

**Promoting and protecting
women's human rights in Australia**

**A submission coordinated by the WomenSpeak
Alliance and endorsed by leading women's
organisations**

to the

National Human Rights Consultation

5 June 2009

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About this submission

This submission was coordinated by the WomenSpeak Alliance. The submission has been endorsed by 39 organisations and nine individuals (listed in the following section), some but not all of whom are members of WomenSpeak. Endorsements were sought from within the WomenSpeak Alliance and from potential supporters more broadly.

Merrindahl Andrew prepared the submission with input from WomenSpeak members and others. The contributions of the following people are gratefully acknowledged: Shivaun Inglis; Kate Lappin; Louise Allen; Simone Cusack; Sheila Byard; Sandy Miller; Vivi Koutsounadis; Edwina MacDonald; Melba Marginson; Margaret Smith; Marian Sawyer; Kate Marsh; Anne Barber; Susan Harris-Rimmer; Raina Hunter; Sandy Miller; Caroline Lambert; Jennifer Strauss; Lydia George; Women With Disabilities Australia; Women's Health Victoria; Kathy MacDermott; Margaret Thornton; Olivia Ball; the representatives of WomenSpeak member organisations who participated in the WomenSpeak forum on 10 February 2009; and all the other people who read and discussed the submission within their own committees and networks. Apologies to anyone mistakenly omitted from this list.

The WomenSpeak Alliance is one of four National Women's Alliances funded by the Australian Government's Office for Women to undertake consultations on issues affecting women. The WomenSpeak Alliance focuses on:

- human rights;
- the involvement of young women and ensuring a youth voice in policy work;
- inclusion and representation of the diversity of women in Australia and their different life experiences;
- networking and strengthening women's organisations, groups and gatherings through sharing resources, information and experience; and
- participating in federal policy issues as they arise.

The WomenSpeak Alliance includes nearly 40 non-government national women's organisations such as membership based groups, peak bodies, industry groups, faith based organisations, service providers and internationally focused organisations. More information about WomenSpeak is available online at <http://www.ywca.org.au/projects/womenspeak/index.php>

Endorsing organisations and individuals

This submission has been endorsed by the following 39 organisations and nine individuals:

Organisations

Aboriginal Legal Rights Movement

Association of Women Educators

Australian Church Women

Australian Federation of Medical Women

Australian Federation of University Women

Australian Reproductive Health Alliance

Australian Women's Health Network

Body Image and Disordered Eating Network of South Australia

Business and Professional Women Australia

Children by Choice

Conflict Resolving Women's Network Australia

International Women's Development Agency

Muslim Women's National Network Australia

National Council of Jewish Women in Australia

National Council of Single Mothers and Their Children

National Foundation of Australian Women

National Rural Women's Coalition

National Union of Students Women's Department

Network of Immigrant and Refugee Women of Australia

Pan Pacific and South East Asia Women's Association Australia

Project Respect

Public Health Association of Australia

Salvation Army

Soroptimist International Australia

UNIFEM Australia

Union of Australian Women

United Nations Association of Australia Status of Women Network

Unity of Ethiopians in WA

Victorian Immigrant and Refugee Women's Coalition

VIEW Clubs of Australia (Voice, Interest and Education of Women)

WAVE (Women in Adult Education and Training)

Women's Electoral Lobby Australia

Women's International League for Peace and Freedom (Australian Section)

Women's Legal Centre (ACT and Region)

Women's Legal Services Australia

Women's Legal Services NSW

Women's Legal Service Victoria

Women with Disabilities Australia

YWCA Australia

Individuals

Olivia Ball

Carmen Hannaker

Dr Susan Harris-Rimmer

Raina Hunter

Dr Caroline Lambert

Professor Marian Sawer AO

Anne Sgro

Dr Jennifer Strauss AM

Professor Margaret Thornton

Glossary

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CPR	Civil and Political Rights as set out in the International Covenant (ICCPR)
CSW	UN Commission on the Status of Women
ESCR	Economic, Social and Cultural Rights as set out in the International Covenant (ICESCR)
HRA	'Human Rights Act' meaning the legislation that may be created for Australia as an outcome of the current consultation
AHRC/HREOC	Australian Human Rights Commission, previously known as the Human Rights and Equal Opportunity Commission.
NGO	'Non-government organisation' or organisations of civil society.
NTER	Northern Territory Emergency Response
PIAC	Public Interest Advocacy Centre (Sydney)
RDA	Race Discrimination Act
UNHCHR	Office of the UN High Commissioner for Human Rights

The major United Nations human rights treaties to which Australia is obliged to give expression in domestic law (together with the associated protocols) are:

- International Covenant on Economic Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention on the Rights of the Child (CRC)
- Convention on the Prevention and Punishment of the Crime of Genocide
- Convention relating to the Status of Refugees and Protocol relating to the Status of Refugees
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime

Also relevant are the four Geneva Conventions on war, to which Australia is a party.

Consolidated recommendations

Violence against women

We recommend that the government ensure that the final action plan on violence against women, in its objectives and its name, commits to eliminating violence, not only reducing it. (Rec. 1)

We recommend that the government ensure that the final action plan on violence against women, and the measures taken to implement it, treat violence against women as a social problem based on discrimination and gender power imbalances. (Rec. 2)

We recommend that the government fund the action plan on violence against women adequately and in a sustained way to reflect the extent of the problem. (Rec. 3)

We recommend that the government include in the action plan on violence against women sustained education and community awareness campaigns that challenge the cultural acceptance of sexualised violence and build on existing programs to promote healthy, respectful relationships. (Rec. 4)

We recommend that the government ensure the action plan on violence against women includes the provision of comprehensive, accessible services, especially by increasing funding to women's non-government organisations that have expertise in assisting women who have experienced violence. (Rec. 5)

We recommend that the government ensure that the action plan on violence against women includes increased funding to women's non-government advocacy organisations that work to make women's right to be free of violence a reality. (Rec. 6)

We recommend that the government include within the action plan on violence against women the further development of legal responses, including enforcement and remedies, which are nationally consistent and recognise violence against women as a human rights violation. (Rec. 7)

We recommend that the government include in the action plan on violence against women clear targets, benchmarks and timeframes against which the results of the plan can be evaluated, and which can be used to review it. (Rec. 8)

Parental leave

We ask the government to introduce legislation to the parliament to establish its paid parental leave scheme, and to endeavour to have this legislation passed, before the next federal election. (Rec. 9)

The legislation establishing a paid parental leave scheme should provide equal entitlements to same-sex couples. (Rec. 10)

We recommend that the government monitor the effects of the paid parental leave scheme and make improvements over time, such as reserved paternity leave and superannuation for parents on leave. (Rec. 11)

Northern Territory Emergency Response

We recommend that the government reinstate the application of the Racial Discrimination Act to the Northern Territory Emergency Response and accelerate the necessary changes to the Northern Territory Emergency Response to ensure compliance with the Racial Discrimination Act. (Rec. 12)

We recommend that the government adopt and enact the Aboriginal and Torres Strait Islander Social Justice Commissioner's 'ten-point plan' for achieving the transition from emergency intervention to community development. (Rec. 13)

We recommend that the government immediately commit to redressing critical infrastructure, housing and staffing shortfalls in the prescribed areas as a matter of basic human rights (not as a 'deal' in which Aboriginal people must cede land rights to the Commonwealth). (Rec. 14)

Constitutional change

We recommend that the government commit to and embark on the process of amending the constitution to properly recognise Aboriginal and Torres Strait Islander peoples as the first peoples of this land. (Rec. 15)

We recommend that the government commit to and embark on the process of amending the constitution to affirm the principles of equality and non-discrimination. (Rec. 16)

Rights to be included in a Human Rights Act

We recommend that the Human Rights Act include a commitment to respect and to ensure to all individuals the rights recognized in the International Convention on Civil and Political Rights, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (Rec. 17)

The Human Rights Act should include economic, social and cultural rights as well as civil and political rights. (Rec. 18)

The Human Rights Act should provide the same level of protection for economic, social and cultural rights as for civil and political rights. (Rec. 19)

The Human Rights Act should contain the positive right to equality before the law, in addition to the other rights listed. (Rec. 20)

The Human Rights Act should contain, in addition to the right to non-discrimination, an explicit statement that the rights and freedoms referred to in it are guaranteed equally to male and female persons. (Rec. 21)

We recommend that fulfilment of the Convention on the Elimination of All Forms of Discrimination Against Women be listed among the objects of the Human Rights Act, together with the other human rights conventions to which Australia is obliged to give expression in domestic law: the International Covenant on Economic Social and Cultural Rights; the International Covenant

on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention and Protocol relating to the Status of Refugees; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. (Rec. 22.)

