



Discussion Paper

Protection of Human Rights and Environmental Rights in Australia

prepared by

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and

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Contents

Introduction..... 4

TERM OF REFERENCE 1: Which human rights (including corresponding responsibilities) should be protected and promoted? 5

- The international human rights context..... 5
- International environmental rights in the human rights context 6
- Non-binding international sources of environmental rights 8
- Environmental rights within domestic human rights instruments..... 9
- Protection of other human rights that relate to the environment 10
- Environmental responsibilities..... 12
- Protection of human rights in Australian law 12
- Which environmental rights should be protected in an Australian Charter?..... 12

TERM OF REFERENCE 2: Are these human rights currently sufficiently protected and promoted?..... 13

- How are human rights currently protected in Australia? 13
- Are human rights sufficiently protected in environmental legislation? 13
- Human rights implications in decision-making about development 14
- The human rights implications of climate change 15
- Environmental campaigners and protest rights 18

TERM OF REFERENCE 3: How could Australia better protect and promote human rights? 20

- What options are there for better protecting human rights in relation to the environment? 20
- Benefits of a 'Human Rights Act' 20
- What would a Human Rights Act look like? 21

Introduction

The Federal Government has established a 'National Human Rights Consultation' (*Consultation*) to promote public debate about the protection of human rights in Australia. An independent Committee has been established to run the consultation, and is currently seeking written submissions from the public. The Committee will then report to the Federal Government to help guide it on developing human rights policy for Australia. Depending on the outcomes of the Consultation, this may lead to the introduction of a legislative 'human rights act'.¹

The Terms of Reference (*TOR*) for the Consultation are:

1. *Which human rights (including corresponding responsibilities) should be protected and promoted?*
2. *Are these human rights currently sufficiently protected and promoted?*
3. *How could Australia better protect and promote human rights?*

EDO (Victoria) and EDO (NSW) have prepared this Discussion Paper to highlight the relevance of environmental issues in this debate. Through the preparation of this Discussion Paper, we hope to outline how human rights connect with environmental issues, why 'environmental rights' are important, and to encourage all interested individuals and groups to respond to the Consultation from an environmental perspective.

The Australian Network of Environmental Defender's Offices will also be making a submission to the Consultation, and we welcome any information or experiences that you may have to contribute or inform us about. We urge you to think about how particular environmental issues may also be human rights issues. Have you been faced with any circumstances, either through your work, or personally, that have highlighted how environmental issues are intertwined with human rights? We also urge you to prepare your own submission for the Consultation; this is a unique opportunity for engaging in the protection of human rights in Australia.

This Discussion Paper is structured in line with the three terms of reference for the consultation.

¹ However, it is important to note that the Federal Government has ruled out the option of a constitutionally enshrined 'bill of rights'.

TERM OF REFERENCE 1:

Which human rights (including corresponding responsibilities) should be protected and promoted?

There is considerable recognition at the international level and in numerous countries around the world of the importance of protecting and promoting environmental rights within the human rights context. This recognition dates back to the 1972 Declaration of the United Nations Conference on the Human Environment², or 'Stockholm Declaration' which recognised the indivisible link between the environment and human rights. It states:

"Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."
(Principle 1)

Since that time numerous international instruments, conventions and experts, as well as over one hundred national governments have formally recognised the importance, indivisibility and interconnectedness of the environment and human rights.

The environment is the resource base for all life and as such is the basis on which many of our fundamental rights depend. The right to life and the right to health could not be fulfilled in an environment which is heavily polluted or where clean water is not available. The right to work is impacted in many countries by environmental pollution or destruction of ecosystems which prevent local communities from making a living through subsistence farming or fishing. The right to a clean and healthy environment is seen by many not just a precursor to other human rights but as a fundamental human right in itself.

It is now widely recognised that human rights are an integral part of the climate change debate. Climate change impacts will disproportionately affect those people whose human rights are already largely ignored or abused. Action or lack of action on climate change now will affect the human rights not just of present generations but future generations as well.

The recognition of the indivisibility of human rights and the environment is therefore twofold. Protection of human rights can improve society's appreciation of and protection of a healthy functioning environment, and protection of the environment can assist in upholding society's human rights.

