

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

**by the City of Darebin, Victoria**

**June 2009**

The City of Darebin makes this contribution to the debate on a National Bill of Rights Charter ("National Charter") based on the understanding that human rights are important and worth protecting, and that Australia would benefit from a National Charter in several ways – in particular from greater understanding of rights within the community and also enhanced protection for individuals and groups from rights breaches.

At this time Council does not have a particular view whether human rights legislation should take the form of a Bill or a Charter of Rights.

The City of Darebin has had the experience - unique to Victorian public authorities only - of operating within the *Charter of Human Rights and Responsibilities Act 2006* ("Victorian Charter"). Darebin was one of the first local councils to respond to the Charter and was commended for its work and leadership in the two reports on the progress of the Charter, prepared for the government by the Victorian Equal Opportunity and Human Rights Commission.

Since the beginning of 2008 Council has worked to ensure our systems, policies, decision-making and legislative processes comply with the rights contained in the Charter. While we acknowledge we are only at the start of what will be a long-term process, we agree it has been a worthwhile and valuable one to date. Our experiences in implementing the Charter inform many of the recommendations made in this submission.

### **Question 1: What human rights should be protected and promoted?**

#### **Charter rights**

The Victorian Charter explicitly protects twenty human rights drawn from recognised civil and political rights and imposes a legal obligation on public authorities to comply with the Charter, act in a way that is consistent with the human rights in the Charter and take human rights into account in their daily operations. In these ways, the twenty rights are both protected and promoted.

Council recognises that human rights are interdependent, indivisible and mutually enforcing. To this end,

Council recommends that a National Charter include legal protection of the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community.

Council acknowledges that a progressive introduction of rights into a National Charter may be a more practical approach. This follows the model of the Victorian Charter, in which a schedule of review dates provides for five-yearly operational

review and update of the Charter. Currently, a review of the operation of the Charter is mandated for 2011. This review must include consideration of whether additional human rights should be included, such as the rights contained in the *International Covenant on Economic Social and Cultural Rights* (ICESCR), the *Convention of the Rights of the Child* (CROC) and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). It will also consider the inclusion of social and economic rights, and the right to self-determination for indigenous peoples.

Council recommends that the National Charter works towards the progressive protection of all human rights of all people.

Council recommends that the twenty civil and political rights in the Victorian Charter be incorporated at a minimum into the National Charter.

Council also recognises that of the twenty civil and political rights in the Victorian Charter, several are of particular relevance and importance to local government. These include the rights associated with public / civil participation:

- Peaceful assembly and freedom of association – which upholds the rights to individuals to gather together in order to exchange, give or receive information, to express views and to conduct a protest or demonstration.
- Freedom of movement – which protects the right of an individual to move without physical or procedural restraint within Victoria.
- Take part in public life – which affirms the right of every person in Victoria to contribute to and exercise a voice in relation to the public life of the state. This ensures all people have the opportunity to contribute to the political process and the public institutions that govern various aspects of their lives.
- Freedom of expression - - which affirms the right of all people to hold an opinion, and the right to expression, protecting an individual's right to seek, receive and express information and ideas of all kinds.

As a provider of an extensive range of programs and services to the community - such as meals on wheels, home care, respite, children's services, disability support services, leisure and multicultural support services - Council recognises that the following rights are critical to our work with the community:

- Protection of families and children – which recognises the fundamental importance of family in the social fabric of society and aims to protect and nurture the family unit. This also affirms the right of all children to protection that is in their best interests.
- Privacy and reputation – which protects people from interferences on their privacy, home, correspondence and reputation.
- Cultural rights – which affirms the right of all people to enjoy their culture, to practice or declare their religion, and to use their language, either alone or with others who share their background. These rights function to ensure not only the survival, but also the development of minority cultures and identity.

- Protection from cruel, inhuman or degrading treatment – which ensures people (and particularly, vulnerable people) are treated with care, respect and dignity.

### **Rights in existing international Covenants**

Council recognises that Australia has ratified and accepted obligations under all of the primary international human rights treaties, including the two main human rights treaties:

- the International Covenant on Civil and Political Rights
- the International Covenant on Economic, Social and Cultural Rights Council

In addition to these core covenants, Australia is party to five of the six international treaties created to ensure the specific recognition and protection of particular groups and human rights:

- International Convention on the Elimination of all Forms of Racial Discrimination
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

Australia is not yet party to the Protection of the Rights of All Migrant Workers and Members of their Families.

The treaties listed above are international conventions which impose binding obligations on the states that become a party to it. Council recognises that many of the rights contained in these conventions are enshrined in Australian domestic law.