We recommend that Australia's Human Rights Act include sex, gender identity, sexual orientation, pregnancy and marital status as unlawful grounds for discrimination. (Rec. 23)

We recommend that the Human Rights Act include race among the unlawful grounds for discrimination. (Rec. 24)

We recommend that the Human Rights Act include disability as an unlawful ground for discrimination. (Rec. 25)

We recommend that the Human Rights Act include age as an unlawful ground for discrimination. (Rec. 26)

We recommend that the Human Rights Act include religious belief as an unlawful ground for discrimination and vilification. (Rec. 27)

The exemptions granted to 'religious bodies' and 'private educational institutions' from the existing obligations to not discriminate should not be replicated in any new Act, and should be removed from existing anti-discrimination legislation. (Rec. 28)

The Human Rights Act should include the responsibility of the government to take positive action to eliminate discrimination, including discrimination on the basis of sex. (Rec. 29)

The Human Rights Act should include recognition that discrimination occurs not only where women are treated differently from men but also where they experience disproportionately negative effects from being treated the same (Rec. 30).

We recommend that the Human Rights Act should include recognition of intersectional discrimination (Rec. 31).

The systems established by the Act should operate as a flexible framework that is able to respond to individual experiences of multiple forms of injustice (Rec. 32).

The Human Rights Act should include an explicit statement acknowledging that women have the right to be free of gender-based violence, both as a form of discrimination and as a fundamental rights violation. (Rec. 33)

The Human Rights Act should include the right to bodily and psychological integrity, including the right to make decisions concerning reproduction and the right to security in and control over one's body (Rec. 34).

The right to bodily and psychological integrity should include the right of children (regardless of disability) not to be sterilised. (Rec. 35)

The Human Rights Act should recognise that all women have a right to:

- obtain accurate information about abortion;
- make their own decision about abortion free of coercion or pressure;
and
- access safe, legal and affordable abortion services. (Rec. 36)

We recommend that the Human Rights Act include a statement committing the government to act in a way that will not reinforce and will instead work to eliminate prejudices based on damaging stereotypes, including sex stereotypes. (Rec. 37)

We recommend that the Human Rights Act include the right of individuals and couples, on an equal basis with others, to found and maintain a family, and to freely choose the number, timing and spacing of their children. (Rec. 38)

We recommend that the Human Rights Act include a statement that the right to health incorporates the right to sexual and reproductive health, of which abortion services are a part. (Rec. 39)

We recommend that the Human Rights Act include a statement that the right to health incorporates the right to enjoyment of and control over one's own sexuality and sexual function. (Rec. 40)

We believe that 'public morality', or any similar formulation, is too ill-defined as a ground for restriction of the right to freedom of expression, and that clarification and justification of all permitted grounds is necessary. (Rec. 41)

The Human Rights Act should state that the right to freedom of expression does not extend to advocacy of hatred that is based on gender, race, ethnicity, or religion, and that constitutes incitement to cause harm. (Rec. 42)

We recommend that the Human Rights Act include an explicit statement that the right to life applies to a person from the time of birth, as in the ACT's Human Rights Act. (Rec. 43)

The rights guaranteed in the Human Rights Act should be guaranteed for all people in Australia, not only for citizens. (Rec. 44)

Form and operation of the Human Rights Act

The government should give serious consideration to establishing a model, similar to the Canadian Charter, which gives courts the power to 'strike down' legislation that is inconsistent with the Human Rights Act, with the proviso that Parliament could specify that a given piece of legislation is valid notwithstanding the fact that it violates the Charter rights. (Rec. 45)

The Human Rights Act should provide for the option of conciliation of complaints about human rights abuses, as well as recourse to legal action in court. (Rec. 46)

The model adopted should include a Joint Standing Committee on Human Rights to examine the human rights implications of legislation. (Rec. 47)

The Human Rights Act should provide for the Australian Human Rights Commission to conduct systemic inquiries on its own initiative, with the government required to provide a response to parliament within six months. (Rec. 48)

The Australian Human Rights Commission should have the power to examine the impact of laws on human rights on its own initiative and the government should be required to provide a response to parliament within six months. (Rec. 49)

As in the ACT, the federal Human Rights Act should give the Australian Human Rights Commission the role of conducting audits and training of government departments. (Rec. 50)

The Australian Human Rights Commission should be adequately resourced to perform all its functions in a way that provides the best possible access for people who believe their human rights have been violated. (Rec. 51)

The Human Rights Act should place a positive responsibility on government authorities to act in ways that are consistent with the Act and to protect the rights listed in the Act. (Rec. 52)

There should be some provision for recognised group action in bringing human rights violations to the attention of authorities and prompting inquiries, conciliation and court action. (Rec. 53)

The Human Rights Act should not contain 'loopholes' that give the Executive even more leeway than is already meant to be provided in the dialogue model. (Rec. 54)

The Australian Human Rights Commission's power to conduct systemic inquiries and review laws (as noted above) and the government's obligation to provide written responses, should apply to all rights, including economic, social and cultural rights, as well as civil and political rights. (Rec 55)

We recommend that the Commonwealth government investigate ways to extend human rights protection at the State and Territory level, through features of the Commonwealth system and/or through leadership and negotiation with State and Territory governments. (Rec 56)

We believe that the Human Rights Act should apply to Australian public authorities when they act outside Australia, as well as within it. (Rec. 57)

The Human Rights Act should outline the principles under which any limitation of rights is to occur. (Rec. 58)

The Sex Discrimination Act

We recommend that the government implement the recommendations of the 2008 Senate committee inquiry into the Sex Discrimination Act, commencing in 2009. (Rec. 59)

The government should implement the Senate Committee's recommendation that the Australian Human Rights Commission be provided with extra resources to perform any additional functions that flow from the government's response to the inquiry. (Rec. 60)

Regardless of whether the government proceeds with the proposed reforms to the Sex Discrimination Act, additional funding should be provided to the Sex Discrimination Commissioner and the Sex Discrimination Unit, to ensure that existing responsibilities for complaints-handling, inquiries and public education are adequately resourced. (Rec. 61)

While we believe the move to an Equality Act deserves serious consideration, it is critical that the other recommendations of the inquiry, which would significantly improve the capacity of the Sex Discrimination Act and the Sex Discrimination Commissioner to address gender inequality, are implemented as soon as possible and certainly not deferred to be part of the broader process. (Rec. 62)

We agree with and urge the government to act on the Senate Committee's recommendation that the Human Rights and Equal Opportunity Commission Act should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then the Australian Human Rights Commission or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, the Human Rights Commission or the court should have to consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated. (Rec. 63)

We believe any process of ultimately aggregating the anti-discrimination Acts must ensure 'levelling-up' rather than 'levelling-down'. (Rec. 64)

Integrating human rights into policy development: women's policy machinery

We recommend that the government, in consultation with women's non-government organisations, the Office for Women, the Sex Discrimination Commissioner and other key stakeholders, reinstate key elements of the women's policy machinery. (Rec. 65)

We urge the government to reinstate and continue to develop a rigorous, comprehensive gender budgeting system. (Rec. 66)

We recommend that the federal government increase its support for women's non-government advocacy. (Rec. 67)

Introduction

It is often said that a society can be judged by how well it treats its most vulnerable members. The National Human Rights Consultation is an opportunity to consider not only how, as a society, we treat vulnerable people but also to what extent we are prepared to put in place institutional protections and to eliminate the systemic power imbalances that make people vulnerable to abuse and mistreatment in the first place.

In Australia, as elsewhere, one of the most pervasive power imbalances is between women and men. The struggle to secure for women in Australia a more equal basis of citizenship and opportunity has continued alongside other social justice movements for over a century, with many significant achievements. This submission argues that the proposed introduction of a national instrument to protect human rights has the potential to be another significant step in this process. The submission also draws attention to other ways in which the Federal Government could address human rights abuses and strengthen the position of women, in parallel with the process of developing a national instrument. This approach reflects the understanding that the substantive fulfilment of human rights requires dedicated action in diverse arenas and should build on the considerable work that has already been undertaken, rather than assuming that a new form of high-level recognition of rights will be sufficient.

