

**Tenants' Union of Tasmania
Submission to the National Human Rights Consultation
June 15 2009**

TENANTS' UNION OVERVIEW

1. The Tenants' Union of Tasmania Inc. is a not for profit community organisation offering free services including tenancy advice, advocacy and referrals. We also offer free community legal education and training in issues relating to tenancy.

AIMS:

2. The Tenants' Union works for the interests and rights of tenants in Tasmania and seeks to:
3. Improve conditions in rental housing in Tasmania so that they meet accepted minimum standards;
4. Raise awareness within the community about tenancy issues; and
5. Promote legislative change where this is necessary to improve outcomes for tenants.
6. Each year the Union provides telephone advice to nearly 2500 callers, provides face-to-face advice to almost 300 clients, and deals with over 50 new cases of a more complex nature.
7. Last year, of the 2261 clients who informed us of their status, 68% self-identified as low income, 3% of clients identified as indigenous, 41% were under 30 years of age and 6% were born overseas. 71% of our clients were women.
8. As our interests and expertise lie in tenancy law and policy, this is focus of this submission.
9. While it is recognized that Australia does not have the recent record of human rights abuses the magnitude of some countries, it is our contention that human rights could be better protected here. We contend that a discrete, comprehensive description of those rights should be carried in a single enforceable form, either as a Constitutional Bill of Rights, or failing that, by a Human Rights Act. Working within the terms of reference of the Consultation, we discuss our support for a Human Rights Act of Parliament, and not a Constitutional amendment.
10. Within the broad questions that form the frame of reference for the Consultation we have used some of the questions asked at the Community Round Tables, and on the National Human Rights Online Consultation¹ as a structure.
11. The body of our discussion does not examine whether corporate persons should be protected, as the questions that form the frame of reference refer to 'Human' rights. However, it is our view that a Human Rights Act should protect only human persons, as with the significant international instruments.
12. We endorse the submission by the National Association of Community Legal Centres to this Consultation, subject to certain matters discussed below.

¹ For example, <http://openforum.com.au/NHROC/1stKeyConsultationQuestion>

Which human rights and responsibilities should be protected and promoted?

What should those rights and liberties be?

13. International Human Rights law generally divides those Rights into Civil and Political Rights (CP Rights), and Economic, Social and Cultural Rights (ESC Rights). We suggest that there is no useful purpose in maintaining the distinction for what has arguably become a hierarchy of rights. We submit that many CP Rights are dependant upon ESC Rights in order to be meaningful, and may be indivisible. The right to privacy, for example, is largely meaningless for the homeless, who have no choice but to live their lives in a public environment.
14. In the opinion of the Tasmanian Law Reform Institute the arguments for limiting rights protection to civil and political rights are not compelling...[and]...speak of timidity rather than rationality². We submit that if it is a question of economic cost, Australia is wealthy enough to protect both ESC and CP rights, and in any case Human Rights legislation can be drafted in such a manner as to balance the benefit against any social imposts.³

Which human rights should be better protected or promoted?

15. Focusing on Housing, the Tenants' Union endorses the submission of the PILCH Homeless Persons' Legal Clinic to the Victorian Consultation Committee in 2005. There are a number of Human Rights related to Housing that are largely indivisible, and are necessary. They include the:
 - Right to be treated with dignity and respect;
 - Right to the highest possible standard of health and health care;
 - Right to decent work;
 - Right to education;
 - Right to adequate housing;
 - Right to a fair trial;
 - Right to privacy;
 - Right to an adequate income and social security;
 - Right to freedom from torture or cruel, inhuman or degrading treatment;
 - Right to an adequate standard of living;
 - Right to adequate food and water;
 - Right to freedom of expression;
 - Right to equality and freedom from discrimination;
 - Right to vote;
 - Right to participation in the community and in decision-making processes that affect you;
 - Right to liberty, safety and security of person;
 - Right to life;

² Tasmanian Law Reform Institute, a Charter of Rights for Tasmania, Report No.10 (2007) at 122

³ For example, the South African *Bill of Rights*, entrenched in the South African *Constitution* of 1996

Right to freedom of movement;
Right to self-determination;
Right to freedom of thought, conscience and religion;
Right to freedom of association and assembly;
Right to participate in cultural life; and
Right to form trade unions.⁴

Do you think that you also have responsibilities along with those rights and liberties?