However it is of concern that not all human rights contained in these covenants are protected by existing domestic law. This creates an untenable and unfair situation, resulting in people who experience rights violations falling between the cracks and an uneven, inconsistent handling of the causes of discrimination.

### **Indigenous Rights**

In relation to the rights of Indigenous Australians, Council believes that an amendment to the Australian Constitution to recognise the existence and importance of Australia's Indigenous population - and to require that laws do not discriminate on the basis of race - would provide a strong basis for rights recognition. However Council recognises and appreciates the difficulties with achieving Constitutional amendments. As an alternative,

Council recommends the explicit recognition of Australia's Indigenous people in a National Charter by:

- recognising Indigenous peoples in the preamble
- recognising the right of Indigenous peoples to effective participation in matters that affect their rights
- recognising the specific rights of Indigenous peoples to their lands, languages, culture and traditional knowledge, among other inherent rights.

Council commends the recent adoption of the *United Nations Declaration on the Rights of Indigenous Peoples (Declaration)* by the United Nations General

Assembly and commends the Australian Government on its subsequent statement of support for the *Declaration*. The *Declaration* affirms the 'minimum standards for the survival, dignity and well-being' of Indigenous peoples.

Council notes the human rights and freedoms particularly relevant to Indigenous peoples include the right to:

- an adequate standard of living, including adequate food, clothing and housing
- the highest attainable standard of physical and mental health
- be free and safe from violence
- self-determination (which can include a guarantee of full, free and effective participation in all aspects of public life, particularly government decision-making)
- recognition and protection of traditional lands, territories and resources
- enjoyment of culture and use and preservation of languages, and to not be subjected to forced assimilation or destruction of culture
- be treated equally under the law.

Council acknowledges that there are clear differences between the experiences of Indigenous and non-Indigenous people in Australia across all indicators of quality of life. Further, Indigenous peoples have also suffered from the limited recognition and protection of their culture, languages and rights and ownership of land and resources.

A National Charter which minimised human rights violations, provided remedies and required government decision-making to be informed by human rights considerations – would provide critical protection to Indigenous peoples and improve the formulation of future laws, policies, decisions and services affecting them.

Council recommends that a National Charter be developed in a way which makes it a powerful tool for fostering a stronger human rights culture in Australia, by promoting greater understanding and respect between Australians – in particular Indigenous and non-Indigenous people.

### **Emerging rights**

In the area of emerging rights – which include the right to a clean environment, the right to affordable and appropriate housing, the right to feel safe and the right to an adequate income – Council agrees that these rights are difficult to protect in law. However Council also argues that these are sometimes the rights which are most relevant and important to people in their day to day lives.

Council has taken a leadership role in the area of environmental sustainability. Council believes that human rights provide a powerful point of reference for identifying and addressing some of the issues faced by people in relation to climate change and the environment in Australia. These impacts are likely to include:

- The right to an adequate standards of living and health – impacted by decreased food production, right to clean drinkable water, and an increase in the range and intensity of diseases
- The right to life – as climate change is predicted to threaten life both directly and indirectly, through extreme weather, diminishing access to safe drinking water and an increase in disease.
- Climate Change and Indigenous Australians – as climate change will likely impact on the health and existence of land – impacting on the right to participate in and strengthen Indigenous cultural life due to the intrinsic link to land of Australian indigenous culture. The economic and health status of remote indigenous communities is also likely to worsen as a result of climate change.

As focus on climate change continues to be viewed primarily through an ecological or economic lens, there appears to be little recognition of the social and human rights impacts of climate change.

Council recommends that a National Charter include a mechanism for examining and including emerging rights as they become easier to understand, measure and assess. This would form part of an overall review and update process for a National Charter.

## Question 2: Are rights sufficiently protected?

### The current situation

Council recognises that human rights do not have consistent and comprehensive legal protection in Australia. There is no comprehensive statement of rights in Australia that operates as a minimum standard for the protection of rights. Many basic rights remain unprotected; others are covered in piecemeal fashion by an assortment of laws. In addition, most of the current protections could be relatively easily removed (such as those protected by statutory or common laws) or are not enforceable (such as international human rights laws that have not been incorporated into domestic law).

Council acknowledges that Australia does have a broad range of domestic legislation that recognises the human rights instruments to which Australia is a signatory. This includes the Racial Discrimination Act 1975 (*Cth*), The Sex Discrimination Act 1984 (*Cth*), the Disability Discrimination Act 1992 (*Cth*) and the Human Rights and Equal Opportunity Commission Act 1986 (*Cth*). Also the *ad hoc* protection of several rights offered through the Australian Constitution and the principles of Common Law which enshrine some human rights.