In the context of the global economic downturn, the goal of developing Australia's human rights protections may be seen by some as a non-essential task that should be deferred until better economic times. Our view is that the financial crisis should not deter the government from improving human rights protections. As the UN Human Rights Council recently stressed, 'global economic and financial crises [do] not diminish the responsibility of national authorities in the realization of human rights...'¹

Despite Australia's relative wealth, as in all countries there is poverty, abuse and discrimination. This continuing fact diminishes Australia as a whole. While people who are relatively well-positioned have a reasonable chance of avoiding serious

¹ UN Human rights Council, 'Human Rights Council Concludes Special session on Impact of Global Economic and Financial Crises on Human Rights', Press Release, 23 February 2009, <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/68B23EF8AD14281EC1257566004856F4?opendocument>

harm from the global downturn, those who are already suffering and struggling are those most likely to experience further hardship. Women are relatively more likely than men to experience poverty, abuse and discrimination. Women are overrepresented among the poor, the disabled, the marginally employed, the sick, the isolated and those whose responsibilities for caring for others exclude them from community life. As well as being constrained from fulfilling their economic, social and cultural rights, people in these groups are most vulnerable to abuses of their civil and political rights. For these reasons, the human rights impacts of the global financial crisis will fall most heavily on women.² This is particularly true in developing countries, but is also true of wealthier countries such as Australia. For example, when a woman forced to accept work as a casual due to family responsibilities then loses her job because she is easier to dismiss than a permanent worker, this represents serious weaknesses in Australia's capacity to genuinely realise human rights.

While the global financial crisis is a significant short- and medium-term problem, human rights protection and the creation of a fairer society are long-term and ongoing concerns, especially for low-income women and those subjected to discrimination on the basis of race, sexuality, disability, age and other characteristics. These women in particular should not have to wait longer for better protection of their human rights. The development of a usable and enforceable overarching Australian national mechanism, such as a Human Rights Act or Charter, is an important step that the government can take now to improve the protection and promotion of human rights, both in the short-term and long-term. This step needs to be accompanied by other changes, such as amendments to strengthen the Sex Discrimination Act and the Australian Human Rights Commission, and efforts to support the variety of ways that individuals and groups already work to protect rights in Australia.

We strongly urge the government to use this opportunity to implement a national human rights protection mechanism. Thanks to the National Consultation and to NGO activity, public support for a Human Rights Act or Charter is currently high: according to a poll conducted for Amnesty International in March 2009, over 80 per cent of Australians support the introduction of a new law to protect human rights, with 85 per cent of these supporters believing the introduction of such legislation should

² Commission on the Status of Women, Fifty-third session, New York, 2–13 March 2009, 'Interactive Expert Panel, Emerging issue: The gender perspectives of the Financial Crisis', Written statement submitted by Mayra Buvinic (World Bank).

be a high priority for the government.³ This represents strong momentum in community opinion, providing the government with a valuable opportunity to introduce a national instrument for rights protection. Even the most well-developed community education program would be no substitute for a legislated or constitutional mechanism for protection of human rights.

Alongside this overarching consultation on human rights, considerable work has recently gone into the development of a National Action Plan on violence against women and children, and proposals to strengthen the Sex Discrimination Act. These processes are underpinned by a common rights-based approach and a commitment to substantive equality. They recognise that welfare-based and complaints-driven systems need to be replaced by approaches that recognise discrimination and violence against women as fundamental human rights violations requiring systemic redress. We welcome this shift in thinking. We encourage the government to use this opportunity to extend its gender equality work and to continue the process of grounding this work more firmly in principles of substantive equality and human rights.

As argued in the submission below, substantive protection of human rights relies upon the capacity of non-government organisations, statutory bodies, community groups and individuals generally to engage in a critical and constructive way with government on rights issues, and to do their work more generally. The government should, therefore, work on providing the necessary opportunities and resources for such engagement and rights activities by actors beyond the Parliament and Executive.

While this submission provides a women's rights perspective to the Consultation, we acknowledge that in reality women have many characteristics as well as their gender, some of which make them vulnerable to human rights abuses on other or interrelated grounds, such as race, disability, age and sexuality. We recognise that some men, too, experience violations of their human rights on these grounds. For these reason we urge the Committee to give close and sympathetic consideration to submissions from groups who advocate in relation to these issues for the rights of people generally, and women in particular. The commitment to gender equality represented

³ Amnesty International Australia, 'Majority support the introduction of a law to protect human rights in Australia', 12 March 2009, <http://www.amnesty.org.au/news/comments/20460/>

in this submission is part of our broader commitment to the principle that all people should have the capacity and opportunity to fully participate in society.

We also urge the Committee to keep in mind that, in practice, it is multi-faceted individuals who are subjected to discrimination and human rights abuses, and such abuses are often not easy to categorise. The human rights protection system should, as far as possible, recognise intersectional discrimination and should keep the focus on redressing wrongs, rather than categorising them to fit into rigid criteria.

The present submission focuses on five areas: addressing already-identified human rights problems; a Human Rights Act for Australia; the Sex Discrimination Act; and integrating human rights principles into policy development and implementation by rejuvenating women's policy machinery. Recommendations are given in bold type.

Women's human rights in Australia: Already-identified needs

While we support the introduction of a national Human Rights Act and advocate other changes to rights protection machinery, we stress that the government has the capacity now to address specific rights issues affecting women that have already been identified, for example in the CEDAW Committee's concluding comments on Australia over recent decades. The current government has already begun to take action to address some of these issues, such as violence against women. Over time, various government and non-government bodies have developed relevant services, networks, advocacy documents and knowledge on issues that are fundamental to women's human rights. Whether or not a Human Rights Act is introduced, these issues will require continued attention and work on a detailed level. Therefore, one way to strengthen women's human rights in Australia is by intensifying activity and taking different approaches in various policy areas that have already been identified as problematic. Here, we focus on three human rights issues: violence against women; paid parental leave; and the Northern Territory Emergency Response.

Violence against women

As discussed further below, violence against women has been recognised as a violation of human rights. Importantly, while the offenders are typically individual men in a private capacity, international legal cases and the guidelines published by international bodies have made it clear that governments have a responsibility to act to prevent, punish and eradicate violence against women.⁴ That is, national governments are not permitted to hide behind the fact that the violence against women is ostensibly not state-sponsored. In April 2009, the UN Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR), commented on the need for Australia to strengthen its efforts to eliminate violence against women, especially violence perpetrated against

⁴ A number of cases on gender-based violence have been brought before the CEDAW committee under the Optional Protocol, which enables individuals from signatory states to make complaints about rights violations to the committee once domestic avenues have been exhausted. One case led to the committee conducting an extensive inquiry into gender-based violence in Mexico, which was found to have breached its CEDAW obligations. The committee subsequently made a number of recommendations to the Mexican state. See Bal Sokhi-Bulley, 'The Optional Protocol to CEDAW: First Steps', *Human Rights Law Review*, 2006 6(1):143-159. Indian jurisprudence has applied CEDAW in deciding on cases of violence against women (in *Vishaka and others v State of Rajasthan* [1997]), as has Canadian jurisprudence (in *R v Ewanchuk* [1999]). See also CEDAW committee comment #19.

Aboriginal and Torres Strait Islander women.⁵ In its most recent comments on Australia in 2006, the CEDAW committee likewise expressed concern about Australia's high rates of violence against women and the low rates of reporting, prosecutions and convictions in sexual assault cases. The Committee called on Australia to act on these issues.

The Australian government has made a positive step in establishing a process to develop a national action plan to address violence against women. On 29 April 2009, the National Council to Reduce Violence against Women and their Children released its *Time For Action* report, and the government issued its response. In responding, the government committed to several actions recommended by the Council, including a national telephone and online crisis service and a respectful relationships program for young people. However, as Amnesty International has noted, the \$75 million allocated in the 2009-10 Budget over four years for the *Time For Action* program and other measures on violence against women is still well below the \$120 million over the next four years that would be required just to match the per capita average set by the Council of Europe.⁶ It also represents no increase on the funding provided over the previous four-year period, despite the government's public commitment to implementing a new national action plan.⁷

The positive steps taken so far now need continued support from government, in terms of political will and resources, towards the release of the National Plan in 2010.

We recommend that the government ensure that the final action plan on violence against women, in its objectives and its name, commits to eliminating violence, not only reducing it. (Rec. 1)

⁵ Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding observations — Australia', Ninety-fifth session, Geneva 16 March–3 April 2009, 2 April 2009

⁶ Amnesty International Australia, 'Budget delivers mixed messages on rights', media release, 13 May 2009, <http://www.amnesty.org.au/news/comments/20974/>

⁷ The 2005–2009 figures are from Amnesty International Australia, 'National Plan must increase funding to services cautions Amnesty International', media release, 29 April 2009. The funding amounts were not made clear in the Budget papers and other government statements, which has made it difficult for women's advocacy organisations to analyse the government's commitments in the area. See Australian Budget 2009-10, *Budget Paper No. 2*, Part 2: Expense Measures, Families, Housing, Community Services and Indigenous Affairs, http://www.budget.gov.au/2009-10/content/bp2/html/bp2_expense-13.htm; 2009 *Women's Budget Statement*, pp. 13-14.