16. Our legal system is made up of a series of rights and responsibilities. We believe that a Human Rights Act should describe basic needs that all humans should be able to expect from the society in which we live. When a person has Rights, there is an implied corresponding responsibility for others to respect and protect those Rights. Criminal, Civil, Administrative and Family law all describe ways in which people are expected to behave in order to avoid legal penalty. We do not believe that it is necessary or appropriate to describe additional responsibilities or duties within Human Rights legislation.

Are human rights and responsibilities sufficiently protected and promoted?

How are these rights and liberties protected?

17. Australia has human rights protections within three tiers of law: the Australian Constitution, legislation, courts, and finally, and to a very limited degree, international law.
18. The Constitution allows for very few individual Rights. Those Rights that have been inferred from the Constitution are very vague, and highly contested (such as the right to free speech, more conservatively interpreted as the right to political expression).
19. There is much legislation providing Rights, but they are throughout the many Acts of Parliament, Commonwealth, State and Territory, and not comprehensive.
20. Although obliged by international law to abide by the terms of those instruments to which a State is signatory, Australia's Constitutional model requires that an Act of Parliament is required to execute those terms domestically. The High Court of Australia has ruled that there is a 'legitimate expectation' that Australia will adhere to the international instruments that it has ratified⁵, however this is precarious, and many commentators predict that this may change if this issue is raised with the Court again in the near future⁶. Australia is also a signatory to the Optional Protocol to the *International Covenant on Civil and Political Rights*, which allows appeals to the United Nations Human Rights Committee, in circumstances where domestic appeals have been exhausted. It is clear that these

⁴ Public Interest Law Clearing House Homeless Persons' Legal Clinic, *Homelessness and Human Rights in Victoria; Submission to the Human Rights Consultation Committee* 2005; Recommendation 3 at 8

⁵ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

⁶ Wendy Lacey, 'The End For Teoh? *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*', Paper Presented at the Constitutional Law Conference 20 February 2004

circumstances would be limited to those with significant resources at their disposal.

If you were trying to explain those rights and liberties to a new Australian citizen, what would you say?

21. If there is a perception amongst Australian residents, and international observers, that Australia accords a high priority to the protection of human rights domestically it is understandable. An Australian presided over the United Nations General Assembly when the Universal Declaration of Human Rights was adopted in 1948⁷. Australia not only signed the declaration at the time, but also argued, unsuccessfully, that the rights protected should be legally enforceable. More recently the Australian Government has argued that it is a ‘model member of the UN’ and that ‘it is unacceptable for Australia...to be criticized...for its human rights record’⁸.
22. In addition to the general (non binding) duty to respect the Human Rights recognized in the 1948 declaration, Australia is signatory to binding instruments that specify particular obligations:
 - the *International Covenant on Civil and Political Rights*;
 - the *International Covenant on Economic, Social and Cultural Rights* (“ICESCR”);
 - the *Convention on the Elimination of All Forms of Discrimination Against Women*;
 - the *International Convention on the Elimination of All Forms of Racial Discrimination*;
 - the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ;
 - the *Convention on the Rights of the Child*; and
 - the *Convention on the Rights of Persons with Disabilities*.
23. Many of these protect Rights such as the Right to Housing, but have not been passed as domestic law in Australia.

Should we have a document or law setting out these rights and liberties?

24. Currently there is no single piece of law that seeks to comprehensively describe human rights in Australia, apart from legislation in the ACT⁹ and Victoria¹⁰.
25. We believe that the interests of accountability and enforceability would better be served by the consolidation of Human Rights in Australia in a single Human Rights Act.

Who should be obliged to protect human rights - the Australian Government? Businesses? Individuals?

26. The provision of housing by public authorities has steadily diminished over time. Instead of investing public resources directly into housing Australia has

⁷ *Universal Declaration of Human Rights 1948 GA Res. 217A (III), 71, UN Doc A/810.*

⁸ Daryl Williams (Attorney-General), ‘CERD Report Unbalanced’ (Press Release, 26 March 2000 in Brynes, Charlesworth & McKinnon, *Bills of Rights In Australia, History, Politics, and Law*, 2009

⁹ *Human Rights Act 2004 (ACT)*

¹⁰ *Charter of Human Rights and Responsibilities Act 2006 (Vic)*

subsidized private investment with, for example, generous tax incentives such as ‘negative gearing’. We contend that the provision of shelter is one of the few recognized human rights that are dependant, for those at the lower socio-economic demographic, upon other individuals to provide. Rented homes represent, to a very large extent, a significant asset of another person.

