



31 August 2011

National Human Rights Action Plan  
Baseline Study Consultation  
Attorney General's Department

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**Submission National Human Rights Action Plan  
Baseline Study Consultation Draft**

The Women's Legal Centre (ACT & Region) Inc. (WLC) welcomes the opportunity to provide comments on the consultation draft of the National Human Rights Action Plan Baseline Study. We are also grateful to the Attorney General's Department for providing such a thorough and informative document to initiate the consultation process.

The Women's Legal Centre (ACT and Region) Inc (the WLC), is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been operating in Canberra since 1996. The main areas in which we provide advice are family law, domestic violence, and employment and discrimination law. Our client group includes disadvantaged women, such as those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. Around half of the women seeking assistance from the Centre in family law matters have experienced family violence.

In our comments we will use the same headings and numbering system as in the Baseline Study. However we have placed all our recommendations of further issues that the National Action Plan could address at the end of our comments.

We have not commented on some specific areas raised in the Baseline Study, such as aged, homeless and refugee people. This is not necessarily because we agree with what is contained in the draft Baseline Study or that we do not think there are other issues that could be addressed in that area, it is simply that we feel there are other organisations better placed to provide appropriate comments.

## **Introduction**

We feel that in order to properly reflect the current position of human rights in Australia the introduction should say that the National Consultation made 31 recommendations and in recommendation 18 unequivocally stated that ‘Australia adopt a federal Human Rights Act’. We also feel that the introduction should include the fact that the National Consultation received 35 014 submissions and that 27 888 of them were in favour of the introduction of a federal Human Rights Act.<sup>1</sup>

## **Chapter one**

### **1.4 Legal protections**

It is, in our view, misleading to suggest that the common law in Australia is ‘influenced by international human rights law’, without clearly stating that, unlike most other western democracies, courts in Australia cannot apply international law unless it has been transformed by legislation into domestic law<sup>2</sup>. The fact that without a federal Human Rights Act, common law can be overridden at any time by legislation<sup>3</sup> should also explained.

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<sup>1</sup> National Human Rights Consultation summary pg XXIV

<sup>2</sup> *Nulyarimma & others v Thompson & Ors* (1999) 96 FCR 193

<sup>3</sup> Nat Human Rights consul summary pg XVII

### 1.5.3 Consolidation of anti-discrimination legislation

It is important that the consolidation of the federal anti-discrimination laws does not diminish them and that current levels of protection are maintained. As stated in the concluding observations and recommendations of the Committee on the Elimination of Racial Discrimination

*The Committee urges the State party to ensure that the review of all federal anti-discrimination laws considers the gaps in legal and constitutional protections against discrimination and that consequent harmonization does not weaken the Racial Discrimination Act. It recommends that the State party take measures to ensure that the Racial Discrimination Act prevails over all other legislation which may be discriminatory on the grounds set out in the Convention. The Committee also recommends that the State party draft and adopt comprehensive legislation providing entrenched protection against racial discrimination.*<sup>4</sup>

It is WLC's view that the consolidated Human Rights Act should also protect people not currently protected under federal discrimination law. This is in accordance with the recommendation of the Australian Human Rights Commission which states

*Federal protection from discrimination on the basis of sexual orientation and sex and/or gender identity would send a powerful message to our community regarding equality. The Commission supports the introduction of such laws, which could have a profound impact on reducing discrimination, vilification and harassment experienced by LGBTI people in Australia.*<sup>5</sup>

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<sup>4</sup> United Nations Committee on the Elimination of Discrimination against Women (CEDAW) concluding observations of the Committee on the Elimination of Discrimination against Women: Australia. Forty-sixth session, 2010, CEDAW/C/AUS/CO/7 [10].