We recommend that the government ensure that the final action plan on violence against women, and the measures taken to implement it, treat violence against women as a social problem based on discrimination and gender power imbalances. (Rec. 2)

We recommend that the government fund the action plan on violence against women adequately and in a sustained way to reflect the extent of the problem. (Rec. 3)

We recommend that the government include in the action plan on violence against women sustained education and community awareness campaigns that challenge the cultural acceptance of sexualised violence and build on existing programs to promote healthy, respectful relationships. (Rec. 4)

We recommend that the government ensure the action plan on violence against women includes the provision of comprehensive, accessible services, especially by increasing funding to women's non-government organisations that have expertise in assisting women who have experienced violence. (Rec. 5)

We recommend that the government ensure that the action plan on violence against women includes increased funding to women's non-government advocacy organisations that work to make women's right to be free of violence a reality. (Rec. 6)

We recommend that the government include within the action plan on violence against women the further development of legal responses, including enforcement and remedies, which are nationally consistent and recognise violence against women as a human rights violation. (Rec. 7)

We recommend that the government include in the action plan on violence against women clear targets, benchmarks and timeframes against which the results of the plan can be evaluated, and which can be used to review it. (Rec. 8)

Paid parental leave

On 10 May 2009 the federal government announced that it would include a paid parental leave scheme in the 2009–10 Budget, to commence in 2011. This welcome announcement brings Australia a big step closer to meeting its human rights obligation to provide a universal paid maternity leave scheme. For this the government deserves congratulations.

To view the government's announcement in context, it must be remembered that international human rights bodies have long criticised Australia's inaction on paid maternity leave. For example, in 2006 the CEDAW Committee expressed concern about Australia's failure to introduce a universal scheme, a failure that meant Australia had to opt out of the relevant sections of international human rights agreements. For many years Australia was, with the USA, one of only two OECD countries that lacked a comprehensive statutory paid parental leave scheme. This long overdue measure is therefore very welcome, especially after speculation in the lead-up to the Budget that the paid parental leave might be found to be 'unaffordable.' It is heartening to see the government make a commitment to investing in the social infrastructure necessary to support women's workforce participation. The long-awaited announcement of a paid parental leave scheme also demonstrates the importance of advocacy by non-government women's organisations and unions, who have campaigned on this issue for more than thirty years.

There are several particularly positive features of the scheme announced by the government. One is the inclusion of self-employed people, casuals, and contractors. Another is the expansive eligibility criteria that establish the minimum amount of time in paid work required in the previous year at approximately one day per week for 10 months over the previous 13 months. Together, such features mean that the scheme will benefit many lower-income women who would otherwise be unfairly excluded.

We recognise that the legislation will take some time to prepare and that a thorough public education campaign in advance of the scheme's introduction will help businesses and employees to understand the scheme. However, we believe the scheme could be effectively introduced in less than 18 months, and it is concerning that its scheduled introduction falls after the next election. We are therefore pleased that the Minister for Families, Housing, Community Services and Indigenous Affairs

has said that legislation for parental leave would pass through the parliament before the next federal election.⁸ **We ask the government to introduce legislation to the parliament to establish its paid parental leave scheme, and to endeavour to have this legislation passed, before the next federal election. (Rec. 9)**

The legislation establishing a paid parental leave scheme should provide equal entitlements to same-sex couples. (Rec. 10)

The government has stated that a review of the scheme will be held within three years after its introduction. This review will provide a useful opportunity to consider how the scheme might be improved. For example, one area in which the scheme might be strengthened is its provision for paternity leave. Although the scheme as announced allows for leave to be shared between parents, the government decided at this time not to take up the Productivity Commission's recommendation for an additional two weeks of paternity leave reserved for the father (or same sex partner) who shares in the daily primary care of the child. Another area in which improvements to the scheme could be investigated is the provision of superannuation for people on parental leave. This is a particularly important issue given the high risks of poverty facing women in old age, due to their reduced ability to accrue retirement savings while care-giving. **We recommend that the government monitor the effects of the paid parental leave scheme and make improvements over time, such as reserved paternity leave and superannuation for parents on leave. (Rec. 11)** In sum, it is very positive that the government has committed to putting in place a scheme to fulfil this basic human right and we look forward to its implementation.

⁸ 'Govt defends parental leave start date', *The Age*, 11 May 2009, <http://news.theage.com.au/breaking-news-national/govt-defends-parental-leave-start-date-20090511-azjo.html?page=-1>

Northern Territory Emergency Response

Among the most serious human rights violations of recent years have been elements of the Northern Territory Emergency Response (NTER), which was initiated by the former government and continued, in large part unchanged, by the current government. The stated intention of the NTER was to stop violence against women and children in remote Aboriginal communities in the NT. However, some of the methods used have been draconian and have had negative effects. For example, the blanket imposition of 'welfare quarantining' has made it difficult for some people to buy food and other essentials. Welfare quarantining has been applied in a humiliating manner to women who are community leaders and who have worked for decades to improve the conditions for their families and to eliminate violence. Targeting this treatment de facto on the basis of race has added to the negative stereotyping and stigma experienced by Aboriginal people, in a way that is anathema to human rights principles. The conflict of the NTER with human rights principles is exemplified by the fact that the former government suspended the Racial Discrimination Act (RDA) from operating in relation to the NTER. The present government has not yet rectified the suspension, and this was noted with particular concern by the UN Human Rights Committee in April 2009. On 21 May 2009, the Minister for Indigenous Affairs announced that the government would introduce legislation in October 2009 to reinstate the RDA in the Northern Territory. However, it is not yet clear that the changes proposed in the government's discussion paper on moving to a 'sustainable development' phase in the NTER would meet the government's responsibilities under the RDA and under the United Nations Declaration on the Rights of Indigenous Peoples, for which the government issued a formal statement of support on 3 April 2009.⁹

We recommend that the government reinstate the application of the RDA to the NTER and accelerate the necessary changes to the NTER to ensure compliance with the RDA. (Rec. 12)

⁹ Department of Families, Housing, Community Services and Indigenous Affairs, *Future Directions for the Northern Territory Emergency Response - Discussion Paper*, 21 May 2009, http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx

We recommend that the government adopt and enact the Aboriginal and Torres Strait Islander Social Justice Commissioner's 'ten-point plan' for achieving the transition from emergency intervention to community development.¹⁰ (Rec. 13)

We recommend that the government immediately commit to redressing critical infrastructure, housing and staffing shortfalls in the prescribed areas as a matter of basic human rights (not as a 'deal' in which Aboriginal people must cede land rights to the Commonwealth). (Rec. 14)

¹⁰ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Ten point plan to improve NT intervention', Media Release, Monday, 31 March 2008.
http://www.humanrights.gov.au/about/Media/media_releases/2008/36_08.html

Constitutional change

We support the introduction of a Human Rights Act for Australia. While we believe that a constitutionally entrenched model would give the strongest possible protections for human rights, we understand that the government has indicated it will only accept a legislative, and not a constitutional model. We therefore make several recommendations below about the way a Human Rights Act on the 'dialogue' model should operate.

We believe, however, that even if a constitutional Bill of Rights is rejected in favour of a 'dialogue' model at this stage, constitutional change is necessary to properly recognise Aboriginal and Torres Strait Islander peoples and to affirm the principles of equality and non-discrimination. **We recommend that the government commit to and embark on the process of amending the constitution to properly recognise Aboriginal and Torres Strait Islander peoples as the first peoples of this land. (Rec. 15) We recommend that the government commit to and embark on the process of amending the constitution to affirm the principles of equality and non-discrimination. (Rec. 16)**

A Human Rights Act for Australia

Rights to be included in a HRA

The recommendations presented below are not meant exhaustively to list all those rights that should be included in a HRA, but to highlight certain rights that are presently under-protected, with serious consequences for women. In particular, it is taken as understood that any HRA would, as a matter of course, include the rights enshrined in the ICCPR, as do (generally) the Victorian, ACT, UK, NZ and Canadian instruments (with a few exceptions). Following Article 2 of the ICCPR, **we recommend that the HRA include a commitment to respect and to ensure to all individuals the rights recognized in the ICCPR, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.**¹¹ (Rec. 17)

Economic, Social and Political Rights

Many of the inequalities and forms of discrimination that women face are economic, social and cultural. Without economic, social and cultural (ESC) rights, an Australian Human Rights Act would be silent on many of the issues of most concern to women. **The Human Rights Act should include ESC rights as well as civil and political rights. (Rec. 18) The HRA should provide the same level of protection for ESC rights as for CCP rights. (Rec. 19)** The acknowledged challenges of achieving equal enjoyment of human rights should not deter us from committing to this goal. We recognise that the capacity for a society to protect the human rights of all people is in some cases restricted by available resources and other practical limitations. However, it is also true that this reasoning is often used as an excuse for allowing gross inequality to continue. There is also a greater overlap between the two sets of rights than is often understood. Accordingly, the Human Rights Act should treat seriously the government's responsibility to protect economic, social and cultural rights.