This part of the Discussion Paper will outline the international basis for environmental rights protections in Australia and provide examples of how other countries around the world are providing legal protection of environmental rights.

The international human rights context

There are three main overarching international human rights instruments – the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights (ICCPR)*, and the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. The Universal Declaration was adopted by the UN General Assembly in 1949. It is not directly legally binding on States, however it is considered by some to be part of customary international law which the international community is bound by. The two

² This declaration can be viewed at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>

Covenants were developed to clarify the Universal Declaration and create legally binding obligations on parties. Australia has signed and ratified both Covenants and is therefore bound by both.

The ICCPR is focused on rights that “derive from the inherent dignity of human beings and are the basis of freedom, justice and peace”.³ It includes rights such as the right to life, the right to a fair hearing, freedom from arbitrary arrest and detention and freedom of equality and expression. The ICESCR focuses on economic, cultural and social rights such as the right to an adequate standard of living, the right to work, the right to equal pay and the right to adequate food water and sanitation.

Australia is a party to a number of other international human rights treaties such as the *Convention on the Rights of the Child* and the *Convention on the Elimination of all Forms of Racial Discrimination* which are also binding on Australia.

In Australia the ratification of an international treaty does not automatically incorporate that treaty into domestic law. Although the Australian Government will be bound by the treaty at the international level, it is not binding at a national level unless the Government sets out those rights in legislation. At most, a treaty that is not incorporated into domestic law will give rise to a legitimate expectation that the government will act in accordance with that treaty unless there is some contrary intention in law.⁴ This does not mean that the government is bound by the treaty, it just gives right for a person affected to make arguments as to why the treaty should be complied with before a decision is made.

Although human rights are partially protected in Australian law through various Commonwealth and State legislation⁵ there is no overarching protection of human rights in Australia. Australia is the only Western democracy that does not have comprehensive legal protection of human rights.⁶

International environmental rights in the human rights context

None of the international human rights instruments to which Australia is a party specifically protect environmental rights. However some environmental rights are considered to be indirectly or implicitly protected through other rights. These include:

- the right to life;
- the right to health;
- the right to adequate housing;
- the right to water;
- the right to food;
- the right to culture;
- the right to participate in public life; and
- the right to freedom of speech.

³ Human Rights Law Resource Centre, *The National Human Rights Consultation – Engaging in the Debate* (2009) 15 accessed at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/a-human-rights-act-for-all-australians/>

⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 290 - 291

⁵ See for example Racial Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth),

⁶ Human Rights Law Resource Centre, *The National Human Rights Consultation – Engaging in the Debate* (2009) 7

For example, the Universal Declaration on Human Rights at article 25 states:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services..."

Although there is no specific reference to the environment, the term 'including' indicates a non-exhaustive list of factors essential to an adequate standard of living.

The ICCPR states at article 6(1):

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

The right to a clean and healthy environment and the right to water are often considered to be precursors to the right to life.⁷ The 2008 Earthjustice report on human rights and the environment⁸ explains:

"The right to life, perhaps the most basic human right, has extensive environmental links. The most obvious connections manifest themselves in situations such as the Chernobyl nuclear disaster and the Bhopal gas leak, each of which fouled the environment in ways that directly contributed to the loss of many lives. Less obvious but equally devastating, extractive industries such as mining, logging and oil development deprive indigenous peoples of the physical basis for their cultures and subsistence, and thereby threaten their lives."

The links between the right to health and environmental rights are obvious. Many health problems stem from or are impacted by environmental pollution. The right to health in the ICESCR at article 12 calls on States parties to take steps for:

"the improvement of all aspects of environmental and industrial hygiene" and "the prevention, treatment and control of epidemic, endemic, occupational, and other diseases".

These rights will also be relevant in the context of climate change which is likely to lead to sea level rise and an increase in the number and severity of extreme weather events. These impacts will threaten the right to life and health among others, and therefore protection of these human rights can provide additional impetus for the need to act to prevent climate change.

Of all the treaties that Australia is a party to, the most direct protection of environmental rights is found within the *Convention on the Rights of the Child*. It refers to aspects of environmental protection in relation to the child's right to health. Article 24 provides that parties shall take appropriate measures:

"to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution".

