rights are insufficiently protected and promoted in Australia, as described by mental health consumers, carers and those working as professionals in the sector. These stories clearly highlight the need for legislation requiring governments to consider and respect human rights in policy development and delivery of programs.

## **2. How could Australia better protect and promote human rights?**

Whilst not listing every right MHCC supports for inclusion in an Act, our recommendation is that Australia should design a HRA that embodies all the rights set out in the various International agreements and covenants that we have ratified, and by so doing meet our obligations under international law. This includes the following:

- Universal Declaration for Human Rights (UDHR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant of Civil and Political Rights (ICCPR)
- Convention on the Rights of the Child (CROC)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of Persons with Disabilities
- Convention on the Elimination of All Forms of Discrimination against Women
- International Convention on the Elimination of All Forms of Racial Discrimination
- International Labour Organisation Discrimination (Employment and Occupation) Convention ILO111

This is a unique opportunity for Australia to look broadly at other documents developed in other democratic environments and not merely base the HRA on existing International models such as the Human Rights Act, which makes part the UK law rights contained in the European Convention on Human Rights.

There are benefits to the creation of a single document in which all human rights could be included. Such an Act will make making it less confusing for people to know that they can refer to one Act in which all their rights and responsibilities are stated, even if they also appear in other pieces of legislation. An added bonus would be the ability to educate and inform the community more effectively as to how they are protected and where those rights are identified.

We strongly urge that in the development of an Act, Australia consider Chapter 2 of the 1996 Constitution of South Africa which is their Bill of Rights. It protects negative and positive rights of all people against the government, including its executive, legislative and judicial branches, and some provisions (such as the ones guaranteeing equality rights) providing rights against the actions of other persons.

The South African Bill is probably one of the most inclusive bills, setting out the rights to health care (including reproductive health), food, water and social security and states that: *No one may be refused emergency medical treatment* (section 27). Positive responsibilities are placed on the state, stating that: *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*<sup>25</sup> We propose that responsibilities be placed on the Government to provide access to all health services for people residing in Australia, including refugees and asylum seekers currently not eligible to receive Medicare and other public services.

Section 24 sets out a number of environmental rights, which is unique in terms of human rights instruments, although environmental rights are recognised in the African Charter on Human and Peoples' Rights and the Stockholm Declaration.<sup>26</sup> Article 24 specifically puts environmental rights into the context of human health, stating: *Everyone has the right to an environment that is not harmful to their health or well-being;* As well as recognising the rights of future generations in the context of sustainable development by stating: *[a]nd to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.*<sup>27</sup>

In NSW, the Anti-Discrimination Act 1977 is specific legislation targeting discrimination limited to that Act.<sup>28</sup> Federal legislation targeting discrimination only applies indirectly to NSW, and the NSW Constitution does not specifically promote or protect human rights.<sup>29</sup>

A few human rights are protected in the Australian Constitution as mentioned earlier (p.4) but the constitution does not specifically protect or promote human rights. MHCC recommend as stated earlier (p.2) that the statutory model serve as a preliminary stage to protecting and promoting human rights in the Constitution. It is critical that as part of the process, the Commonwealth require all states establish reciprocating legislation so as achieve equality for all.

It should not be forgotten that included in a Human Rights Act, the corresponding obligations and responsibilities of its citizens should be made unequivocally clear.

### **Australian Human Rights Commission (AHRC)**

MHCC recommend that as part of an Australian HRA, it is necessary to entrench a National institution into the charter. The Australian Human Rights Commission is well placed to undertake this role as the first point of contact for complaints if provided with adequate funds to expand its role and capacity. As an independent body, it is committed to promote respect for, observance of and the protection of human rights for everyone without fear or favour. To better protect and promote human rights in Australia the Commission could be tasked to:

- Develop greater awareness of human rights in the community
- Make recommendations to the Government to improve the carrying out of human rights
- Undertake studies and report to Parliament on matters relating to human rights
- Investigate complaints of violations of human rights and seek appropriate relief

### **Actions that Government should initiate in establishing a statutory HRA**

In addition to some comments throughout this submission, MHCC propose that the Government needs to be proactive in implementing the following:

- Create a parliamentary process to ensure that new and existing laws comply with the human rights embodied in a HRA and develop awareness amongst parliamentarians as to how laws impact on human rights
- Guarantee judicial independence by giving their selection to an expert panel, rather than politicians<sup>30</sup>
- Give judges the power to interpret legislation, and issue a 'declaration of incompatibility' if it fails to be consistent with the HRA but not to strike it out
- To ensure government departments develop policy and implement service delivery that respects human rights as identified in the Act
- That Government task the AHRC to develop a Human Rights Action Plan backed up by resources and a commitment to initiating protections<sup>31</sup>
- That Government develop and enact laws protecting non-citizen peoples from human rights abuses whilst resident in detention or in the community including the right the health services and the ability to seek employment while awaiting visa decisions
- That Government in enacting a HRA require reciprocating state legislation to ensure equality across jurisdictions
- That Government initiate a national education and information program, including human rights in the school curriculum

### **3. Which Human Rights and responsibilities should be protected and promoted?**

In Australia, the States take responsibility for service delivery, such as health, housing, and disability services. It is imperative that in undertaking these responsibilities the States should have to apply human rights standards of care whether in the public or non-government services as well as in detention. Proposed legislation should be scrutinised to establish compatibility with the HRA and bodies whether government, public or non-government would be required to comply.