<sup>5</sup> [http://www.hreoc.gov.au/human\\_rights/lgbti/lgbticonsult/report/section13.html](http://www.hreoc.gov.au/human_rights/lgbti/lgbticonsult/report/section13.html)

## Chapter 2

There is, in WLC's view, a biased presentation of some of the facts in Chapter 2. By way of example, the beginning of the chapter suggests that contributors in the National Consultation Report were very positive about the state of human rights in Australia. However it ignores that fact that the National Consultation Report also highlights the fact that many contributors felt that

*Three recent developments in law and government policy were repeatedly referred to as giving rise to human rights concerns: the Northern Territory Emergency Response (also known as the Intervention), the treatment of asylum seekers, and national security legislation. Many who participated in the Consultation felt that in these instances a balance between individual liberty and the public interest might not have been struck.<sup>6</sup>*

Further the constant references to the Universal Periodic Review – National Report do not make it clear that it is the Government's own document and contains the Government's own assessment of its performance on human rights. There is no reference to any of the shadow reports presented to the committee. There is little reference to the concluding observations and recommendations of the committee Universal Periodic Review of Australia which the Government has rejected in whole or in part including that Australia should:

- have substantive Federal laws that ensure equality
- amend of the *Native Title Act 1993*
- enter a formal agreement of reconciliation with Aboriginal people
- allow irregular migrants to have equal access to Australian law
- amend the *Marriage Act 1961* to recognise same-sex marriage
- introduce a Human Rights Act

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<sup>6</sup> Nat Human Rights consul summary pg XIV

### **2.1.1 Legal Assistance**

This is not in the WLC's view a correct representation of the true position of funding for legal assistance services for those who cannot afford to pay private lawyers.

As stated by David Hillard, Pro Bono Partner Clayton Utz in a letter to the editor of the Australian Financial Review this year entitled *Legal Access to Justice is Fundamental*

*.....The 2011 budget last week confirmed that last year's increase to legal aid was only one-off.....*

*Legal Aid funding levels are insufficient to resolve the access-to-justice crisis across Australia. Too many people miss out on advice and representation. Even with 2010's one off increase, the funding for legal aid remains \$20 million a year below 1997 levels .....there has been a 78 per cent reduction in the availability of legal aid for civil law matters since 1995 -1996.<sup>7</sup>*

Human rights or discrimination cases are classified by legal assistance services as civil and therefore representation in those cases is specifically reduced by the current government funding policy.

## **Chapter 3**

### **3.1 Aboriginal and Torres Strait Islander people**

#### **3.1.5 Freedom from Discrimination**

The WLC is concerned that there appears to be nothing in this section of the study that highlights the problem of the intersection of discrimination for Aboriginal women under the existing federal anti-discrimination laws. That is, that at present a complainant has to somehow work out whether she has been discriminated on the basis of her gender or her

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<sup>7</sup>[http://afr.com/p/opinion/legal\\_access\\_to\\_justice\\_is\\_fundamental\\_H2G8HSI1tYgeMffuVFIPPI](http://afr.com/p/opinion/legal_access_to_justice_is_fundamental_H2G8HSI1tYgeMffuVFIPPI)

Aboriginality. There should be an indication whether or not that particular problem will be addressed in the proposed consolidated Anti-Discrimination Act.

The WLC welcomes the fact that the government has repealed some aspects of the Northern Territory Emergency Response (NTER). However we suggest that in this section it should be made clear that income management remains in many areas of the Northern Territory and disproportionately affects Aboriginal women. As the NTER was a significant concern for contributors to the National Consultation Report we feel the comments highlighted in a recent Equality Rights Alliance report, *Documenting Women's Experience of Income Management in the Northern Territory* should be included such as:

*Women raised concerns about not asking for Centrelink help to exit abusive relationships because they don't want to be referred for Income Management.*

*Nearly three quarters of women said they do not feel safer.*

and

*There is also a perception that it is intended for Aboriginal or African migrant families.....<sup>8</sup>*

WLC feels that this section of the Baseline Study should also include the recommendation made by the Committee on the Elimination of Racial Discrimination in 2010

*The Committee urges the State party to support the proper performance of the AHRC, through adequate financing and staffing, including through the appointment of a full-time Race Discrimination Commissioner. It also recommends that the State party consider expanding the powers, functions and funding of the AHRC.<sup>9</sup>*

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<sup>8</sup> Documenting Women's Experience of Income Management in the Northern Territory July 2011, Equality Rights Alliance, Canberra, Australia

<sup>9</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination – Australia*, CERD/C/AUS/CO/15-17,2010[11]

## **3.2 Women**

The WLC is pleased that the Government has acceded to the optional protocol under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). We also feel that this section of the Baseline Study has covered the breadth of the relevant issues well, except for the following 2 points. We also have a number of suggested issues that the National Action Plan could address at the end of these comments.