Therefore although Australia is not bound at international law to specifically and comprehensively protect environmental human rights, it is clear that the treaties to which Australia is legally bound do provide a framework within which environmental rights should be protected and promoted.

⁷ Justice Brian Preston, 'The Environment and its Influence on the Law' (2008) 82 *Australian Law Journal* 180

⁸ Earthjustice, *Environmental Rights Report on Human Rights and the Environment* (2008) 6
<http://www.earthjustice.org/our_work/issues/international/human_rights/> at 19 May 2009

Non-binding international sources of environmental rights

There are a number of other international instruments that specifically refer to environmental human rights but are not legally binding on Australia because they are draft texts, or they are not intended to be legally binding on parties, or they are conventions that Australia is not a party to. Some of these instruments are environmental instruments that note human rights linkages and some are human rights instruments that note the importance of environmental rights. Although they are not binding on Australia they are evidence of a strong global recognition of the importance of environmental rights and they indicate the path that Australia can follow.

As noted above, the Stockholm Declaration was the first international instrument that specifically recognised the indivisible link between the environment and human rights. It states at Principle 1:

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

Similarly the 1992 Declaration on Environment and Development⁹, or ‘Rio Declaration,’ recognises the right of humans to a healthy and productive life in harmony with nature.

The most comprehensive of all the international texts on environmental rights is the 1994 Draft Principles on Human Rights and the Environment¹⁰. It contains a number of articles which outline the importance of environmental rights in the human rights context. The document was drafted by a group of international experts on human rights and environment protection on behalf of the UN Special Rapporteur for Human Rights and the Environment. It was never formalised as an international instrument and is not binding. Some of the key articles in the Draft Principles state:

- “Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.” (Article 1)
- “All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.” (Article 2)
- “All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.” (Article 4)

The Draft Principles highlight the indivisibility of human rights and environmental rights. A clean healthy environment is integral to the enjoyment of many other human rights such as the right to life, the right to health and food, the right to adequate housing etc. The Draft Principles are often quoted by human rights experts and international human rights bodies as a model text of environmental rights protection.

As can be seen from the above statements there is considerable support at the international level of the importance and indivisibility of environmental rights within human rights protections. It is not a new concept and not a radical concept. This recognition continues to grow through many international bodies

⁹ Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14/Rev.1 (1972).
<<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>> on 19 May 2009

¹⁰ Draft Principles On Human Rights And The Environment, E/CN.4/Sub.2/1994/9, Annex I (1994)
<<http://www1.umn.edu/humanrts/instrree/1994-dec.htm>> on 19 May 2009

and provides a strong foundation for Australia to include environmental rights within human rights protections.

Environmental rights within domestic human rights instruments

The protection of environmental rights in a human rights context at a domestic level is not a new concept. Many countries around the world provide some protection of environmental rights within their human rights charters.

Earthjustice summarised the constitutional recognition of environmental rights in a submission to the UN Commission on Human Rights in March 2005:

“Numerous constitutions of the nations of the world guarantee a right to a clean and healthy environment or a related right. Of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources. One hundred and nine of them recognise the right to a clean and healthy environment and/or the state’s obligation to prevent environmental harm. Of these, 56 constitutions explicitly recognise the right to a clean and healthy environment, and 97 constitutions make it the duty of the national government to prevent harm to the environment. Fifty-six constitutions recognize a responsibility of citizens or residents to protect the environment, while 14 prohibit the use of property in a manner that harms the environment or encourage land use planning to prevent such harm. Twenty constitutions explicitly make those who harm the environment liable for compensation and/or remediation of the harm, or establish a right to compensation for those suffering environmental injury. Sixteen constitutions provide an explicit right to information concerning the health of the environment or activities that may affect the environment.”¹¹

For example South Africa has specifically protected environmental rights in its Constitution:

“Everyone has the right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable and other legislative measures that (i) prevent pollution and degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”¹²

In 2005 France amended its constitution to include environmental provisions, known as the Environment Charter. The Charter contains 10 articles covering rights and responsibilities of its citizens in relation to the Environment. As it is incorporated into the Constitution it is legally binding and gives environmental rights and responsibilities the same status as other rights such as the right to life and universal suffrage. Article 1 of the Charter states:

“Everyone has the right to live in a balanced environment which shows due respect for health.”¹³

Even small developing countries such as East Timor have provided protection of environmental rights in their constitutions. Section 61 of the East Timor Constitution states:

“1. Everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations.