However the current situation does not, in Council's view, represent the optimal model for human rights protection. It is noteworthy that despite being a party since 1990, the United Nations Human Rights Committee ("UNHRC") has found seventeen separate human rights violations in Australia under the International Covenant on Civil and Political Rights. This alone suggests that it international treaties are not sufficient protection of human rights for Australians.

It is not clear whether a National Charter would have prevented these seventeen violations occurring. However as a party to these treaties, Council believes that a National Charter should reflect the rights contained in each and all of them.

Basic rights such as the right to life, the right to protection from torture, the right to vote and everyone's right to equality before the law are not currently protected by domestic law at the federal level.

### **The Australian Human Rights Commission (formerly the "Human rights and Equal Opportunity Commission")**

The Australian Human Rights Commission ("AHRC") was established as a national, independent statutory body in 1986. Its role is to administer a range of acts such as the Racial Discrimination Act 1975. It is also responsible for improving understanding, respect and protection of human rights in Australia, focusing particularly on issues relating to gender, race, disability, age and Indigenous Australians.

The AHRC reports to the Australian Government on failures to meet its international human rights standards under the treaties it has ratified. However it cannot force the government to act on its recommendations, nor can it provide redress to individuals or groups who have been affected by the failure to meet human rights standards. Its power is limited largely by the will of the government of the day.

This restriction on the power of the AHRC means it cannot consistently offer effective advocacy and support to people in Australia experiencing discrimination. Similarly it cannot comprehensively monitor government for human rights breaches.

However, Council sees the AHRC as the most appropriate body to take on the important role of promoting, administering and overseeing a National Charter. Its role needs to be expanded and strengthened. The AHRC needs to take a leadership role in educating Australians about human rights, human responsibilities and the links between rights and a socially inclusive community.

Council recommends the expansion of role, responsibilities and resourcing of the AHRC to more fully monitor and promote a National Charter in the Australian community and provide monitoring, expertise and resources to government, similar to the role of the Victorian Equal Opportunity and Human Rights Commission.

### **Question 3: How can we extend protection of rights?**

Given that the current protection of human rights under Australian law is currently ad hoc and piecemeal (as established in section 2 above), Council believes that a National Charter would provide the most comprehensive protection of the greatest range of rights.

Council recommends the adoption of a National Charter of Human Rights.

The preferred model would be a Charter which protects all human rights of all persons in Australia and provides mechanisms for complaint and redress when human rights breaches occur.

As already discussed in response to Question 1, in lieu of providing this expansive protection of rights, Council recommends that graded or progressive protection of human rights be considered (as per the Victorian Charter model).

There are several issues which Council believes need careful consideration in the formulation of a National Charter:

- Its enforceability as a rights protecting and promoting instrument. Currently there are only minimal accountabilities placed on public authorities to implement the Victorian Charter. While this is an approach that is more likely to be acceptable to governments, Council believes that it must be supported by a strong system of reporting and monitoring to ensure its effectiveness.
- The relationship between the Victorian Charter and a National Charter. The legal and practical relationship needs to be as clear and as unambiguous as possible; ideally a National Charter should strengthen the Victorian Charter and vice versa.

### **Human Rights and Public authorities**

Public authorities are the executive arm of government and government service delivery. To this end, all public authorities should be required to both act compatibly with human rights and give proper consideration to human rights when making decisions and implementing legislation. This is the obligation imposed by the Victorian Charter on public authorities.

Council recommends that a National Charter should bind all Commonwealth public authorities. Such public authorities should be required to both act compatibly with human rights and give proper consideration to human rights when making decisions and implementing legislation.

### **A Human Rights and Social Inclusion Framework**

After 12 months of working on Charter implementation, Council is now working on the development of a human rights and social inclusion framework. This brings together the thinking behind the Social Inclusion agenda of the current Rudd government and connects it to the work we are doing within Council to implement the Victorian Charter. Clearly there are natural synergies between the two approaches; Council views human rights as a 'value-add' to its social inclusion work.

Council anticipates that the framework will guide its future work by embedding human rights considerations further into thinking, decisions and actions, and build a culture of human rights in Darebin's diverse community.

Council is drawing on the experience and literature of the United Kingdom in our thinking and modelling of this framework, and recognises that this is pioneering work in Australia.