Increasingly, it is being recognised that although there are challenges involved in applying ESC rights, this does not mean such rights cannot be applied in legal decisions and policy-making. In the UK, for example, ESC rights principles have

¹¹ International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/law/ccpr.htm>

been successfully used to argue that local education authorities could not legitimately rely on 'financial reasons' to restrict access to education through home tutoring for a sick child.¹² In a case involving an Irish woman who could not afford the legal services necessary to obtain a court order against her abusive husband, the European Court of Human Rights noted that many civil and political rights (such as the right to access to the courts) have social and economic implications, which can impose positive obligation on the state, in this case the obligation to provide legal aid.¹³

Equality before the law

The Human Rights Act should contain the positive right to equality before the law, in addition to the other rights listed. (Rec. 20)

Separate free-standing statement on gender equality

The Human Rights Act should contain, in addition to the right to non-discrimination, an explicit statement that the rights and freedoms referred to in it are guaranteed equally to male and female persons. (Rec. 21) Such a provision is included in Canada's Charter of Rights and Freedoms. This would encourage a gendered perspective to be applied to the other rights guaranteed by the document. An example internationally of such application is the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women (the Belem do Para convention),¹⁴ which identifies violence against women as an act that infringes several of women's rights, including: the right to personal liberty and security; the right not to be subjected to torture; the right to have the inherent dignity of her person respected and her family protected; the right to equal protection before the law and of the law; the right to simple and prompt recourse to a competent court for protection against acts that violate her rights; and the right to associate freely. Without a gender-sensitive perspective, it is likely that violence

¹² *R v. East Sussex County Council ex parte Tandy*, House of Lords, [1998] 2 All ER 769, cited in Centre on Housing Rights and Evictions (COHRE), 'Leading Cases on Economic, Social and Cultural Rights: Summaries', Working Paper No. 3, ESC Rights Litigation Programme, January 2006, Geneva: COHRE, pp. 50-51. See

http://www.cohre.org/store/attachments/COHRE_Leading%20ESC%20Rights%20Cases.pdf.pdf

¹³ *Airey v Ireland*, European Court of Human Rights, 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305, cited in COHRE, 'Leading Cases on Economic, Social and Cultural Rights', p. 14.

¹⁴ Inter-American Convention on the Prevention, Punishment and Eradication of Violence against women (the Belem do Para convention)
<http://www.oas.org/cim/english/convention%20violence%20against%20women.htm>

against women will continue to be seen in narrow terms as a separate 'women's issue', rather than as a way in which women's rights more generally are restricted.

Objects of the Human Rights Act to refer to CEDAW

In order to ensure that the Human Rights Act is interpreted and implemented in a way that is consistent with the body of law developed under CEDAW, it is essential that the HRA make explicit reference to CEDAW. **We recommend that fulfilment of CEDAW (the Convention on the Elimination of All Forms of Discrimination Against Women) be listed among the objects of the Human Rights Act, together with the other human rights conventions to which Australia is obliged to give expression in domestic law: the International Covenant on Economic Social and Cultural Rights; the International Covenant on Civil and Political Rights; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Rights of Persons with Disabilities; the Convention on the Rights of the Child; the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention and Protocol relating to the Status of Refugees; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. (Rec. 22.)**

One of the reasons it is important for women that all of these conventions are expressly listed is because they include important statements elaborating rights not specified in detail in CEDAW. For example, Article 6 of CPRD confirms that:

1. States Parties recognize that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.
2. States Parties shall take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in [CPRD].

Right to be free of discrimination

Sex, gender and related grounds

Clearly, one of the central rights in any human rights instrument is the right to be free of discrimination. All comparable human rights instruments include sex (or gender) as an unacceptable ground of discrimination. However, it has often proven difficult for women to use this right to achieve substantive equality with men. We make several recommendations to try to improve the prospects for substantive gender equality in an Australian Human Rights Act. First, the Act should adopt the most expansive possible list of relevant grounds, to make it clear that any gender-based discrimination is unacceptable. For example, South Africa's Bill of Rights includes gender, sex, pregnancy and marital status as grounds. **We recommend that Australia's HRA include sex, gender identity, sexual orientation, pregnancy, family responsibilities and marital status as unlawful grounds for discrimination. (Rec. 23)**

Race and related grounds

Like sex, race is included in all comparable human rights instruments as an unacceptable ground for discrimination. Under Australia's *Racial Discrimination Act 1975 (Cth)* discrimination on the basis of race incorporates discrimination on the basis of colour, descent (ancestry), national origin, ethnic origin and, in some cases, immigrant status. The Human Rights Commission recently produced a report that documents disturbing contemporary manifestations of racism, particularly against Aboriginal and Torres Strait Islander peoples, Muslim and Arab Australians, African Australians, and refugees.¹⁵ As discussed elsewhere in this submission, many women are subjected to discrimination on the intersecting grounds of race and gender together (as well as, sometimes, other characteristics). To strengthen existing efforts to combat discrimination in all its complex forms, the HRA must prohibit race discrimination. **We recommend that the HRA include race among the unlawful grounds for discrimination. (Rec. 24)**

¹⁵ Report of the Australian Human Rights Commission to the Office of the High Commissioner of Human Rights in preparation for the Durban Review Conference, March 2009, http://www.hreoc.gov.au/racial_discrimination/conferences/Durban2009/Report_Preparation_Durban2009.html

Disability

Women with disabilities are among those under-protected by existing human rights systems in Australia. As Women With Disabilities Australia has recently argued:

There are more than two million women with disabilities in Australia and they continue to be one of the most excluded, neglected and isolated groups in our society, experiencing widespread and serious violations of their human rights, as well as failures to promote and fulfil their rights. They remain largely invisible and voiceless, ignored by national policies and laws, even though they face multiple forms of discrimination, structural poverty and social exclusion... Their issues and needs are often overlooked within services and programs. They remain marginal to social movements designed to advance the position of women, and the position of people with disabilities. Negative stereotypes from both a gender and disability perspective compound the exclusion of women with disabilities from support services, social and economic opportunities and participation in community life...¹⁶

It is therefore crucial that, among other measures, the right to freedom from discrimination on the basis of disability be fully recognised in the HRA. **We recommend that the HRA include disability as an unlawful ground for discrimination. (Rec. 25)**

Age

Older women and young women often face discrimination based on their age as well as their sex. Discriminatory attitudes and stereotypes in the workplace and in other social spaces create particular barriers against young women and older women achieving equal enjoyment of their human rights. While the United Nations Declaration on Human Rights does not explicitly list age as one of the grounds on which discrimination is unacceptable, the principle of non-discrimination on the basis of age (as an 'other status' in Article 2) is well-developed in international human rights law. This principle has recently been recognised in Australian anti-discrimination legislation (with the *Age Discrimination Act 2004* [CW]). **We recommend that the HRA include age as an unlawful ground for discrimination. (Rec. 26)**

¹⁶ Women With Disabilities Australia, Submission in response to the Australian Government's Discussion Paper: 'Developing a National Disability Strategy for Australia' (December 2008), <http://www.wwda.org.au/wwdandssub08.htm>

Religion

Other gaps in rights protection have been identified in a joint submission by community legal centres including Women's Legal Services NSW to the Human Rights Commission's inquiry into Freedom of Religion and belief in the 21st Century.¹⁷ The legal centres identified several areas in which Australia's laws fail to fulfil our treaty obligations in this area, including the absence of protection federally and in some State jurisdictions against discrimination and vilification on the basis of religious belief. Accordingly, **we recommend that the HRA include religious belief as an unlawful ground for discrimination and vilification. (Rec. 27) The exemptions granted to 'religious bodies' and 'private educational institutions' from the existing obligations to not discriminate should not be replicated in any new Act, and should be removed from existing anti-discrimination legislation. (Rec. 28)**

How the Act could protect against discrimination

As the overarching women's anti-discrimination convention, CEDAW is an important point of reference. It provides an account of how the human right to non-discrimination can be used to achieve substantive equality, including by establishing that governments have a responsibility to actively promote gender equality and not only to not discriminate. **The Human Rights Act should include the responsibility of the government to take positive action to eliminate discrimination, including discrimination on the basis of sex. (Rec. 29)**

CEDAW also provides some guidance on how to interpret discrimination, clarifying that sex discrimination can be both direct and indirect, that is, arising both from different treatment on the basis of sex, and same treatment that has different effects because of sex. The issue of how to deal with direct and indirect discrimination is covered by the recommendations of the Senate Inquiry into the Sex Discrimination Act (discussed below), but here it is sufficient to note that **the Human Rights Act should include recognition that discrimination occurs not only where women are treated differently from men but also where they experience disproportionately negative effects from being treated the same (Rec. 30)**. This recognition could occur in the preamble text and could take the form of a more

¹⁷ The submission was jointly made by Women's Legal Services NSW, the Public Interest Advocacy Centre, the Kingsford Legal Centre, the Inner City Legal Centre, and the Redfern Legal Centre. See <http://www.piac.asn.au/news/bulletins/211.html>

general statement about direct and indirect discrimination, applying to all forms of discrimination, not only sex discrimination.