### **3.2.1 Freedom from violence**

In particular the draft Baseline Study does not refer to the whole of clause 29 in which the committee recommended that as well as introducing the *National Plan to Reduce Violence Against Women and Children 2010-2022*, Australia also:

*.....develop strategies to prevent homelessness resulting from domestic violence and ensure that women who are victims of domestic and family violence and their children are provided with appropriate ongoing accommodation and integrated support. The Committee recommends that the State party take appropriate measures<sup>10</sup>*

### **3.2.2 Right to gender equality**

#### **(a) Women in political and public life**

WLC welcomes the government's decision to set a 40% gender target on its own boards and decision making bodies. However we feel that this section of the Baseline Study should also include the fact that the CEDAW committee has not only recommended that Australia introduce special measures to ensure gender equality, it:

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<sup>10</sup> United Nations Committee on the Elimination of Discrimination against Women (CEDAW) concluding observations of the Committee on the Elimination of Discrimination against Women: Australia. Forty-sixth session, 2010, CEDAW/C/AUS/CO/7 [29].

*...continues to be concerned that the State party does not favour adoption of temporary special measures<sup>11</sup>.*

And further states:

*The Committee also recommends that the State party consider expanding the mandate of the Sex Discrimination Commissioner to address all issues of gender equality.<sup>12</sup>*

## **3.2 Children and young people**

The WLC supports the creation of a Commonwealth Commissioner for Children and Young People and urges the Government to do so.

### **3.3.1 Freedom from violence**

The WLC strongly supports the Federal Government's moves to provide better protections for people who have experienced family violence within the family law system and believe that the proposed amendments are essential to place safety and protection of children and family members at the forefront of the *Family Law Act*.

### **3.3.3 The rights of children in the criminal justice system**

It should in our view be made clear that at least in Victoria, children aged 17 at the time of the offence, do not appear in the Children's Court but instead in the Magistrates Court, with adults.<sup>13</sup>

We are also concerned that the draft Baseline Study does not include the fact that the Committee on the Rights of a Child recommended in their 2005 concluding observations and recommendations that Australia:

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<sup>11</sup> Ibid at [26]

<sup>12</sup> Ibid at [21]

<sup>13</sup> <http://www.childrencourt.vic.gov.au/ca256ca800014b4a/page/criminal+division?opendocument&1=30-criminal+division~&2=~&3=~>

*...strengthen its efforts to bring its domestic laws and practice into conformity with the principles and provisions of the Convention, and to ensure that effective remedies will be always available in case of violation of the rights of the child.<sup>14</sup>*

Further, we feel that in order to properly reflect current human rights concerns in relation to Australia, references to clauses 28 - 30 and 38 & 39 should also be included, they are reproduced below.

*28. The Committee recommends that the State party strengthen its efforts to ensure effective implementation of the general principle of the best interests of the child as enshrined in article 3 of the Convention in all legal provisions as well as in judicial and administrative decisions and in projects, programmes and services that have an impact on children.*

*29. The Committee notes the efforts of the State party to implement fully article 12 of the Convention, but is concerned that the views of the child are not always sufficiently taken into account in judicial and administrative proceedings affecting the child. Furthermore, while the Committee notes the existence of the National Youth Roundtable, it expresses concern that participation by children in the Roundtable is limited in practice (the average age of contributors in 2004 was 20) and that it does not always balance geographically.*

*30. The Committee recommends that the right of the child to express his/her views in all matters affecting him/her be expressly provided in the Family Law reform. Furthermore, the Committee recommends that a Roundtable specifically for children, be established and that the contributors be selected in accordance with the principle of equitable geographic distribution.*

*38. The Committee recommends that the State party take measures to strengthen the current programmes of family support, e.g. by targeting the most vulnerable families,*

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<sup>14</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005) [10]

*in order to reduce the number of children placed in out-of-home care. It further recommends that the State party:*

- (a) Strengthen its support for foster care, e.g. by improving equal access to adequate medical care by children in foster care;*
- (b) Strengthen supervision of foster care and establish regular review of this kind of placement with a view to reuniting the child with his/her natural family;*
- (c) Promote and facilitate the maintenance of contact of the child in foster care with his/her natural family.*

