

Submission to the National Human Rights Consultation



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1. ABOUT WOMEN'S HEALTH VICTORIA

1.1 Women's Health Victoria is a statewide women's health promotion, information and advocacy service. We are a non government organisation with most of our funding coming from various parts of the Victorian Department of Human Services. We work with health professionals and policy makers to influence and inform health policy and service delivery for women.

1.2 Our work at Women's Health Victoria is underpinned by a social model of health. We are committed to reducing inequities in health which arise from the social, economic and environmental determinants of health. These determinants are experienced differently by women and men. By incorporating a gendered approach to health promotion work that focuses on women, interventions to reduce inequality and improve health outcomes will be more effective and equitable.

1.3 Women's Health Victoria welcomes the opportunity to respond to this important consultation. Our vision is for a society in which there is an accepted approach to health that is empowering and respectful of women and girls; one that recognises the importance of gender in determining health outcomes and utilises a sound gender analysis in policy making and in health and community service design. Human rights are an important step towards reaching this goal.

2. ARE HUMAN RIGHTS SUFFICIENTLY PROTECTED IN AUSTRALIA?

2.1 Human rights are the principles that enable us to live a dignified and rewarding life in which our freedoms are respected, protected and fulfilled. Violations of human rights occur in Australia every day and the current legislative protections are inadequate in protecting the rights of vulnerable and disadvantaged groups^{1,2}. Our

human rights must therefore be comprehensively and consistently enshrined in law at a federal level.

2.2 Australia remains the only liberal democracy in the world that does not have a bill of rights, charter or human rights act, despite repeated calls by the UN to entrench our commitment to international obligations in such a way^{3,4}.

2.3 In the absence of a federal charter, the widespread support for a human rights framework is clearly demonstrated by the number of state governments who have enacted, or are in the process of enacting, human rights legislation. Victoria and the ACT have a Charter and Human Rights Act respectively and consultation processes have begun in Western Australia and Tasmania.

2.4 Women's Health Victoria welcomes the opportunity to create a charter at a federal level that is meaningful, progressive and that can have an impact on the lives and experiences of all Australians.

RECOMMENDATION 1: Australia should now move to formally enshrine human rights in one document.

3. HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE OUR HUMAN RIGHTS?

3.1 Women's Health Victoria strongly supports the need for a charter of human rights at a federal level. A charter would:

1. Improve the quality and accountability of government;
2. Consolidate and strengthen human rights protections for all Australians;
3. Encourage social inclusion;
4. Improve Australia's reputation abroad; and
5. Constitute one effective, legal and political response to human rights violations⁵.

3.2 Dialogue model of human rights

3.2.1 Women's Health Victoria believes that a dialogue model of human rights should be adopted. A charter or human rights act for Australia should be an ordinary act of Parliament, in a style similar to the Victorian Charter of Human Rights and Responsibilities and the UK Human Rights Act. This forms part of a trend away from constitutionally entrenched bills of rights to models that maintain the sovereignty of Parliament. A 'dialogue' between the three arms of government – the Executive, Parliament and the Judiciary – is created whereby:

- Parliament must ensure that new Bills are compatible with human rights.
- The courts hear any cases in which human rights are invoked and can recommend that the government re-examine a law in line with human rights.
- Parliament must then consider whether the law should be upheld but are under no obligation to change the law. The courts do not have the power to force Parliament to repeal the law⁶.
- Public authorities must take human rights into account in their decision-making.

- 3.2.2 The focus of a dialogue model is on the prevention of breaches of human rights by improving how government and public authorities draft legislation, design policies and carry out their day-to-day work. Human rights are taken into account at the earliest stage of development. Enforcement by the courts on a case by case basis is not the primary means of redress⁷.

RECOMMENDATION 2: A dialogue model of human rights should be adopted, in a style similar to the Victorian Charter of Human Rights and Responsibilities.

- 3.3 It is important to note that in other Westminster countries, the introduction of human rights legislation has not altered the relationship between Parliament, the Executive and the Judiciary, but instead 'has increased awareness of human rights within government and observance of human rights by government'⁸.
- 3.4 The impact of a federal charter must be considered in light of the existing charters in Victoria and the ACT. A federal charter could contain a clause which states that it is intended to act concurrently with state charters. An example of such a provision can be found in section 6A(1) of the Racial Discrimination Act 1975 (Cth) which states:

This Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory that furthers the objects of the Convention and is capable of operating concurrently with this Act.

- 3.5 How a federal charter is to operate in the states and territories should also be explored. Human rights protections that are consistent across all states and territories should be encouraged.