Finally, there is no substantive right to be free from discrimination as long as human rights mechanisms are set up in a way that does not recognise that a person may be subject to discrimination based on several aspects of their identity at once, for example race, gender and disability. This form of rights violation is known as intersectional discrimination. Where human rights mechanisms do not recognise intersectional discrimination, people whose rights have been violated are often forced to artificially compartmentalise their experience and to choose action against only one form (or basis) of discrimination. This neglects the extent of complainants' grievances and provides an inadequate indication of the complex systemic issues involved. For example, if trafficking in women is seen only as a gender issue, then the factors of race and poverty are not addressed. **We recommend that the Human Rights Act should include recognition of intersectional discrimination (Rec. 31). The systems established by the Act should operate as a flexible framework that is able to respond to individual experiences of multiple forms of injustice (Rec. 32).** Further specific recommendations about the Sex Discrimination Act and the other Commonwealth anti-discrimination acts are included below.

Right to be free of gender-based violence

As the CEDAW committee has made clear, gender-based violence is a form of discrimination that limits women's achievement of other human rights.¹⁸ As such, it deserves special mention within the Human Rights Act, even though it can be interpreted from the other standard provisions, together with the CEDAW committee's comments. The widespread nature of violence against women, and the appallingly slow pace at which it is being eliminated (if at all), demands that the HRA do more than refer to all individuals' right to 'liberty and security of the person.' It is also important for women to be able to see that issues that concern them directly are addressed in the HRA: many women would not immediately identify the violence they experience as violations of the 'liberty and security of the person.'¹⁹

¹⁸ CEDAW committee general comment 19.

¹⁹ Caroline Morris, 'Remember the Ladies': A Feminist Perspective on Bills of Rights', *Victoria University of Wellington Law Review*, 2002, Volume 33, No. 3&4, <http://austlii.law.uts.edu.au/nz/journals/VUWLR/2002/18.html>

The Human Rights Act should include an explicit statement acknowledging that women have the right to be free of gender-based violence, both as a form of discrimination and as a fundamental rights violation. (Rec. 33)

We recognise that there may be objections to the inclusion of this right, because it is unusually specific. Women's right to be free of gender-based violence is not explicitly included in CEDAW, or in the ICCPR or ICESCR. Neither is it explicitly included in any of the comparable national human rights instruments (e.g. in New Zealand, the UK, Canada or South Africa) or Australian sub-national Acts (ACT or Victoria). Yet few people, in 2009, would disagree with the proposition that women have a human right to live free of gender-based violence. Some may argue that the other general human rights protections are sufficient: the long history of the struggle to achieve recognition of gender-based violence as a crime demonstrates that general rights and laws have not been adequate. The government states, and has taken action showing, that it is committed to eliminating violence against women. To cement this commitment at the highest level, it should include the explicit right of women to be free of gender-based violence in the Human Rights Act.

Right to bodily and psychological integrity — including reproduction

The Human Rights Act should include the right to bodily and psychological integrity, including the right to make decisions concerning reproduction and the right to security in and control over one's body (Rec. 34). We recognise that control over reproduction is a controversial matter on which community opinions differ. However, this fundamental human right is accepted by the vast majority of the Australian community. For example, in relation to abortion, in 2003 around 81% of Australians were pro-choice, and only nine per cent definitely anti-choice, with women of child-bearing age overwhelmingly in favour of the right to choose an abortion.²⁰

The right to bodily and psychological integrity should include the right of children (regardless of disability) not to be sterilised. (Rec. 35)

²⁰ Katharine Betts, 'Attitudes to abortion in Australia: 1972 to 2003', *People and Place*, vol. 12, no. 4, 2004, pp. 22–27.

Access to reproductive health services

To ensure that women genuinely have the capacity to make decisions concerning their reproduction, they must have access to a range of reproductive health services.

The HRA should recognise that all women have a right to:

- **obtain accurate information about abortion;**
- **make their own decision about abortion free of coercion or pressure;**
and
- **access safe, legal and affordable abortion services. (Rec. 36)**

Gender stereotyping

Negative gender stereotypes (together with racial and other stereotypes) are at the root of much of the discrimination and mistreatment experienced by women. CEDAW requires state parties to take action to eliminate prejudices based on gender stereotyping. In the HRA, this could take the form of a more general responsibility on government to work to eliminate prejudices based on stereotypes. **We recommend that the HRA include a statement committing the government to act in a way that will not reinforce and will instead work to eliminate prejudices based on damaging stereotypes, including sex stereotypes. (Rec. 37)**

Right to found a family and to decide on the number, timing and spacing of children

The right to found a family is included in the ICCPR, and in the UK Human Rights Act (by reference to the European Convention on Human Rights). Alongside this right, other principles have been developed to encapsulate the human rights dimensions of family formation. In 1994 the Cairo International Conference on Population and Development (ICPD) agreed that people should have the right to freely choose the number, timing and spacing of their children. This has since been adopted as a fundamental principle of development and population policy. The capacity to make decisions about when to have children, and how many to have, is of particular importance for women, who are most affected by the responsibilities of childbirth and child-rearing. Accordingly, **we recommend that the HRA include the right of individuals and couples, on an equal basis with others, to found and maintain a family, and to freely choose the number, timing and spacing of their children. (Rec. 38)**

Right to health — to include sexual and reproductive health

As noted above, we believe it is important for the HRA to include ESC rights as well as CP rights. One of the ESC rights is the right to ‘enjoyment of the highest attainable standard of physical and mental health.’ As the Committee on Economic, Social and Cultural Rights has stated, the highest attainable standard of health requires control over one's health and body, including sexual and reproductive freedom.²¹ **We recommend that the HRA include a statement that the right to health incorporates the right to sexual and reproductive health, of which abortion services are a part. (Rec. 39)** (See also Rec.s 34 and 36 above.)

Right to health — to include sexuality

Women have historically been deprived of sexual autonomy and inculcated with confusing and damaging beliefs about their sexuality. For example, there are still widespread sexual double standards that applaud promiscuous men and stigmatise promiscuous women, while warning women that they must be sexually available to sustain a secure relationship with a man. These beliefs and stereotypes, which are especially problematic for young women, limit women's capacity to enjoy the highest attainable standard of physical and mental health. As noted above, control over one's own sexuality is recognised by the Committee on Economic, Social and Cultural Rights as an essential part of health.²² Therefore, **we recommend that the HRA include a statement that the right to health incorporates the right to enjoyment of and control over one's own sexuality and sexual function. (Rec. 40)**

Freedom of expression — limitations

While freedom of expression is clearly a fundamental right that should be included in any overarching rights mechanism, most such mechanisms limit this right in certain ways. For example, the Victorian Charter provides for this right to be limited ‘to respect the rights and reputation of other persons’, or ‘for the protection of national security, public order, public health or public morality.’

²¹ Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), Twenty-second session Geneva, 25 April-12 May 2000 Agenda item 3, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: ‘The right to health is not to be understood as a right to be *healthy*. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom...’

²² Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000).

We believe that ‘public morality’, or any similar formulation, is too ill-defined as a ground for restriction of the right to freedom of expression, and that clarification and justification of all permitted grounds is necessary (Rec. 41). The HRA should state that the right to freedom of expression does not extend to advocacy of hatred that is based on gender, race, ethnicity, or religion, and that constitutes incitement to cause harm (Rec. 42), as in the South African Bill of Rights.

Right to life and when life begins

We recommend that the HRA include an explicit statement that the right to life applies to a person from the time of birth, as in the ACT’s HRA. (Rec. 43) This definition is necessary to prevent the resulting national HRA from being used to undermine already-established legal protections recognising women’s right to choose an abortion. It also reflects a considerable body of international and domestic law.²³

Rights of non-citizens

The rights guaranteed in the Human Rights Act should be guaranteed for all people in Australia, not only for citizens. (Rec. 44) As shown by Australia’s record in immigration and refugee matters over recent decades, it is non-citizens who are most vulnerable to abuses of their human rights. We accept that voting rights may be reserved to citizens.