*39. The Committee also recommends that the State party maximize its efforts, within a set time period, to reduce the significant number of indigenous children placed in out-of-home care, inter alia by strengthening its support for indigenous families. It further recommends that the State party fully implement the Indigenous Child Placement Principle and intensify its cooperation with indigenous community leaders and communities to find suitable solutions for indigenous children in need of alternative care within indigenous families.<sup>15</sup>*

### **3.5 Gay, lesbian, bisexual and gender diverse people<sup>16</sup>**

The WLC is pleased that the Government removed many areas of discrimination against same-sex couples in federal laws. However we call on the government to legalise same sex marriage to enhance equality for all Australians.

#### **3.5.4 Sex and/or gender diverse people**

We also applaud the Federal Attorney-General for initiating a review into how and why sex and gender data is collected. However we believe the Baseline Study should refer to all 15

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<sup>15</sup> Ibid.

<sup>16</sup> We note that the use of terminology can be difficult and in our contribution have adopted the term used in the Baseline Study.

recommendations of the Australian Human Rights Commission's report, *Sex Files: the legal recognition of sex in documents and government records*

**Recommendation 15:** *The federal government should take immediate steps to ensure that all federal government departments and agencies provide clear and accessible information relevant to legal recognition of sex in documents and records and how those documents and records can be amended, such as by including a page on the department or agency's website dedicated to this topic.*<sup>17</sup>

### **3.7 People with disability**

The WLC is of the view that this section of the Baseline Study does not sufficiently address the current human rights concerns specifically affecting women with disability.

*Women with disabilities face particular disadvantages in the areas of education, work and employment, family and reproductive rights, health, violence and abuse.*<sup>18</sup>

We are also concerned that the recommendation made by the CEDAW committee in its concluding observations in 2010 has not been included

*The Committee urges the State party, in the light of its recent ratification of the Convention on the Rights of Persons with Disabilities, to undertake a comprehensive assessment of the situation of women with disabilities in Australia.*<sup>19</sup>

The WLC urges the drafters of the Baseline study to read the Women With Disabilities Australia report, *Assessing the situation of women with disabilities in Australia – a human rights approach*<sup>20</sup> and include its content and recommendations.

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<sup>17</sup> [http://www.humanrights.gov.au/genderdiversity/sex\\_files2009.html#Heading180](http://www.humanrights.gov.au/genderdiversity/sex_files2009.html#Heading180)

<sup>18</sup> *Assessing the situation of women with disabilities in Australia – a human rights approach* Frohmader C Women With Disabilities Australia (WWDA) July 2011

<sup>19</sup> United Nations Committee on the Elimination of Discrimination against Women (CEDAW) concluding observations of the Committee on the Elimination of Discrimination against Women: Australia. Forty-sixth session, 2010, CEDAW/C/AUS/CO/7.[43]

<sup>20</sup> Frohmader C Women With Disabilities Australia (WWDA) July 2011

### **3.7.2. Legal Capacity**

#### **(a) Non- therapeutic sterilization**

The draft Baseline Study does not indicate the widespread concern across many United Nations committees that Australia should:

*....prohibit the sterilization of children, with or without disabilities<sup>21</sup>*

*The Committee recommends that the State party enact national legislation prohibiting, except where there is a serious threat to life or health, the use of sterilization of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and free consent.<sup>22</sup>*

Clearly there needs to be a national policy on the non therapeutic sterilization and it should be in accordance with International Law and the comments stated above.

### **3.9 People in prisons**

The WLC welcomes the fact that the Government is working towards the ratification of the Optional Protocol to the CAT. The ratification would be a great tool in the advancement of human rights for prisoners in Australian gaols and we urge the Government to do so immediately.

#### **3.9.2 Rights of women in prison**

The WLC is concerned that the ACT gaol is often held up as being human rights compliant when in fact it is not.

From our clients we have heard many stories of human rights abuses at the gaol, including the fact that women with mental health issues are being held in the Crisis Support Unit only

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<sup>21</sup> Committee on the Rights of a Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, UN Doc CRC/C/15/Add.268 (2005)[46 (e)]

<sup>22</sup> United Nations Committee on the Elimination of Discrimination against Women (CEDAW) concluding observations of the Committee on the Elimination of Discrimination against Women: Australia. Forty-sixth session, 2010, CEDAW/C/AUS/CO/7.[43]

being released from their cell for 1 hour a day (as they have to be separated from the men held in that unit).