RECOMMENDATION 3: A federal charter must contain a clause that states that it is intended to act concurrently with existing state charters.

- 3.6 Women's Health Victoria believes that a federal charter should extend to non-citizens of Australia as well as citizens. Non-citizens can be a vulnerable group who must be able to access their human rights when they are in Australia.

RECOMMENDATION 4: The rights of all people in Australia must be protected in any federal charter.

- 3.7 Any federal charter should allow for a process of conciliation and arbitration on human rights issues that individuals can access. This should be conducted by a body such as the Human Rights Commission, who should also have the power to report on human rights progress in Australia and conduct training and education to foster a human rights culture.

RECOMMENDATION 5: A Human Rights Commission should be set up to hear human rights complaints, report on the government's human rights progress and provide training and education.

3.8 Promoting a human rights culture

- 3.8.1 A federal charter could act as a foundation for a human rights culture by encouraging a society in which individuals are aware of and assert their rights and responsibilities. It would provide a framework for a rights-based approach, already used by many organisations in Australia, that analyses inequalities and redresses discriminatory practices⁹.
- 3.8.2 A charter could also be used as an advocacy tool for professionals and service users to obtain better, more just services from public authorities without recourse to the courts¹⁰.
- 3.8.3 The implementation of any federal charter must be coupled with an extensive awareness raising campaign and ongoing human rights education across all sectors of society. These factors are crucial in ensuring that a human rights culture takes hold in Australia.
- 3.8.4 The Victorian Equal Opportunities and Human Rights Commission acknowledges that moving towards a human rights culture is a gradual process but significant steps are being made towards this goal. *Emerging Change: 2008 Report on the Operation of the Charter of Human Rights and Responsibilities* provides evidence for the changes that have occurred since the enactment of the Victorian Charter in 2006:

Already we are seeing improvements in the responsiveness of state and local government services, in the quality of public sector decision making and in the protection of vulnerable people and groups¹¹.

RECOMMENDATION 6: A human rights culture should be fostered and encouraged through widespread awareness raising and ongoing human rights education.

4. WHICH HUMAN RIGHTS SHOULD BE PROTECTED?

- 4.1 International instruments such as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights should serve as the basis for any federal charter as they are well established, universally accepted and legally tested.

RECOMMENDATION 7: The rights set out in existing international instruments should be used as the basis for any federal charter.

4.2 Indivisibility of human rights

- 4.2.1 Since the drafting of the Universal Declaration of Human Rights in 1949, human rights have come to be categorised as civil and political rights or economic, social and cultural rights, reflecting the ideological blocs established in the Cold War. Western nations saw civil and political rights as a 'bulwark against communism'

and these were given primacy. In contrast, economic, social and cultural rights were regarded as a burden on taxpayers and the free market¹².

- 4.2.2 The Universal Declaration of Human Rights, however, does not distinguish between the two sets of rights. The UN consistently reaffirms the indivisibility of civil and political rights and economic, social and cultural rights¹³. The UN Committee for Economic, Social and Cultural Rights stated in 1993:

Violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights¹⁴.

Both sets of rights must be incorporated into any federal charter.

RECOMMENDATION 8: A federal charter must reflect the indivisibility and interdependence of civil and political rights and economic, social and cultural rights by including both sets of rights.

4.3 Civil and political rights

- 4.3.1 Civil and political rights concern the participation of individuals in civic life (such as the right to vote or free speech) and safeguard them from arbitrary state power (such as freedom from torture). They include rights that protect the rule of law (such as the right to a fair hearing) as well as the right to life, freedom of thought, religion and expression and freedom from discrimination.
- 4.3.2 Civil and political rights are fundamental rights that must be enshrined in any federal charter and there is a strong case for including economic, social and cultural rights as well.

4.4 Economic, social and cultural rights

- 4.4.1 Economic, social and cultural rights are those rights that are necessary to meet basic human needs such as the right to food, water and shelter, the right to health, to education, to employment and to social insurance. They are a powerful way of redressing inequality and disadvantage and any national charter of human rights must incorporate these alongside civil and political rights.
- 4.4.2 Australia has ratified the International Covenant on Economic, Social and Cultural Rights and incorporating some if not all of these rights into a federal charter would be an important way of meeting our international obligations¹⁵.
- 4.4.3 The right to an adequate standard of living, the right to social security and the right to health all have the power to make a tangible difference to the lives and experiences of Australian women. It is easy to see that violations occur across Australia every day, yet without these rights, other rights cannot be fully enjoyed.
- 4.4.4 Although economic, social and cultural rights have not been included in the charters and human rights acts in Victoria, the ACT, the UK, Canada and New Zealand, a number of countries and regions have included them. These include Quebec¹⁶, South Africa¹⁷, Finland¹⁸, Norway and India¹⁹. The Charter of Fundamental Rights of the European Union also contains economic, social and cultural rights²⁰.