Further to our earlier comments (p.7) in order to embrace the Social, Economic and Cultural Rights of People with Disability we endorse the UN Convention on the Rights of People with Disability endorsed by Australia<sup>32</sup> (2008) to include rights to:

- have the same access as everyone else to the physical environment, transport, information and communications, and other facilities and services
- live independently and be included in the community
- equal opportunity and inclusion in education
- the highest attainable standard of health and access to health and rehabilitation services
- effective measures to ensure the equal right of people with disability to work, including support for reasonable adjustments to be made to the work environment
- an adequate standard of living, including access to housing and to assistance with disability expenses where necessary
- equal recognition before the law and access to justice
- respect for privacy and family relationships
- be free from cruel, inhuman or degrading treatment
- freedom of movement and personal mobility

People with mental health disability are characteristically subject to human rights violations. Many are unable to access the mental health treatment and support services such as community living skills, employment and supported accommodation necessary to live as independently as possible in the community.

As a consequence many people with mental illness and co-existing complex needs (such as drug and alcohol problems, intellectual disability, and brain injury) frequently end up in interactions with the criminal justice system or become homeless because they cannot access the care and services they need.<sup>33</sup>

A high percentage of homeless people have chronic mental health issues. Similarly figures show that over 75% of homeless people and those in the criminal justice system are adult victims of childhood abuse and domestic violence who have never received mental health support.<sup>34</sup> Young people with all forms of mental health disability are present amongst the homeless population. Chamberlain and MacKenzie (2003) suggest that homelessness is: *[b]est understood as a process, or series of biographical transitions.*<sup>35</sup>

Whilst causality is diverse and complex, particularly relevant is the transition of youth to adult homelessness and the aetiology amongst young homeless people, which may result in a progression to chronicity.<sup>36</sup>

The National Homelessness Strategy (2000)<sup>37</sup> identified several factors, which have altered the character of homelessness in recent years, several of which closely relate to child sexual and physical abuse and neglect, mental illness and substance abuse.<sup>38</sup>

In developing a HRA that addresses social, economic and cultural rights, issues of cultural diversity must be included that enable culturally diverse people with mental health issues to access services that are culturally appropriate and that respect the religious and cultural differences which may require specialist language and service delivery models.

There is also the issue of young people with disability who need special support end up living in aged care nursing homes – surrounded by people four or five times their age. Some of these young people are less than 10 years old. They have no option to living in aged nursing homes because there are not enough long-term care and support services available for people their age. Many of these people will experience developmental and mental health issues as they develop towards adulthood.<sup>39</sup>

In the event of a HRA coming into force, where some protection of human rights exists in State based legislation, this should not be removed unless the HRA can establish that no State rights will be lost in the enactment of a single Federal Human Rights Charter. The rights and freedoms in the HRA should be fully enforceable against those violating those rights laid down by State law.

MHCC does not support any authority of human rights over corporations, as they can pursue their rights and interests through other avenues in which they are recognised as *'legal persons'*.<sup>40</sup> This does not include the right of advocacy organisations having the authority to represent the rights of individuals or groups, which MHCC supports. However, we do not support an Act that would allow individuals to challenge others on the basis of human rights violations. We believe there are appropriate laws in place that provide redress through the courts.

We believe all people subject to Australian law, should benefit from a HRA protection, whether a citizen or not, and that the HRA should not be removed from any part of Australia, previously outside of protection from some safeguards.

Rights should only be balanced against the reasonable rights of others to exercise them, and *should not be contingent on fulfilling the responsibility. Moreover, it does not become another person's enforceable right* (, 2009).<sup>41</sup>

## Case Studies

Names have been altered to conceal identity. Some stories were written whilst others were received verbally.

## Consumer Stories

- Jennie a long time consumer with a diagnosis of bipolar disorder is under a long term Community Treatment Order (CTO). She reports that she is obligated to receive her daily medication in her home. She has never been given any choice as to alternatives to where she may receive her medication. She says that she feels this practice is like a *daily home invasion*, and that she would prefer to receive treatment elsewhere. She feels that those that treat her make judgements as to her affect in that if she is upset about something, that they assume it relates to her mental illness as opposed to being a normal reaction to everyday life events. She is told that she is acting up, and asked whether she has been drinking too much coffee. She feels that she is judged and defined by her diagnosis and that her medication is altered at the whim of the health professional. She reports that in all the years no-one has explained how she could appeal her CTO, which is consistently rolled over, without her being offered representation before the Tribunal by clinicians other than her treating team.