27. For this reason we believe that an individual person, including a corporate person, as well as the Australian Government, who is in the business of providing housing, should be obliged to protect the Human Right of housing.

Many of the submissions to the Consultation in favour of a Human Rights Act propose a model that obliges non-Government entities to protect Human Rights only when fulfilling Government functions. We submit that under that model there is a danger that a dichotomy between ‘Government’ and ‘non-Government’ functions may result in the failure of some protection of Human Rights. The Tenants’ Union points to the potential dichotomy in this model between public and privately managed tenancies.

28. The following case study demonstrates a problem with the Human Right of Shelter (and other related and indivisible Rights) in the private rental market under current law:

Case study

Fatima and Mohammed are recent immigrants to Tasmania. They live in a privately rented property in a Hobart suburb with their four children. They have reached the end of a 12 month lease. Their children attend a local school, they have established a garden and they have generally good relations with their neighbours. Some children in the street have recently begun shouting racist taunts and throwing stones at a window of their home facing the street. So far it has been broken nine times. The police have been involved, but it has not stopped. Under Tasmanian law a landlord must make repairs to the premises unless caused by the tenant. Also under Tasmanian law a landlord may evict a tenant within four weeks of a lease ending without stating a reason. The family has received an eviction notice, which they believe is due to the regular damage to the property. They were given 14 days to leave. The Tenants’ Union advised them that, unless they can prove that the eviction is due to unlawful discrimination, they do not have a right to stay. They were unable to find another house within a convenient distance from the school.

Do you think that particular groups need special protections?

29. It is recognized in Australia that there are many instances that require particular groups to be afforded special protections in law. Consumer protection legislation, for example, involves recognition that individual consumers do not have the same ability to enter beneficial contracts as corporations. Residential tenancy legislation throughout Australia provides significant protections for tenants that are contrary to the normal presumptions of freedom of contract at common law.
30. We believe that tenants are in need of special protections:

Case study

Lucy lives in an outer suburb of Hobart with children aged three years and 18 months respectively. Her only income is Centrelink benefits. In mid winter she noticed that the back garden of her rented premises was very

muddy and there was a strong smell of sewerage. She soon realized that the septic tank was leaking. Lucy approached the private landlord, who told her that it was too expensive for him to repair. The Tenants' Union advised Lucy of the remedies available to her under the *Residential Tenancy Act 1997* (Tas). In short, she had the option of terminating the lease, paying for the repairs and seeking reimbursement from the landlord, or seeking an Order for Repairs from the Magistrates Court. Lucy did not have sufficient funds to complete the repairs herself, and was intimidated by the prospect of a hearing at the Magistrates Court. In addition the Tenants' Union advised her that it would be lawful for the landlord to retaliate by evicting her at the end of her lease for forcing him to complete the repairs.

Case Study

Philip privately rented a unit in Launceston and was half-way through a 12 month lease. He is on a very low income. He paid \$150 per week in rent. The standard Real Estate Institute of Tasmania allowed a rent increase every 6 months. The rent was increased by over 30% to \$200 per week. Philip was unable to afford the increase. The Tenants' Union advised Philip that he could seek an Order from the Magistrates Court that the increase was unreasonable, but would be unlikely to succeed, as the Court is only specifically directed by the *Residential Tenancy Act 1997* (Tas) to have regard to the general level of rents in the locality in making a decision. There is no provision in Tasmanian law for a tenant to terminate the lease for reasons of hardship. Philip fell into rent arrears, was evicted, and was pursued for compensation for the breach of his lease obligations.

31. Those case studies not only demonstrate the need for special protection for some classes of people, but also are examples of the need for people to be able to enforce their Human Rights against other individuals who are in the business of providing those Rights.

Are there any circumstances in which you think that your human rights and responsibilities should be suspended? If so, when?

32. If certain Human Rights are not to be considered absolute, a Human Rights Act should state explicitly which rights are to be absolute (such as freedom from torture or slavery) and those that are non-absolute (such as the right to liberty). We submit that it is important that legislation that has the effect of suspending any right is examined, and the intention made explicit.
33. It should not be necessary for a person to be a citizen, or even to be in Australia lawfully, for that person to be protected by a Human Rights Act.
34. We submit that a Human Rights Act should protect all human persons within Australia's legal jurisdiction or control.