Council is considering the British Institute for Human Rights' human rights framework as a basis for the framework. Its five features provide a powerful lens through which Council can view and shape its work:

- The explicit use of human rights values and legal standards in policy, planning and service delivery
- Ensuring clear accountability throughout the organisation in achieving this
- Empowering staff and community members with knowledge, skills & commitment to realising human rights
- Enabling meaningful participation of all key stakeholders in identifying human rights issues
- Non-discrimination and prioritising attention to those groups whom we know are particularly vulnerable to human rights breaches.

The universal nature of human rights provides a compelling basis for Council's work in creating and fostering socially inclusive communities. Moreover, local governments across Australia are ideally positioned to undertake this work due to their ability to impact the environmental, economic, employment, cultural and social wellbeing of residents.

Ultimately, a human rights and social inclusion framework will consolidate, reinforce and continually improve Council's work in public service delivery and outcomes.

Council recommends that a National Charter include resources and support to public authorities and community organisations to implement a human rights based approach.

Council recommends that a National Charter note the synergies between human rights and social inclusion.

### **Human rights in decision-making**

Council hopes that a National Charter would (at a minimum) require human rights to be considered in decision making of government departments and public authorities.

A National Charter can improve the quality of all laws by making the consideration of human rights a part of all law-making and policy development processes. This can happen most effectively by:

- requiring Parliament to scrutinise all new laws for potential infringements of people's human rights;
- requiring Ministers and their departments to respect human rights when developing policy, implementing laws and making decisions; and
- requiring courts to interpret all legislation (as far as practicable) in accordance with the National Charter.

Council bases this opinion on its own experience in Victoria. Council has developed a 'Charter Checklist' to its guide decision making and ensure decisions are scrutinised against the Victorian Charter rights at an early stage. The checklist is now a component on triple bottom line reporting in Council reports,

and officers must assess their recommendations to Council against the Victorian Charter. This is a relatively simple but effective way of embedding human rights considerations in decision-making, and ensures that any restrictions on rights are well reasoned and justified.

Council recommends that a National Charter require the consideration of human rights in the decision making processes of all public authorities at state and national level.

### **Human rights in service delivery**

Human rights can be used to guide the planning and delivery of government and community services to the community.

Council recognises that as human rights are universally acknowledged and agreed standards, they can be used as principles or benchmarks for laws, policies, practices, services and programs. A National Charter should, as the Victorian Charter has done, require public authorities to consider human rights in service delivery.

As human rights principles become a basis for service delivery, this will work to promote better understanding of rights in the community.

Council recognises that it is often the most vulnerable and marginalised people who have the highest interaction with public services, and are also more likely to experience rights violations. The British Institute of Human Rights has collected evidence on the actual impacts of a human rights approach in service delivery in the UK – impacts include more efficient and holistic public policy, more flexible, responsive and individualised and ‘consumer friendly’ social services and more empowered service users.

Council recommends that a National Charter provide a foundation for the consideration of human rights in public service delivery.

### **Protecting vulnerable people by addressing disadvantage**

As mentioned above, Australia’s most socially and economically marginalised people are the most vulnerable to human rights violations.

Council has greatly appreciated the Victorian Charter’s inclusion of the right to recognition and equality before the law, particularly section 8(4) which ensures that certain acts of ‘positive discrimination’ are not construed as breaching the Charter. This makes it permissible for Council to take measures which aim to redress historic discrimination against an underprivileged group. Council recommends that such a section be included in a National Charter.

In addition, Council recognises that important advocacy and support is provided to vulnerable groups through positions such as Commissioners. The position and work of the current Aboriginal and Torres Strait Islander Social Justice Commissioner demonstrates this.

Council recommends the appointment of Commissioners to represent the interests of vulnerable groups, as part of the National Charter. These positions would complement and add to the work already being done by the Aboriginal and Torres Strait Islander Social Justice Commissioner

The Darebin Aboriginal and Torres Strait Islander Consultative Committee recently called for the establishment of a Social Justice Commissioner in Victoria, and for the first Commissioner appointed to this position to be an Indigenous person.

### **A human rights culture**

While already touched on throughout this submission, Council wishes to emphasise the importance of building a human rights culture within the Australian community. A particular strength of a human rights approach is that it brings everyone in. It's not about them-and-us – it's about me, them and us! Human rights are not about a hierarchy of rights or giving more to some groups than others; they are about respect and responsibility for all. The universal nature of human rights provides a compelling basis for Council's work - and the work of all governments and public authorities - in creating and fostering inclusive communities.

Council recommends that a National Charter establish the rationale and process for building a human rights culture in the Australian community, and provide resources to support this work.