During her several treatments in mental health facilities, Jennie says that she was never involved in discussions around her care plan, explained the side effects of her medication and given any choices as to her treatment. She says: *I am not a person any more, I am just my illness, my children are with my mother and I am supposed to have visiting rights every two weeks, but if my mother is in a bad mood or wants to punish me, she says I can't see them.* Jennie has a support worker who remarks that even in her presence the mental health workers often treat Jennie with little respect, are judgemental and provide little information to Jennie as to her position regarding the ongoing CTO and treatment plan.

- Gloria has been on a CTO for several years: *I strongly believe this is as a result of moral dislike rather than clinical judgement.* She believes that her human rights were breached in terms of freedom of expression, movement and association because she has been judged as a result of her religious beliefs. Gloria believes that she should not be *judged* as a medical case, but as a person.
- Alice writes: *I do hope that somebody at the consultation was able to tell their story about the negative impacts of consulting the wrong mental health professionals, and the devastating impacts that come with therapists and doctors jumping to conclusions – misdiagnosing, judging, and the domino effect and the failure to take adequate time to accurately assess the individual whether in a private or community based setting.*

*What is lacking and needed is for upcoming therapists to learn to listen, truly be non-judgemental and be mature enough to understand that patients are people. There are some disorders within the DSM (Diagnostic Statistical Manual) that are heavily stigmatised and patients are affected by this. Some people fit the diagnostic criteria but some accidentally fall into it through incorrect diagnosis because of inadequate assessment methods. They are left feeling helpless, lack basic rights and are still confusingly ill. We need a system to spot inaccuracies to increase the chances of each patient receiving the treatment they need, where the next clinician takes a proper look at the patient's symptoms instead of just following on from the previous treating practitioner.*

*Consumers also need to have their privacy rights protected ensuring patient files aren't shared amongst those who do not have adequate permission to do so. Major work needs to be done in terms of better treatment avenues for those who suffer from the most stigmatised disorders. At the end of the day they are human and loved, but probably not by themselves.*

- *Stephanie writes: I could get no treatment because of where I lived when I was unwell, I ended up drinking and taking drugs to help me cope and got into trouble with the police. I ended up in goal where I received medication for my addictions but no therapy to deal with my emotional pain. Now I see a counsellor in a community women's centre and I have learned that my emotional state is as a result of childhood sexual and physical abuse.  
I am not borderline personality disorder, but a person with a traumatic history that just needed to be listened to and validated to get well. Didn't I have the right to help? Didn't I have the right to be safe in my own home?*
- *I was a person working in an employment service, and did not disclose my mental health issues. When I did so I was actively harassed and discriminated against. I sought another job and did not disclose my issues to co-workers. I have been accused of poor performance. I have been on a CTO for seven years. What justifies this length of time? I should have been accepted, I should have been able to claim a percentage of pension when I am unwell and unable to work. Disability should be part of funding in employment.*
- *Three consumers in a group consultation agree that the major issues for them have been:*
  - *lack of acceptance and respect, disbelief surrounding their credibility and honesty and a right to be mentally different and not conform to other ways of being*
  - *absence of information they have received about their illness, treatment alternatives and their rights*
  - *absence of explanation about treatment decisions and an opportunity to be heard by decision makers*

*One consumer says: There are plenty of people to tell you what to do; but not what is happening. Who are all these people? Why don't they introduce themselves to me? What is their role?*

- *When I first got ill I was lost for three years. I was given no information on my illness. Who was treating me? Were they a doctor or student? It would have been really helpful to have had information available where I was located geographically before I became chronically unwell. What I needed was a specific person to provide information, there were no consumer advocates and I was informed about Official Visitors but nothing was explained about their function. I wasn't even supplied with pens or paper. The consumer is left to work it out for themselves. What we need is a 'go to' person. I ended up believing the hospital was 'where I lived'. I had no idea that there was a way out. There were plenty of people to tell me what to do, to not do, but not to help. What I would like is that a comfortable situation is developed to allow consumers the freedom to ask questions, to be engaged and listened to.*
- *I gave a rude gesture to a neighbour for valid reasons. The police were called, four arrived forced their way in and manhandled me. I was injured. I was put on a CTO but I hated the medication and gave it a miss. The police were called and six arrived and threw me in a van. I was in a state, I started to panic; there were no windows. I tapped on the partition twice and said that I needed air; both times I was told to 'shut up'.*

*I think the police were very heavy handed. I feel that all my frustrations and anger are misinterpreted and seen as part of psychiatric problems. My CTO forces me to accept where I am told to receive my medication, I am given no choice. When I say I want my CTO reviewed I am told by my clinician 'if we don't have a CTO how can we control you?' I have never received counselling or any therapeutic interventions. My early trauma has never been addressed. Medication is all that has been provided. Better information could be provided, GP shared care is little promoted, there are other services out there, but the system does not provide easy access. Failure to address various traumas means failure to provide adequate medical care.*

- Paul voluntarily admitted himself to a mental health care facility. He was unhappy with his medical treatment. The facility did not explain its policies very well, and were not flexible enough in their application.