A former prisoner who had served 11 years of a 12 year sentence recently said, 'the last 12 months at the AMC were the worse months of the whole sentence. I had been on work release for years in NSW, working full time and earning money, preparing for release. When I came back here I was locked in my cell for most of the day'.

There is virtually no employment for prisoners in the gaol and as indicated in the *ACTCOSS Submission to the Alexander Maconochie Review* which was prepared in partnership with the ACT Women and Prisons Group:

*Women in the AMC report experiencing particular problems in relation to education and programs. Incarcerated women have reported the education area is often short staffed and this carries through to the library, which means women often cannot access the library.*<sup>23</sup>

That submission further highlighted issues in relation to female prisoners accessing health care services.

*General access to a doctor is difficult for prisoners, one woman reported she had been at the AMC for a month and only seen a doctor on arrival, despite needing more regular attention due to an ongoing health issue.*

*A woman who was being contained in a high needs section of the AMC, due to self harm, had been waiting for an assessment by a mental health worker for four months.*<sup>24</sup>

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<sup>23</sup> ACTCOSS Submission on the Alexander Maconochie Centre Review September 2010 pg10  
[http://www.actcoss.org.au/publications/Publications\\_2010/2310SUB.pdf](http://www.actcoss.org.au/publications/Publications_2010/2310SUB.pdf)

<sup>24</sup> Ibid pg 11

*Consultancies reveal pregnant women at the AMC are not able to access similar support a pregnant woman in the outside community would receive<sup>25</sup>*

It is very clear from speaking to prisoners that there are many issues in relation to the day to day running of the gaol. Whilst the current policies may provide appropriate consideration of human rights, the reality for prisoners, particularly women, is far from compliant with general human rights principles or the *Human Rights Act 2004 (ACT)*.

*The prisoners are bored, there is not enough programs for them to be engaging in and work experience or opportunities are limited. Prisoners' family connections are being further damaged due to inadequate systems to enable family visits.*

*People who are incarcerated and present with mental health or drug and alcohol issues are not receiving appropriate care or given any real opportunity for rehabilitation<sup>26</sup>.*

### **3.9.3 Oversight mechanisms for systemic human rights concerns**

The WLC feels that the position of the ACT Official Visitor should be put in context. Whilst they are able to bring complaints to Corrective Services they do not have any independent investigating power. They are appointed by the Minister for Corrective Services and receive their remuneration through that Department.

The statistics quoted on page 81 of the Baseline Study also raise significant concerns if they are put in context. The ACT gaol has a maximum capacity of 350 prisoners and at the relevant time, certainly was not at capacity, that means that there was potentially one complaint per prisoner, which displays a very high level of dissatisfaction over a 4 ½ month period.

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<sup>25</sup> Ibid pg 14

<sup>26</sup> Ibid pg 15

## **Issues that a National Action Plan could address**

### **Chapter 1**

- Introduce a federal Human Rights Act
- Fund a Community Legal Centre in each State and Territory to engage in human rights advocacy and education similar to the present Human Rights Law Centre in Victoria

### **Chapter 3**

- Increase protection against discrimination for Aboriginal women and all Aboriginal people who have a disability
- Ensure the UN Declaration on the Rights of Indigenous People is implemented in full in consultation with Aboriginal and Torres Strait Islander people
- Withdraw Australia's reservations to CEDAW
- Introduce temporary special measures to ensure gender equality in all areas of public life
- Include superannuation in the paid parental leave scheme
- Develop a National Pay Strategy or specialised unit within Fair Work Australia to monitor pay equality gaps
- Create the position of a Children's Commissioner within the Australian Human Rights Commission
- Increase the age of criminal responsibility in Australia
- Legalise same sex marriage across Australia
- Introduce national legislation to allow change of sex without the requirement of surgery
- Make discrimination on the basis of homelessness illegal
- Make discrimination on the basis of an irrelevant criminal record illegal
- Develop an effective and accessible complaint mechanism for people who have a complaint about a violation of their human rights