4.5 Reasons for including economic, social and cultural rights

4.5.1 Economic, social and cultural rights can strengthen our democracy and ensure the participation and empowerment of Australians. They are not vague and aspirational as some argue²¹.

4.5.2 It is a myth that economic, social and cultural rights are not as urgent or important as civil and political rights. As Victorian Attorney-General Rob Hulls noted in 2005:

While those of us confident of shelter and a decent meal tonight may see civil and political rights as the priority, the right to freedom of expression is of very little interest to Victorians with no housing and little chance of food²².

4.5.3 Economic, social and cultural rights have been argued to be matters of government policy and not suitable issues for judges to decide on. The UN Committee on Economic, Social and Cultural Rights, however, has clearly stated that to prevent judges from deciding on these issues is to 'drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged groups in society'²³.

4.5.4 Economic, social and cultural rights can be justiciable (that is, they give a right of action in the courts for individuals whose rights have been violated). Experience in other parts of the world, such as the Inter-American Court on Human Rights, demonstrates that the 'justiciability of rights is about reinstating rights'. Ferial Tinta notes:

the reality of international law has shown that artificial separations of the two sets of rights do not occur in real cases...rights are intertwined and interwoven²⁴.

4.5.5 Widespread public support for economic, social and cultural rights exists. Salvaris notes a number of Australian surveys in which respondents were asked to rank a selection of rights. Economic, social and cultural rights such as the right to education, health, work and a decent standard of living were consistently high on the list²⁵.

4.6 It is our view that the indivisibility of human rights should be respected. All economic, social and cultural rights are important, but Women's Health Victoria believes that the following rights in particular should be included in a federal charter:

- the right to social security and social insurance (Article 9 ICESCR)
- the right to an adequate standard of living, including adequate food, clothing and housing and the continuous improvement of living conditions (Article 11 ICESCR)
- the enjoyment of the highest attainable standard of mental and physical health (Article 12 ICESCR)

RECOMMENDATION 9: A federal charter should include the right to health, the right to an adequate standard of living and the right to social insurance and social security as these rights would help to eradicate discrimination, poverty and violence against women.

5. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING AND THE RIGHT TO SOCIAL SECURITY AND SOCIAL INSURANCE

- 5.1 These two rights are an important way of ensuring that inequality of economic participation and financial security, and disparities in living standards and housing options for women are addressed by governments. They would cover a wide range of issues for women, including violence against women, the gendered role of women as (primarily unpaid) caregivers and parental leave.
- 5.2 A right to an adequate standard of living and the provision of appropriate social insurance mechanisms addresses how:
- (a) Economic inequality is a central factor of women's lives that affects their experiences of independence and disadvantage.
 - (b) Poverty and a lack of housing options trap women in situations of violence.
 - (c) Women's participation in the workforce is diminished by their gendered role as (unpaid) caregivers and a lack of childcare and parental leave options.
 - (d) Changing policies around work mean that women are more likely to work in informal sectors with low wages and little job security and superannuation and other benefits and entitlements²⁶.
- 5.3 These factors affect the capacity of women to access and enjoy all the human rights available to them. A federal charter could be used to challenge discrimination, acknowledge the role of women as unpaid carers and comprehensively tackle violence against women by ensuring that housing options and economic independence are strengthened and maintained.

6. THE RIGHT TO HEALTH

- 6.1 The World Health Organisation Commission on Social Determinants of Health recommends an approach to health that addresses the social determinants of health, including poverty, gender, race, early life experiences, social exclusion and conditions of work²⁷. This is reiterated by the UN Special Rapporteur on the Right to Health from 2002 to 2008, Paul Hunt, who stated that the right to health encompasses not only access to healthcare, but also the underlying determinants of health²⁸. Participation, empowerment and accountability all intersect with the right to health. It is the 'right to have opportunities to be healthy'²⁹.
- 6.2 This understanding of the right to health would ensure the development of policies that address the structural and social determinants of health. A range of issues that impact on the health of Australian women could be considered including violence against women, discrimination, economic participation and social exclusion.
- 6.3 A charter that requires governments to take the right to health into account when drafting legislation and policy would be a powerful and transformative document as it would provide a framework that acknowledges and addresses the intersection between health, inequality and injustice³⁰.