For example, he was denied access to his belongings in the middle of the night when he wanted to read one of his books, and was offered medication when he asked permission to smoke (for which he was denied). He thought the staff needed better training to deal with his illness. He also thought there should be lockable cupboards at facilities to protect the property of consumers from being stolen whilst they receive treatment.

- Angela developed depression when she was 18. She was treated with medication, but often felt that the drugs only aggravated the problem. She is currently stable and healthy, but she fears changing doctors because then she may have to change her medication, and in the interim between changing medication she feels she is in danger of returning to acute mental illness.

She has always found that being employed makes her feel much better.

Her mental illness has caused the break up of her family life and she lost custody of her children.

- Joan gave an example of where she felt her human rights were infringed. A few years ago she recognised she was displaying symptoms of psychosis. She went to hospital seeking medical attention but after being admitted to a temporary bed, she found herself being handcuffed by the police and told she was going to be put into a paddy wagon. She was unaware of why she this was happening to her. The police escorted her to Cumberland hospital (not in a paddy wagon) where the doctor immediately advised that the handcuffs be removed from her. She was then taken to Westmead hospital, before being discharged (in Westmead) without any money to make her way home. Joan thought that the actions of the police were too aggressive and only exacerbated the situation. She said she would never forget being treated like that.
- Scott was diagnosed with a mental illness and given medication. Scott says that he was not made aware of the side effects of the medication and that he remained on it for a long time without it being reviewed or updated. He then had a reaction to the medication, sustaining a severe neck injury. He says he did not know that this injury was a possible side effect of the medication.

Scott described an experience he had in a health care facility. He said that at times he cried, but that when he did so the staff gave him drugs that made him stop crying. He felt that he had a right to feel sad or cry and that the administering of the drugs infringed on his right to self determination and his freedom of thought.

Scott also said that his doctor had once called him a hypochondriac, which he found very hurtful and offensive.

- Chris is a mental health consumer. He says that he finds it hard to stay functioning at a good level and that he often finds it hard to get up and keep motivated. Chris explained his desire to contribute to society, but that his health makes that difficult to achieve. He said that he realises the importance of work for his health, but said that he struggles because he feels sick at work and battles to stay in control.
- *I was required to have a case manager by my boss to help me cope with my bouts of depression. I was offered a counsellor who provided psychotherapy. I wanted to have CBT. Why can't I have the type of therapy that I feel will work for me? If I work full-time I can't have a case manager, and my illness makes me ineligible anyway through PHAMS. I found the public sector very rejecting so I went to the Brain and Mind Institute and found a private practitioner.*

*I feel that I have not been supported by the system or my employer. I really did not understand the process. My human rights are not respected and I do not have adequate access to health care. I feel I am discriminated against.*

*I am worried about breaching my CTO, my private practitioner says call the crisis team but I am discriminated against because I have associated myself with private practice and the crisis team won't visit, they will only speak on the phone. I need access to information. I need to write a letter, the case manager at the employment agency is insincere and unhelpful. I want support to write a letter and be responded to.*

- *My story goes way back, but is still an issue today. I only discovered I was on a pension when I received a letter from Centrelink. I'm involved in my healthcare but not in decision making. Care coordination might not always be able to see you, can't they tell you when they can and give you a time? Instead I have to sit in intake and wait.*

*I would like to have proper access to treatment from someone with whom I can communicate and trust. I'd like to be able to choose my health worker.*

- *As a consumer I'm not taken seriously. I have the feeling of disbelief by staff including the Official Visitor.*
- A consumer has been involved in a rehab service on a yearly contract for 3 years. In this fourth year the job description has changed and was re-advertised to require a minimum 3 year driver's licence as essential criteria. This prevented the person doing the job to reapply and is now out of work. They feel that their rights have been breached and that they have been discriminated against on the basis of criteria not relevant to the job. They feel that they should have a right to continuity of contract.
- A consumer reports being threatened in hospital by another patient. They feel that they should be entitled to have a safe environment.
- A consumer reports that they were been diagnosed with a personality disorder. Concerned with her treatment she asked to see her medical records. When given the records she found the records of another person. She expressed her concern regarding medical records security protocols.
- When ill David has always been transported by the police in a van and not by ambulance. He reports being assertive not aggressive but that seclusion has been used indiscriminately including use of restraints. He feels that he has been arbitrarily detained, and received inadequate healthcare.