¹¹ Earthjustice, *Environmental Rights Report on Human Rights and the Environment* (2005) 37 <http://www.earthjustice.org/our_work/issues/international/human_rights/> at 19 May 2009

¹² *Commonwealth Constitution*, Chapter 2 section 24

¹³ Constitution of 4 October 1958, accessed at <http://www.assemblee-nationale.fr/english/8ab.asp>

2. The State shall recognise the need to preserve and rationalise natural resources.
3. The State should promote actions aimed at protecting the environment and safeguarding the sustainable development of the economy.”¹⁴

The lack of comprehensive human rights protection in Australia gives Australia a lack of credibility on the international stage. Protection of human rights including environmental rights at the national level would allow Australia to participate more fully in the human rights debate and provide a more credible platform to encourage other countries to improve their human rights and environmental protection standards.

Protection of other human rights that relate to the environment

Indigenous rights

While environmental rights apply equally to all people, there is recognition of the need to provide specific protection for particular groups who are disproportionately affected by environmental degradation and who have a particular cultural connection to land and the environment. Climate change for example may disproportionately affect indigenous people as sea level rise inundates traditional land and increasing temperatures alter the availability of water and cause changes to the local populations of flora and fauna. A number of instruments therefore specifically protect indigenous rights in connection with the environment. The Draft Principles on Human Rights and the Environment state:

“Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence. Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wildlife or other resources.” (Article 14)

Australia recently gave formal notice of its support for the United Nations Declaration on the Rights of Indigenous Peoples, although it is not binding on States. The Declaration includes rights relating to indigenous people and the environment. For example Article 29 states:

“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”

Participatory rights

“No matter how strong a substantive right to a clean environment might be on paper, it would be meaningless without the procedural (and related) rights necessary to pursue respect, protection and promotion of that right.”¹⁵

In addition to rights that directly protect people’s right to a clean and healthy environment, recognition of “procedural rights” is important to ensure environmental rights are fully realised. A number of instruments protect the public’s right to fully participate in governance and legal systems, which assist in ensuring

¹⁴ Constitution of the Democratic Republic of Timor-Leste August 2001 accessed at <http://www.timor-leste.gov.tl/constitution/constitution.htm>

¹⁵ Marie Soveroski, ‘Environment Rights versus Environmental Wrongs: Forum over Substance?’ (2007) 16 *Review of European Community and International Environmental Law* 261, 261.

environmental rights are properly implemented and protected. For example access to information, access to justice, public participation in public decision-making, and the right to peaceful assembly are all rights that must be protected to ensure environmental rights are fully protected by governments. At the international level ¹⁶ the need for protection of these rights has been recognised in numerous instruments and reports. For example the Rio Declaration states:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” (Principle 10)

The *Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention)* is the most comprehensive instrument on procedural environmental rights. It entered into force in 2001, is legally binding and has over 40 parties. It creates rights to protect the “three pillars” of public participation - access to information, public participation in decision making and access to justice in environmental matters. Although it is a regional convention focused on the European Union, any country can join the convention (although Australia is not a party). The objective of the Convention contained in Article 1 states:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention.”

A number of international environmental treaties that are binding on Australia also specifically protect participatory rights. For example the Framework Convention on Climate Change requires parties to:

- “(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:
 - (i) the development and implementation of educational and public awareness programmes on climate change and its effects;
 - (ii) public access to information on climate change and its effects;
 - (iii) public participation in addressing climate change and its effects and developing adequate responses”¹⁷ (Article 6)

In 1995 Finland reformed its constitution to strengthen its protection of fundamental rights. The Constitution of Finland now provides that public authorities must “endeavour to guarantee ... the right to a