How could Australia better protect and promote human rights and responsibilities?

Do we need a new Commonwealth law to protect human rights?

35. The structure of the Australian system of government requires that in order for an international instrument to become explicit domestic law the Parliament must pass appropriate legislation. Australia is signatory to numerous

Should our human rights be considered more formally by the Government when they are making laws?

36. A common model of Human Rights legislation¹¹ obliges a Statement of Compatibility to be tabled in Parliament upon the introduction of proposed law. We submit that a further role of the Parliament should be to respond to a Declaration of Incompatibility by the Courts, and that a specialist Parliamentary Committee should be convened to scrutinize legislation, including subordinate legislation for compatibility with Human Rights objectives.

Do we need better ways to ensure that the Government and its agencies respect our human rights?

37. The Human Rights Act should be drafted in order that the purposes are reflected in the policies of Government and its agencies. Not only should Government Agencies give proper consideration to Human Rights in the formation of policy, but the processes, including appeals mechanisms, should further the purposes of Human Rights legislation.

What do you think the role of the Courts should be in the protection of our human rights?

38. We submit that the Courts should be given powers to award damages to individuals whose human rights are breached.
39. A common model of Human Rights legislation gives the Courts the power to make a Declaration of Incompatibility.
40. Recently critics have argued that this model would be unconstitutional in Australia¹², based on the argument that such a Declaration by the High Court of Australia would be characterized as an advisory opinion, or alternatively would be considered a ruling that was not binding (if the relevant Minister was not a party to the matter). We submit that a Human Rights Act could be drafted in such a form that either ensured that to seek a Declaration by a plaintiff would be to bring a relevant and constitutional matter before the Court. In the alternative we submit that a Declaration be sought in conjunction with other remedies, which would ensure that a constitutionally valid matter was before the Court. In order that any Order of the Court be binding, we submit that it would be possible to draft the

¹¹ For example, the *Human Rights Act 2004* (ACT), the *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 1998* (UK)

¹² Bob Carr, 'So, whose rights reign supreme?', *The Age*, 5th June 2009, also 'Bill of Rights is the Wrong Call', *The Weekend Australian*, 9th May 2009, also Greg Craven, 'Groundhog Day Over Rights', *The Australian Financial Review*, 12th January 2009

Human Rights Act in such a way as to ensure that the appropriate Minister was to become a Party to the matter, for which a Declaration was sought.

What should you be able to do if you think your human rights have been breached?

41. Julian Burnside QC suggested that a Bill of Rights could either be ‘strong or weak’¹³. In his opinion, a weak model, by obliging parliament to assess new legislation for human rights compatibility ‘introduces a political cost for betraying any of the rights that have been identified’, whereas a strong model will give rise to a right for damages.¹⁴
42. We submit that a Human Rights Act should involve the ability to litigate to protect Rights, rather than simply require the courts to notify the legislature in some way that a human right is breached.

Conclusion

43. Many commentators suggest that as a liberal democracy, Australia does not need specific Human Rights protection. Former Premier of NSW Bob Carr, states that ‘The common sense of the Australian people tells them that they are free.’¹⁵ Even if we were to accept that, what better time, when Australia is a robust democracy that has a culture of human rights protect. Now is the time to implement the strongest human rights protections – while we are in the best position to do it.
44. We do not contend that a Human Rights Act would be a panacea for all future human rights issues in Australia. Critics of Bills of Rights have pointed to regimes in which comprehensive human rights protections have existed in theory, but have been ignored in practice. Examples include the USSR under Stalin, and more recently Zimbabwe, and Sudan¹⁶. In answer we submit that the practical effect of any law requires an independent judiciary, an autonomous media, and an accountable government. A Human Rights Act provides a firm foundation for healthier democracy.



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¹³Julian Burnside, ‘Do We Need a Bill of Rights?’, The Tasmanian Peace Trust Lecture, Hobart, 17th August 2008

¹⁴Julian Burnside, ‘Do We Need a Bill of Rights?’, The Tasmanian Peace Trust Lecture, Hobart, 17th August 2008

¹⁵ Bob Carr, ‘Bill of Rights is the Wrong Call’, The Weekend Australian, 9th May 2009

¹⁶ Bob Carr, *Bill of Rights is the Wrong Call*, The Weekend Australian, 9th May 2009