- As a patient in a hospital one consumer said that he felt threatened in such a confined space. He reported that staff dealt with it poorly and the situation escalated. He became mentally worse as a result of his living conditions. He feels that he has the right to life in a safe environment and the right to access adequate health care.
- A consumer says that: *when she is being assertive and speaks her mind she is put in seclusion, staff use this indiscriminately to punish us.*
- A consumer on a continuing CTO was not given information about advocacy support or information about their rights and responsibilities. They were not involved in their CTO care plan. They were not informed about their right to be represented at the Mental Health Tribunal hearing. They state that right to information, adequate health care and to participation were breached.
- A consumer writes: *While in psychiatric hospitals consumers should not have to deal with sexual advances from staff members. This should be so for all consumers regardless of social background factors such as bad reputation etc.*

*All consumers should have human rights in the community, at places of employment and tertiary institutions and not be subject to 'special treatment' e.g. surveillance of themselves and their friends and general 'persecution', especially if they are breaking the law.*

*Human rights should apply to ALL mental health consumers irrespective of social class, background, gender, ethnicity (including 'white trash'), religion, embodiment states and reputation.*

*The wider community and mental health communities must realise that sometimes a mentally ill person does things out of character. Where this is not pursued by the law why spend 30 years exacting revenge over something the victim barely remembers?*

*Don't forget that 1 / 2 Australians are subject to mental illness over their lifetime. So please in future do not act out your own problems and hang ups on a mentally ill individual (female of course!) who is trying to get on with her life. And leave her friends alone.*

## **Common human rights issues arising from consumer consultation**

### Right to Health:

- Inadequate diagnosis, stuck on medication for years with little review of the prescription or diagnosis
- No explanation of side effects of medication
- Professionals accepting previous clinical diagnosis without re-evaluation

### Right to Work:

- The importance of having access to work was a recurring theme, not only as a way to be able to contribute to society, but as good for one's health
- The right to work that accommodates episodic illness and the need to care for self
- The right to have meaningful and well paid work
- The right to undertake education and training to be able to develop a career path

### Right to Family:

- Mental health consumers often lose custody of their children, and are cut off from contact with them, sometimes this is arbitrary or far too prolonged due to stigma even when consumers are managing their illness or recovered

- There was also a complaint that the family members of mental health consumers were either not allowed or unable to look after them
- Carers are frequently treated as part of the problem by the system and treated disrespectfully
- Carers are often expected to take responsibilities beyond their capabilities due to age, other commitments and responsibilities – the system does not adequately support carers financially, emotionally or in terms of respite

#### Right to Security and Feeling Safe:

- The right to a safe and secure environment is undermined when receiving treatment in a health care facilities because property is frequently stolen and there is no where to place valuables whilst at the facility
- The right to sexual safety in facilities needs to be addressed
- To be believed when reporting sexual or physical abuse

#### Right to Respect:

- To be listened to and have one's lived experience valued
- Not to have capacity discounted because of a diagnosis
- To be included in treatment plans
- Not to be categorised as the illness, and to be respected as an individual
- Not to be told to change lifestyle when it is the medication that has resulted in obesity or other side effects
- To be believed that you can make decisions about medical interventions and that refusal is not part of the illness
- To have concerns regarding loss of libido as a result of medication taken seriously by treating professionals
- To be taken seriously as a young adult consumer or young carer of an adult consumer
- Not to be told that *doctor knows best*

#### Freedom from Discriminatory treatment:

- To not be described in derogatory terms such as a 'hypochondriac' by treating professionals
- To not be handcuffed and manhandled by the police
- To not be transported in a paddy wagon
- To not be allowed appropriate food according to religion or preference
- To not be given nutritious food
- To be allowed the privacy to maintain sexual relations with partners whilst in facilities
- To be separated from and not allowed to care for babies and small children in a safe secure environment

#### Right to Self-Determination:

- The consumers felt that they did not feel like they "fitted in" with other people's expectations of behaviour. They thought that they should be able to feel accepted even if they were a little bit different, because that was who they are
- The right to make a personal decision to smoke when in a facility somewhere in the grounds that for a period may be 'home'

#### Right to Advocacy:

- The right to complain and be taken seriously
- To be informed as to one's rights and processes to appeal CTOs
- To be represented

## Stories and comments from clinicians, advocates and nurses

- A counsellor reports that her client Mary had been admitted into a psychiatric facility ten days after the birth of her baby. During a psychotic episode she was admitted via ED where her husband was told that their baby could not stay with his mother. Investigating this policy practice, the counsellor discovered that since December 2008, NSW Health have banned babies accompanying mothers in psychiatric facilities. Whilst acknowledging the issues of safety for a baby in a general mental health facility, and the potential risk that the mother may have posed to self and baby (under a diagnosis of post-natal psychosis), reasons for the policy were neither explained to the husband or mother. The client reported that whilst unwell she imagined that her baby had been taken from her and was extremely distressed when she could not see, hold or feed her baby. As a consequence of this policy, she was no longer able to breast feed or develop attachment to her baby.

Despite eventually being transferred to the only mother and baby unit in NSW (a private 8 bed facility at St John of God), she reports having been left with major issues as a result of her having been unable to access safe psychiatric care in a specialised mother/baby unit whilst unwell. Clients unable to access services via private funds are less fortunate. Note: Dr Phillip Boyce (previous President of the Aus & NZ Psychiatric College, and expert in this field) has been fighting for such safe units for 20 years. His comments have fallen on deaf ears.