Possible objections

We acknowledge that some of the rights that we have proposed for inclusion in the HRA go beyond the basic covenants and are not included in either the Victorian or ACT Acts. However, the rights proposed generally express established principles of international human rights law, drawing on the comments of the relevant human rights committees and major international agreements. It is also worth remembering that the model generally proposed for Australia (and supported here) is a legislative model of the ‘dialogue’ form, the government having already ruled out a constitutional model. A HRA on this model is already relatively weak and non-binding on government, relying more on persuasion and advocacy than on enforcement and

²³ See for example, the review provided in Victorian Law Reform Commission. 2008. *Law of Abortion: Final Report*. Melbourne: Victorian Law Reform Commission, pp. 158–159; pp. 163–171.

remedies. This matter is discussed further in the next section. Given that this is the case, a government committed to such goals as eliminating violence against women should willingly take on the challenge of being 'bound' by additional rights principles.

Form and operation of the Human Rights Act

The model

As mentioned above, we believe that a constitutionally-entrenched instrument would give the strongest possible protection for human rights. At the least, we believe that **the government should give serious consideration to establishing a model, similar to the Canadian Charter, which gives courts the power to ‘strike down’ legislation that is inconsistent with the Human Rights Act, with the proviso that Parliament could specify that a given piece of legislation is valid notwithstanding the fact that it violates the Charter rights. (Rec. 45)**

Because the government has ruled out the possibility of constitutionally entrenched rights protection, the model most widely discussed in relation to this consultation, and supported by significant bodies such as the Law Council, is the ‘dialogue’ model. The dialogue model is a legislative model similar to the systems operating in the UK and in the ACT and Victoria. Broadly speaking, the ‘dialogue model’ retains ultimate decision-making power in the parliament, but requires legislation to be checked for compatibility with the Human Rights Act, requires courts to interpret legislation in terms of the HRA and issue statements of incompatibility where such interpretation is not possible, and provides a limited right of remedy through the courts for individuals whose human rights have been breached by public authorities.

We support the introduction of such a model but have concerns about its scope and enforceability. First, in terms of its scope, the dialogue model only covers rights violations by public authorities. Yet many, perhaps most, of the violations experienced by women are at the hands of private individuals and cultural attitudes. Domestic violence is an important example. It is for this reason that CEDAW obliges state parties to not only refrain from violating women’s rights, but also to proactively take measures to prevent private individuals from committing human rights abuses against individuals. More generally, it must be recognised that the cases in which the HRA will directly affect outcomes are only the ‘tip of the iceberg’ of the many individual situations in which a human rights perspective could be applied. For these reasons, the human rights protection system should be made as accessible, broad and well-resourced as possible. Government should also recognise and support the many ways in which equality and empowerment are already being promoted, including where these are not called ‘human rights.’

In terms of enforceability, the dialogue model leaves the ultimate power in the hands of the parliament. While this can be seen as being more democratic, it must be remembered that the strong party discipline in Australian politics means that in most practical cases, control of the human rights system will effectively rest with the Executive (the review and watchdog functions of the Senate notwithstanding). Because human rights protections are dependent on resourcing and political commitment (witness the Human Rights Commission's experience of budget cuts) the power of the Executive is even stronger.

Admittedly, among the strengths of the dialogue model are that it promotes a human rights culture, and that the rights contained in the Act can be invoked in advocacy, often to good effect. Nevertheless, the potential remains for a government to abuse its strong position of power in the dialogue model, by subtle means (such as limiting funding to advocacy bodies or manipulating parliamentary processes to reduce the impact of the HRA) and not-so-subtle means (simply overriding declarations of incompatibility and proceeding with incompatible legislation).

While there would be legal remedies for those individuals whose rights are directly violated by a public authority, this avenue is only available where the authority could have acted otherwise under the law. This again reserves the bulk of the power to the parliament: that is, practically, in the Australian system, the Executive.

Because of these inherent restrictions on the dialogue model's ability to gain legal 'traction' on the operations of government (let alone beyond government) it is vital that the most stringent possible mechanisms be included in the HRA system. Many of our recommendations below are included to this end.

Recommendations on the form and operation of a legislated Human Rights Act on the dialogue model

Conciliation of complaints as well as court action

The Human Rights Act should provide for the option of conciliation of complaints about human rights abuses, as well as recourse to legal action in court. (Rec. 46) The Human Rights Commission has successfully conciliated complaints under existing human rights and anti-discrimination laws, and this would

be the logical body to conduct such conciliation under the new HRA. The conciliation option is important because the process needs to be as accessible as possible. Nevertheless, the option of formal legal action is essential and needs to be publicly-resourced to allow access to justice for low-income people. In both conciliation and legal action, the system must maintain an emphasis on the public harm of human rights violations and on the systemic power dynamics that underpin them.

Government compliance — legislation to be reviewed by parliamentary committee

The HRA should require a parliamentary committee to be established to review all legislation for compliance with human rights principles as articulated in the Act. Although this function must be supplemented by external scrutiny by courts, the Human Rights Commission and non-government advocacy organisations, it is important that the parliament as a whole, and not only the Executive, has a role in overseeing human rights protection. **The model adopted should include a Joint Standing Committee on Human Rights to examine the human rights implications of legislation. (Rec. 47)**

Human Rights Commission — systemic inquiries and examination of laws

The Human Rights Act should provide for the Human Rights Commission to conduct systemic inquiries on its own initiative, with the government required to provide a response to parliament within six months. (Rec. 48) At present the Human Rights Commission can conduct systemic inquiries but there is no obligation on the government to respond. This substantially weakens the function of such inquiries.

An essential component of the dialogue model is the examination of legislation to ensure it complies with the Human Rights Act. As well as declarations of compatibility in Parliament, and the provision for declarations of incompatibility by the courts, the model adopted should include a strong mechanism for examining the human rights implications of legislation. For this reason, **the Human Rights Commission should have the power to examine the impact of laws on human rights on its own initiative and the government should be required to provide a response to parliament within six months. (Rec. 49)**

Human Rights Commission — audits and training

As in the ACT, the federal HRA should give the Human Rights Commission the role of conducting audits and training of government departments. (Rec. 50)

This is an important way to influence departmental cultures to be more respectful of human rights, and to ensure staff are aware of their obligations.

Human Rights Commission — resourcing

The Human Rights Commission should be adequately resourced to perform all its functions in a way that provides the best possible access for people who believe their human rights have been violated. (Rec. 51)

Responsibility on government authorities to act consistently with the Act

The Human Rights Act should place a positive responsibility on government authorities to act in ways that are consistent with the Act and to protect the rights listed in the Act. (Rec. 52) As well as the remedies available to individuals at law, accountability for this responsibility should be achieved through audits and systemic inquiries as noted above.

Group action and complaints by advocates

There should be some provision for recognised group action in bringing human rights violations to the attention of authorities and prompting inquiries, conciliation and court action. (Rec. 53) Individuals often do not have the capacity to act alone, and the role of intermediary advocacy groups should be supported. This is particularly important when people are on low incomes and experiencing hardship and discrimination.

No unnecessary loopholes in parliamentary process

The Human Rights Act should not contain ‘loopholes’ that give the Executive even more leeway than is already meant to be provided in the dialogue model. (Rec. 54) For example, in the Victorian Act, section 28 lays out the requirement for legislation to be subjected to a ‘statement of compatibility’ process in parliament. But section 29 states that a failure to comply with section 28 does not affect the validity of

any Act that happens to pass through Parliament without the 'statement of compatibility' process being performed. Note here that section 28 already provides the possibility for the member proposing the Bill to issue a statement of *incompatibility*, and section 31 explicitly permits the parliament to override the Human Rights Charter in such cases. What section 29 does is ensure that there are no consequences (beyond possible embarrassment) if the parliament does not even go through the process of declaring a Bill to be compatible or incompatible. This seems unnecessarily lenient. There is no reason why the process itself should not be made a solid requirement, especially when the parliament has an override power in any case.

Review and inquiry powers for economic, social and cultural rights

The Human Rights Commission's power to conduct systemic inquiries and review laws (as noted above) and the government's obligation to provide written responses, should apply to all rights, including economic, social and cultural rights, as well as civil and political rights. (Rec 55)

Gaps in coverage at State and Territory level

We note that the dialogue model as widely discussed would still leave some significant gaps in rights protection at the State and Territory level. This is because only Victoria and the ACT have introduced human rights instruments that apply to State/Territory public authorities and legislation. **We recommend that the Commonwealth government investigate ways to extend human rights protection at the State and Territory level, through features of the Commonwealth system and/or through leadership and negotiation with State and Territory governments. (Rec 56)**

Extra-territorial application

There is no moral justification for requiring the Australian state to adhere to human rights principles within Australia but allowing it to contravene these principles in its actions abroad. Recent global events in immigration, military conflict and international aid highlight the importance of Australia acting as a 'good global citizen'. **We believe that the Human Rights Act should apply to Australian public authorities when they act outside Australia, as well as within it. (Rec. 57)**

Limiting rights

We recognise that conflicts (real or apparent) may arise between the rights enshrined in the HRA. Such conflicts can have important consequences for women. For example, it is sometimes claimed that freedom of thought, conscience and religion should take priority over the sexual and reproductive rights of women, a proposition we reject. Because of potential conflicts such as this, **the HRA should outline the principles under which any limitation of rights is to occur. (Rec. 58)**

The Sex Discrimination Act

The *Sex Discrimination Act 1984* is one of four federal anti-discrimination acts (the others being the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*).