6.4 Sexual and reproductive health

- 6.4.1 Sexual and reproductive health form part of the right to health. The UN Committee on Economic, Social and Cultural Rights has stated in its General Comments on

the Right to the Highest Attainable Standard of Health that women's health must be promoted throughout their lifespan in an effort to eliminate discrimination against women. Sexual and reproductive health is part of that goal³¹. The UN Factsheet on the Right to Health asserts that:

States should enable women to have control over and decide freely and responsibly on matters related to their sexuality, including their sexual and reproductive health, free from coercion, lack of information, discrimination and violence³².

- 6.4.2 Women must be free to make decisions regarding their fertility, including decisions about when and whether to have children, based on their own life experiences, personal views and beliefs.
- 6.4.3 The Beijing Declaration, which stemmed from the Fourth UN Conference on Women in 1995, unequivocally affirms that 'the right of all women to control all aspects of their health, including their own fertility, is basic to their empowerment'³³. This is echoed by the Public Health Association of Australia, which states that control of fertility is crucial to a woman's ability to maintain her health³⁴.
- 6.4.4 Australia also has an obligation to implement the principles of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article 12 requires that measures be taken to ensure 'on a basis of equality of men and women, access to health care services, including those related to family planning'³⁵.
- 6.4.5 Access to accurate, timely and unbiased information about sexual and reproductive health, sexual relationships and contraception is critical in supporting both women and men to make informed decisions. Evidence demonstrates that comprehensive sexual and reproductive health education and access to a variety of effective contraceptive choices help lower the rate of unplanned pregnancies³⁶.

6.5 Abortion

- 6.5.1 Women should have equity in access to a range of reproductive health services including safe, legal abortion. All women have a right to:
 - obtain accurate information about abortion;
 - make their own decision about abortion free from coercion or pressure; and
 - access safe, legal and affordable abortion services.
- 6.5.2 Access to safe abortion services is a necessary part of any comprehensive system of reproductive health services³⁷. To deny these services is to breach a woman's right to health.
- 6.5.3 Termination of pregnancy should be regulated in the same way as all health services and should be part of health services planning, service delivery and health workforce training.
- 6.5.4 Women should be able to 'make their own reproductive decisions with dignity and freedom from stereotypes and stigma'³⁸. The decision to continue or terminate an unplanned pregnancy or a pregnancy where the foetus has been diagnosed with

abnormalities can be difficult for many women and the provision of services and information about abortion should be made accessible, affordable and equitable³⁹.

- 6.5.5 Equity in access to abortion services can be an issue, particularly for women from rural and regional areas where services are limited or non-existent. Even where a service exists, women in rural and regional areas may travel elsewhere to ensure privacy and confidentiality. Traveling to metropolitan areas to access services can place further emotional and financial strain on women already making the often challenging decision to terminate a pregnancy. Financial barriers can also limit a woman's access to abortion, with varying rates charged by private clinics⁴⁰.
- 6.5.6 A right to be treated equally and with dignity and respect requires the rethinking of pregnancy from the perspective of the woman affected, by removing barriers to services and by recognising the inherent dignity that exists in controlling and making decisions about her own body⁴¹. A woman's right to be treated equally and with dignity and respect must not be infringed by restrictions placed on abortion services.

RECOMMENDATION 10: Comprehensive, equitable and accessible sexual and reproductive health services, including termination of pregnancy services, are a human right and must be ensured by a federal charter.

6.6 Abortion and the Victorian Charter

- 6.6.1 The Victorian Charter of Human Rights and Responsibilities contains a 'savings provision' that states that 'nothing in this Charter affects any law applicable to abortion or child destruction' (section 48)⁴². This means that Parliament, the courts and public authorities are not required to take into account the rights listed in the Charter when making decisions based on laws relating to abortion. The issue of abortion is explicitly avoided.
- 6.6.2 To expressly exclude abortion using a savings provision violates a woman's ability to access her rights. If women's rights are considered to be equal to those of men and other groups in our society, then specifically excluding abortion from the remit of a national charter is to breach those rights, despite Australia's international obligations and recent signing of the Optional Protocol to CEDAW. Abortion is the only issue that is excluded by the Victorian Charter and in doing so, Parliament has effectively discriminated against women by denying them the capacity to access their human rights in this area. This must not occur in any proposed national Charter.
- 6.7 Access to abortion intersects with a number of different human rights for women including the right to life and the right to freedom of thought, conscience, religion and belief. These are examined below.

RECOMMENDATION 11: Abortion must not be expressly excluded in the proposed charter as occurred in Victoria as to do so is to ignore women's rights.