- A counsellor reports that her client John experiencing extreme anxiety disorder; chronic depression with co-existing substance abuse was spiralling out of control and encouraged by the counsellor to admit himself into a psychiatric facility. John's anxiety was exacerbated by concerns with regards to the real possibility of losing his job. Stigma and discrimination were the rationale he offered for not having told his workplace, however, his ongoing absences and erratic behaviour were putting his job security at risk and the counsellor encouraged John to disclose the bare minimum of information to his manager, in order that he might have the best chance of keeping his job. Whilst all this was happening his aged mother was unwell and, as her primary carer, his anxiety was aggravated by his inability to care for her if he went into hospital. Summoning up the strength to disclose to his manager and securing a place in a facility, John found when he arrived that the regime was fairly rigid and that he was not allowed access to his mobile phone to call his mother for the first week. Later he was able to use a public phone at certain times however this meant that he had to disclose his whereabouts to his mother, rather than tell her he was on a holiday, as was his preferred option, so as not to distress her. Whilst reporting improvement after a 4 week stay, he reports these issues plus the inability to smoke in any outside part of the facility as issues that he felt hindered rather than helped his recovery.
- A psychologist reports a high functioning young man in the hospitality industry was diagnosed with bipolar and received anti-psychotic medication. The side effects were extreme weight gain (30 kilos) and depression exacerbated by the eventual loss of his employment. His loss of self esteem as a consequence of the weight gain subsequently resulted in his suicidal ideation, and eventually he was admitted to a facility. In 2005 there was a restriction on novel antipsychotics that would have produced less unpleasant side effects, and they were unavailable for patients with a diagnosis of bipolar disorder. Eventually the patient obtained a different treating psychiatrist willing to vary the diagnosis to Schizophrenia for PBS benefit.
- A senior mental health nurse reports that since the 1990s there has been an ongoing issue of duty of care with regards to gender segregated wards in mental health facilities. One example she described was during nurse hand-over, when a young psychotic woman wandered into a room where a man with schizo-affective disorder

pushed her up against the wall and was about to rape her had the nurse not happened into the room. The young woman was so disoriented that she had no idea what was happening to her at the time.

- A senior consumer advocate working in the public sector reported being witness in a coffee shop to casual conversation between three clinicians. *I was sitting real close with my fourteen year old daughter, and one of them went into a really detailed psychiatric, medical and personal history about a patient, even his age and such like. I sensed it was gossip rather than a clinician's debrief. It was treated like an interesting tit-bit. I was outraged with this massive breach of the person's human right to confidentiality. I sensed one of the clinicians was uncomfortable, but neither said anything. It was really unprofessional. I said nothing because I was with my daughter. After we left my daughter said, 'that wasn't right was it Dad, talking about someone like that?' I was so proud that she understood. Next time even if I am with the kids I'll say something.*

*The clinician showed a lack of respect for the privacy and confidentiality for that person. He didn't see his patient as a person but as a diagnosis. Where was professional duty of care? It really was bad role modelling.*

*We all have rights and responsibilities. If it had happened in the workplace I would have reported it. We really need to ensure that professionals receive ongoing training and supervision at all levels.*

- Marian is employed as a non-clinical worker. She was assaulted by a consumer with a history of physical abuse, and had not been warned about him. When she asked why, she was told it was a matter of confidentiality.

Marian told of a homeless man in the hospital grounds that said he was nightly regularly raping a patient with memory loss as a result of ECT wandering about in her nightdress. Marian reported this to staff who failed to act to protect the patient. As a consumer advocate she feels her complaints are not taken seriously, and generally are insufficiently reported. She believed that neither she nor patients are afforded their human right to a safe environment.

- A consumer advocate writes:
  1. *Consumers repeatedly refer to the central importance of work in regaining and maintaining mental wellness, and yet there is an unrecognised right to work.*

*Society as a whole expects people to work to support themselves. Yet while there is an implied duty to earn a living, there is no corresponding right to work. Those unable to find work often receive little sympathy –indeed there is a widespread assumption - encouraged by politicians- that they might be malingering.*

2. *We have seen in recent years that even basic protections against arbitrary detention can easily be overturned by parliament. Nowadays it seems you can't get into hospital unless you are scheduled, but once you are scheduled, you seem to lose your rights. Consumers spoke about indignities such as being*

- *handcuffed by police when transferred between hospitals,*
- *stripped,*
- *denied access to private belongings,*
- *in hospital for years without knowing why*
- *denied access to one's children*
- *injected without consent,*
- *belittled by medical staff,*

- *unable to get information about medication and side effects*

3. *Because we often find ourselves in vulnerable positions we tend not to speak up for our moral rights as human beings. Instituting legal rights is but one way of addressing this. Perhaps more importantly, consumers need to keep voicing their views.*