While the SDA has been used effectively in some individual cases, and has acted as an incentive to better practices generally, it has experienced a number of problems. Some of these relate to resourcing and limits imposed on the SDA's complaints function within the former Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission — AHRC). Others concern the provisions in the SDA itself.

As part of a review of the SDA, in 2008 WomenSpeak joined with Security4Women to make a comprehensive submission endorsed by a number of leading women's organisations. This submission suggested many ways to strengthen the Act and its implementation, including by reviewing the SDA's definitions of discrimination to give full effect to CEDAW obligations pertaining to formal equality and substantive equality. The submission also recommended that the individual complaints process overseen by the Sex Discrimination Commissioner be strengthened, and more effectively linked with measures to identify and address systemic disadvantage. The final report of the inquiry was consistent with the joint women's organisations' submission, and made many well-considered recommendations.

While the government has missed the opportunity to announce a response to the inquiry, as had been hoped, on International Women's Day, 8 March 2009 (the 25th anniversary of the passage of the SDA), it still has the opportunity to do so in the anniversary year. **We recommend that the government implement the recommendations of the 2008 Senate committee inquiry into the Sex Discrimination Act, commencing in 2009. (Rec. 59)**

Of particular importance is the issue of resourcing for the Sex Discrimination Commissioner and the staff that support her work. **The government should implement the Senate Committee's recommendation that the AHRC be provided with extra resources to perform any additional functions that flow from the government's response to the inquiry. (Rec. 60)** However, the Committee inquiry also brought to light the the serious funding cuts that

HREOC/AHRC has experienced since 1996 and the resource constraints that will increasingly limit the Sex Discrimination Commissioner's work as, under current trends, complaints are increasing. As HREOC stated in its submission to the Senate inquiry:

HREOC's appropriation revenue in 2008-09 is \$13.55 million. This is approximately 12.5% less than the budget appropriation for 2007-08. This is the greatest decrease in HREOC's budget since 1996 when HREOC's total funding base was reduced by 40% over four years.²⁴

We therefore recommend that regardless of whether the government proceeds with the proposed reforms to the SDA, additional funding should be provided to the Sex Discrimination Commissioner and the Sex Discrimination Unit, to ensure that existing responsibilities for complaints-handling, inquiries and public education are adequately resourced. (Rec. 61)

It is important that the Human Rights Consultation and whatever actions flow from it support and do not obstruct or undermine any improvements already underway to the SDA. Particularly relevant is the possibility raised by the Consultation Committee that the SDA could be 'streamlined' with the other three anti-discrimination acts to create a single Act. The women's organisations' submission recommends a 'review of the entire anti-discrimination framework in Australia with a view to the adoption of an Equality Act', looking to the lessons of the UK, where such an Act brought together the various anti-discrimination acts in a new Act with increased powers and resources. The final report of the committee inquiry recommends that the AHRC conduct a public inquiry on the merits of such an amalgamation, to report by 2011. **While we believe the move to an Equality Act deserves serious consideration, it is critical that the other recommendations of the inquiry, which would significantly improve the capacity of the SDA and the Sex Discrimination Commissioner to address gender inequality, are implemented as soon as possible and certainly not deferred to be part of the broader process. (Rec. 62)**

One of the most important limitations of the SDA, which was highlighted by several submissions to the Senate review, is the inability of the present SDA to deal

²⁴ HREOC, Submission to the Senate Standing Committee on Legal and Constitutional Affairs Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality, p. 217.

effectively and fairly with intersectional discrimination. While the possible development of an omnibus Equality Act (discussed below) would provide an opportunity to address intersectional discrimination, more immediate action should also be taken. **We agree with and urge the government to act on the Senate Committee's recommendation that the HREOC Act should be amended to provide that, where a complaint is based on different grounds of discrimination covered by separate federal anti-discrimination legislation, then the Australian Human Rights Commission or the court must consider joining the complaints under the relevant pieces of legislation. In so doing, the Human Rights Commission or the court should have to consider the interrelation of the complaints and accord an appropriate remedy if the discrimination is substantiated. (Rec. 63)**

As well as making recommendations specific to the SDA, the women's organisations' submission suggests a number of ways the Act could be amended to make it consistent with the best features of the other anti-discrimination acts. **We believe any process of ultimately aggregating the anti-discrimination Acts must ensure 'levelling-up' rather than 'levelling-down'. (Rec. 64)**

Integrating human rights into policy development: women's policy machinery

The Consultation Committee asks us to consider how we might integrate human rights principles into policy development. We believe this is one of the most important potential areas of progress offered by the current review. We urge the government to not only introduce new systems but also to strengthen existing mechanisms by which human rights are promoted within government, including where these mechanisms do not currently go by the name of 'human rights'.

Thirty years ago, Australia led the world in the development of women's policy machinery to integrate a gender perspective in all of government's operations.²⁵ This model inspired developments in other countries and spread to all state and territory governments in Australia. The model involved a central 'hub' in the Prime Minister's/Premier's Department, and women's policy units in line departments. It was supplemented by the women's budget process, which applied a gender analysis to the budget as a whole, and to spending in all areas. This model was, for a time, effective in ensuring a gender equity perspective was present in policy development in most areas of government. Although it was not typically thought of in terms of human rights, with a human rights perspective we can see it was a powerful model of integrating human rights principles (in this case, gender equality principles) into policy development. For example, a major recent UNIFEM report points out the potential of gender budgeting as a human rights tool.²⁶

Unfortunately, women's policy machinery at the national level was largely dismantled under the former government.²⁷ The Women's Bureau in the Department of Employment (in existence since 1963) was abolished, along with policy units in other departments. The Office for Women was removed from the central Department of Prime Minister and Cabinet (to the Department of Families, Housing, Community Services and Indigenous Affairs) and was reduced in its capacity to coordinate policy work between departments. The Women's Budget Program was transformed from a powerful analytical tool to a publicity exercise. All of these changes have served to weaken the capacity for women's rights to be integrated within policy development.

²⁵ Marian Sawer, *Sisters in suits: women and public policy in Australia, 1990*, Allen & Unwin, Sydney.

²⁶ Diane Elson, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, Unifem, May 2006.

²⁷ Marian Sawer, 'The Fall of the Femocrat', in Joyce Outshoorn and Johanna Kantola (eds), *Changing State Feminism*, 2007, Basingstoke, UK: Palgrave Macmillan, pp. 20-40.

We recommend that the government, in consultation with women's non-government organisations, the Office for Women, the Sex Discrimination Commissioner and other key stakeholders, reinstate key elements of the women's policy machinery. (Rec. 65)

Two areas in particular would benefit from being strengthened. The first is gender budgeting: analysing budgets to determine their relative impacts on women, men, boys and girls in different social and economic groups. Australia was a leader in the development of gender budgeting systems, which have been taken up around the world. Unfortunately, in Australia at the federal level the process has become less rigorous in recent years as women's policy machinery generally was downgraded and as governments came to use the gender budget statement as merely an opportunity to promote budget 'highlights' for women, instead of the original purpose: to assess budget impacts through a gender analysis.

There is an opportunity now, with the growing emphasis on substantive gender equality as a human rights issue, to renew the use of this vital tool. In its most recent agreed conclusions (March 2009), the UN Commission for the Status of Women urged governments to 'promote incorporation of gender-responsive budgeting processes across all areas and at all levels'. We note that the most recent Women's Budget Statement usefully includes some analysis of how different groups of women are situated, alongside summaries of the government's initiatives. **We urge the government to reinstate and continue to develop a rigorous, comprehensive gender budgeting system. (Rec. 66)**

The second area of women's policy machinery that could be strengthened is support for women's advocacy, such as the advocacy provided through the WomenSpeak network. We note that processes are currently under way that have the potential to achieve this. Non-government advocacy organisations connect grassroots groups and communities with government processes in a way that supports human rights protection. **We recommend that the federal government increase its support for women's non-government advocacy. (Rec. 67.)**