7. RIGHT TO LIFE AND WHEN LIFE BEGINS

- 7.1 The central issue when considering the right to life as it relates to the termination of pregnancy is ascertaining when life begins – at birth, at the moment of conception or somewhere in between. When drafting any potential national charter of human rights, the implications of any decision on when life begins must be taken into account.
- 7.2 Women’s Health Victoria is clear that life begins at the moment of birth. There is much jurisprudence to support this view and the *Law of Abortion: Final Report* published by the Victorian Law Reform Commission in 2008 provides an exploration of the key issues⁴³.
- 7.3 In international law there is no precedent for interpreting the word ‘human being’ as including the foetus^{44,45}. The Universal Declaration of Human Rights states that ‘everyone’ has a right to life and, following debate during the drafting process, chose not to include specific reference to the foetus⁴⁶. In the International Covenant on Civil and Political Rights, the right to life has been consistently interpreted as beginning at birth. The preamble to the Convention on the Rights of the Child, which is not legally binding, states that the rights of the child ‘before as well as after birth’ should be protected, however there is no consensus as to whether this includes the foetus. Elsewhere, the Committee on the Convention on the Rights of the Child has referred to the need for States to take measures against unsafe abortion practices⁴⁷. The UN Human Rights Committee has also made consistent calls for states to decriminalise abortion laws⁴⁸.
- 7.4 The right to life is not specifically conferred by CEDAW, however the CEDAW Committee has framed the issue of maternal mortality as a result of unsafe abortions as a violation of a woman’s right to life⁴⁹. In addition to these conventions, the Victorian Law Reform Commission has also cited examples of case law in Australia, as well as the UK, Canada, South Africa and France, in which the foetus does not have legally enforceable rights until they are born⁵⁰.
- 7.5 This extensive body of law should influence any decision about the point at which life begins. The Australian Capital Territory in the Human Rights Act (ACT) 2004 explicitly qualifies the right to life in section 9(2) by stating ‘this section applies from a person from the time of birth’ and Women’s Health Victoria recommends that a similar approach be taken in relation to any national human rights charter for Australia⁵¹.

RECOMMENDATION 12: Life begins at birth and this must be reflected in any right to life clause in the charter.

8. FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF

- 8.1 Individuals should not be discriminated against because they hold, or do not hold, particular religious beliefs. Australia is a secular democracy and religious rights should not be given primacy over other rights. They should be recognised as one of many, as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights stipulate.
- 8.2 The religious beliefs or conscientious objection of a health professional must be balanced against a woman’s right to access accurate and timely health

information and make informed choices about her body. A health professional who holds a particular religious belief or conscientious objection should not be discriminated against, but nor should their beliefs affect the ability of their patients to access healthcare and their human rights⁵².

8.3 The sexual and reproductive rights of women are often compromised by rights relating to freedom of thought, conscience, religion and belief and a national charter of human rights provides an opportunity to change this⁵³. The balancing of rights is a process that should be proactively acknowledged in any charter. A clause should be included that acknowledges that competing rights must be carefully weighed up and balanced. Certain rights, such as freedom of religion, should not be privileged over other rights. Section 7(2) of the Victorian Charter contains a provision outlining when human rights may be limited and this could be replicated in any federal charter. It states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including:

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

RECOMMENDATION 13: Religious rights and conscientious objections should not be privileged and an express provision that outlines the process by which human rights are balanced should be included.

9. FREEDOM OF EXPRESSION

9.1 The Victorian Charter allows for the right to freedom of expression to be limited 'for the protection of national security, public order, public health or public morality' (section 15(3)(b)). Women's Health Victoria believes that the term 'public morality' should not be used in any federal charter as it is too unclear and ambiguous. The South African Charter frames the limitation on this freedom differently and its format could be used as an example when drafting a similar provision:

The right to subsection (1) does not extend to:

- (a) propaganda for war;
- (b) incitement of imminent violence; and
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm⁵⁴.

RECOMMENDATION 14: A limitation to freedom of expression on the grounds of 'public morality' should not be included.

10. CONCLUSION

10.1 Women's Health Victoria has welcomed the chance to consider how our human rights can be strengthened and better protected. We believe that the Victorian Charter provides a useful example of a model that could be used at a federal level in Australia. At the national level, a human rights charter must include economic, social and cultural rights and ensure that women's sexual and reproductive health are respected.

10.2 A charter of human rights is a powerful means by which the voices of marginalised and disenfranchised groups can be heard. It is a way of embedding a human rights culture in Australia in which principles such as participation, equality and respect are encouraged. Thank you for the opportunity to participate in this historic consultation process.

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