### **Carer stories**

- *I couldn't get help for my son until he got into trouble with the police and ended up in Long Bay Forensic Hospital. Now I can't get him out.*
- *I always feel like I am being blamed for being an over zealous mother. I just get desperate to get help for my daughter, she is not a child and she has a right to live her life but she needs support and she is just not getting it.*
- *When my daughter developed an eating disorder it was suggested that she had been sexually abused. She has never said she was abused, we are a loving family and now my husband is suffering depression because he feels he was implicated.*
- *I'm getting old, what will happen when I'm gone? I don't know who will care for my 45 year old son, he is a hermit but we see that he is fed, clean and safe. I don't seem to be able to get information as to what the alternatives are. I don't think he would survive in a home even if there was one. I have visions of him becoming homeless.*
- *I have three young adult children all with mental health issues. I have been a single Mum for years and need to work to keep us all. Where do I get respite or financial assistance? I get sent to warm fuzzy information evenings and am supposed to network with other carers and drink tea, but what I need is concrete support not a talk fest.*
- *I am a professional person with a reasonable income but I can't go on forever paying for my son's private treatment. I am way past retirement age but can't face putting him into the hands of the public sector, I've seen what those places look like, but unless I keep working I cannot afford his care.*
- *My husband is a lawyer, and even he has had difficulty navigating the system on behalf of our son, goodness knows what it is like for people who cannot assert their rights.*
- *My daughter consistently self harms and is suicidal, every time she ends up in Emergency she is released without my knowledge, goes back to her haunts and ends up in more strife. Everyone has given up on her. She has a diagnosis of borderline personality disorder. I'd like her to try this DBT thing, but where do I get that for her without paying for it. We have no money. I am becoming ill myself with anxiety and am now taking anti-depressants.*
- *My partner is a survivor of child abuse, she needs long – term therapy but we can't afford it. The GP has offered to refer her to a Psychologist through the Medicare scheme but she has been to two already and they all seem to be offering CBT. She says that she wants to be listened to, not told what to do.*

## Conclusion

What kind of society are we? What kind of society do we want for our families and grandchildren to live in?

The positive experience since enacting a HRA in the UK has been that often people can assert their rights without a need for lawyers. The law unlike many statutes is easy for all to understand. Robertson (2009) reports that increasingly: *charter claims do not come to court or even require legal advice, because the justice of them can be recognised by public service, when advance by the victim, or by concerned professionals.*<sup>42</sup>

We propose that this is a strong incentive to promote such an Act in Australia which empowers people to speak up for their rights and gives them the tool to accomplish this. Charter critics propose that citizens can exercise their role in the democratic process every few years without the ability to challenge governments for inhuman and unjust decisions in the interim. We suggest that is good grounds for the Government to endorse a HRA for Australia.

In the absence of a constitutional alternative, MHCC recommend to the Consultation Committee that the most affective way in which to protect the rights of all those who live in Australia is to enact a statutory HRA that prohibits human rights violations by governments, institutions, agencies and individuals representing those bodies and challenge law that does not comply. It will enable to courts to interpret the law that breaches human rights. Government departments must be required to issue a *Statement of Compatibility* for new policy developed, improving the quality and accountability of governments.<sup>43</sup>

A comprehensive framework that includes both the contents International conventions and agreements that Australia has ratified, together with the best *Third Generation*<sup>44</sup> inclusions from i.e. the European Charter and the South Africa Bill of Rights, will provide the basis on which our community can nurture a culture of human rights and aspire to greater awareness and understanding of rights and responsibilities, and the rights of others in our society.

## Summary of Recommendations

1. That the Government enact a statutory Human Rights Act as the first step towards protecting and promoting human rights in Australia: that prohibits human rights violations by governments; institutions; agencies and individuals representing those bodies and challenge law that does not comply. The Act should include the following:

- To recognise and protect universal rights not protected by Australian law
- To enhance our democracy by setting out and protecting rights that attach to Australian citizenship
- To protect the rights of minorities including non-citizens
- To give legal rights to those otherwise powerless to advocate for their social, economic and cultural needs
- To bring Australia in line with every other western democracy
- To meet the obligations we have voluntarily assumed to incorporate into our legal instruments
- To put rights above politics and above arbitrary governmental action
- To enhance government policy making, and administrative decision making
- To help educate Australians about human rights and their system of government
- To promote tolerance and understanding and contribute to a culture of respect for human rights.

2. That the Statutory Bill of Rights includes Social, Economic and Cultural Rights as described in the UN Convention on the Rights of People with Disability.

3. That the HRA includes all the rights set out in the various International agreements and covenants that Australia has ratified.
4. That the Government look broadly at rights contained in other documents developed in other democratic environments for possible inclusion such as: the UK Human Rights Act, and the South African Bill of Rights.
5. That issues of cultural diversity be included in the HRA enabling access to services that are culturally appropriate and may require specialist language and service delivery models.
6. That the Commonwealth requires all States establish reciprocating legislation so as achieve equality for all.
7. That proposed legislation whether State or Federal should be scrutinised to establish compatibility with the HRA: and bodies whether government, public or non-government should be required to comply.
8. That the States should have to apply human rights standards of care whether in the public or non-government services as well as in detention.
9. That the HRA should identify corresponding obligations and responsibilities.
10. That the HRA entrench a National institution into the charter, that being the Australian Human Rights Commission (AHRC).
11. That where some protection of human rights exists in State based legislation, that this should not be removed unless the HRA can establish that no State rights will be lost in the enactment of a single Human Rights Act.
12. That rights and freedoms in the HRA should be fully enforceable against those violating those rights laid down by State law.
13. That the Government does not support any authority of human rights over corporations. This does not include the right of advocacy organisations having the authority to represent the rights of individuals or groups.
14. That all people subject to Australian law, should benefit from HRA protection, whether a citizen or not, and that the HRA should not be removed from any part of Australia, previously outside of protection from some safeguards.
15. That rights only be balanced against the reasonable rights of others to exercise them, and should not be contingent on fulfilling the responsibility; and that it does not become another person's enforceable right.

MHCC thank all those individual and organisations that have contributed to this submission by sharing their stories. We also thank the Human Rights Consultation Committee for giving us the opportunity to be a part of this important National discussion, and we look forward to the report to Government. MHCC express their willingness to be involved in any future consultations.

For any further information regarding this submission please contact Corinne Henderson, Senior Policy Officer, at [corinne@mhcc.org.au](mailto:corinne@mhcc.org.au) or Ph: 02 9555 8388 ext 101.

- <sup>1</sup> Robertson, G. (2009). *The Statute of Liberty: How Australians can take back their rights*. Vintage Books: Sydney, Australia, p.98.
- <sup>2</sup> PIAC (2009), Advice to MHCC, p.3
- <sup>3</sup> Ibid.
- <sup>4</sup> Australian Human Rights Commission (2009). *Let's talk about rights: Toolkit*, p.5.
- <sup>5</sup> Ibid.
- <sup>6</sup> Available: [http://en.wikipedia.org/wiki/Northern\\_Territory\\_National\\_Emergency\\_Response](http://en.wikipedia.org/wiki/Northern_Territory_National_Emergency_Response)
- <sup>7</sup> PIAC (2009), Advice to MHCC, p.6.
- <sup>8</sup> McGarrity, N. (2009). *Errors in the anti-charter campaign: the need for public education about human rights*. Alternative Law Journal, Vol 34. No 1, 2009.
- <sup>9</sup> Op, cit, Robertson (2009), p.94.
- <sup>10</sup> Ibid, p.95.
- <sup>11</sup> Lynch, P.(2009). *Human Rights through national consultation*. Alternative Law Journal, Vol 34. No 1, 2009, p.59.
- <sup>12</sup> Byrnes, A. (2008). First Steps Forward: the 2007 report on the operation of the charter of human rights and responsibilities. Victorian Equal Opportunities and Human Rights Commission.
- <sup>13</sup> Op cit, Robertson (2009), p.95.
- <sup>14</sup> Report of the Consultation Committee for a Proposed WA Human Rights Act (2007). Available: [http://www.department.dotag.wa.gov.au/files/Human\\_Rights\\_Report\\_chapter1.pdf](http://www.department.dotag.wa.gov.au/files/Human_Rights_Report_chapter1.pdf)
- <sup>15</sup> Op cit, Robertson, G. (2009), p.97.
- <sup>16</sup> Kirby, M. (2009). *Reflections on Law Reform and the High Court*. Alternative Law Journal, Vol 34. No 1, 2009.
- <sup>17</sup> Op, cit. Robertson (2009) p.8.
- <sup>18</sup> Op, cit. Robertson (2009) p.47.
- <sup>19</sup> Op, cit. Robertson (2009) p.8.
- <sup>20</sup> McGarrity, N. (2009). *Errors in the anti-charter campaign: the need for public education about human rights*. Alternative Law Journal, Vol 34. No 1, 2009.
- <sup>21</sup> Ibid.
- <sup>22</sup> Dworkin, R. (1990). *A Bill of Rights for Britain*. Chatto & Windus, UK. Cited in Robertson, G. (2009). *The Statute of Liberty: How Australians can take back their rights*. Vintage Books: Sydney, Australia, p.43.
- <sup>23</sup> Op, cit. Robertson (2009) p.66
- <sup>24</sup> Williams, G. (2004). *The Case for an Australian Bill of Rights: Freedom in the War on Terror*. Sydney, UNSW Press.
- <sup>25</sup> South Africa Government Information Website. Available: <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>
- <sup>26</sup> Ibid.
- <sup>27</sup> Ibid.
- <sup>28</sup> PIAC (2009), Advice to MHCC, p.5
- <sup>29</sup> Ibid
- <sup>30</sup> Op, cit. Robertson (2009) p.47.
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- <sup>39</sup> Op cit. HREOC (2009).

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<sup>42</sup> Op, cit. Robertson (2009), p.160.  
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<sup>44</sup> PIAC (2009), Advice to MHCC, p.8.