¹⁶ Dinah Shelton, ‘Human Rights and Environment Issues in Multilateral Treaties Adopted between 1991 and 2001’ (Background paper to the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva, 14-16 January 2002) <<http://www.unhcr.ch/environment/bp1.html>> at 19 May 2009. Treaties include the *Protocol on Environmental Protection on the Conservation of Antarctic Fauna and Flora*; *Convention on Biological Diversity*; *Convention on Persistent Organic Pollutants*

¹⁷ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 U.N.T.S. 107, Article 6 (entered into force 21 March 1994) <<http://www.austlii.edu.au/au/other/dfat/treaties/1994/2.html>> on 19 May 2009.

healthy environment and for everyone the possibility to influence the decisions that concern their own living environment" (section 20).

Environmental responsibilities

In an environmental context, environmental responsibilities are as important as environmental rights. Numerous international and domestic human rights instruments set out the responsibilities of government and/or citizens to protect the environment, and sometimes to remedy environmental harm. For example, the French Environment Charter places specific responsibilities on its citizens to protect the environment and remedy any damage caused:

“Art 2 - Everyone is under a duty to participate in preserving and enhancing the environment.

Art 3 - Everyone shall, in the conditions provided for by law, foresee and avoid the occurrence of any damage which he or she may cause to the environment or, failing that, limit the consequences of such damage.

Art 4 - Everyone shall be required, in the conditions provided for by law, to contribute to the making good of any damage he or she may have caused to the environment.”

Questions

- What environmental rights do you think are relevant to Australia?
- Do you think it is useful to include environmental responsibilities in a human rights instrument?

Protection of human rights in Australian law

Two Australian jurisdictions currently provide legislative protection for human rights – Victoria and the ACT¹⁸. Both Charters are quite narrow in their scope and only protect civil and political rights and therefore neither specifically protect environmental rights. However as noted above, environmental rights may be indirectly protected through other human rights such as the right to life, which is protected in both Charters. In addition, both Charters protect participatory rights to some extent – both contain specific protection for freedom of expression and peaceful assembly.

Which environmental rights should be protected in an Australian Charter?

In relation to maintaining a clean and healthy environment and supporting the wellbeing of people within their environment, the ideal human rights charter would encompass a range of different rights. The charter would protect civil and political rights as well as economic social and cultural rights, as a number of these rights can be of benefit for environmental protection and for the protection of people within their environment. It would also provide specific protection of environmental rights either in the form of an encompassing right to a clean and healthy environment or a set of related environmental rights.

It would include environmental rights for Indigenous Australians. It could also specifically include the right to water. Finally, it would include participatory rights, either specifically targeted towards community participation in environmental protection or general community participatory rights through civil, political, economic, social and cultural rights.

Obviously, the scope and value of human rights protection goes beyond the environmental sphere, and therefore there are a number of other rights that must also be included in a model charter. However, identification of those rights goes beyond the scope of this paper. For more discussion of the full range of

¹⁸ *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and the *Human Rights Act 2004 (ACT)*

rights that could be protected, see the Human Rights Law Resource Centre's paper on the national human rights charter.¹⁹

TERM OF REFERENCE 2:

Are these human rights currently sufficiently protected and promoted?

How are human rights currently protected in Australia?

As noted in Part 1 above, human rights are currently protected through the Australian legal system in a number of limited ways. These include some constitutional protections (such as the implied right to vote and a limited implied right to freedom of political communication), specific legislation that implements the provisions of international human rights treaties that Australia is a party to, such as the *Racial Discrimination Act 1975* (Cth)²⁰ and the *Sex Discrimination Act 1984* (Cth)²¹, and the common law (which together with evidence law, for example, has established a right to fair trial).²² There is also some state legislation protecting some human rights (such as state level discrimination legislation), and both the ACT and Victoria have human rights act, although both only include civil and political rights.

However, there are no direct legal protections for civil and political, nor economic, social and cultural rights at the Federal level, despite the fact that Australia is a signatory to both international conventions establishing these human rights.²³ Nor does any Australian law protect any specific 'environmental rights', such as the right to a clean and healthy environment.

Are human rights sufficiently protected in environmental legislation?

A plethora of legislation in Australia's States and Territories, and some at the Federal level, aims to protect the environment, regulate the use and development of land, and manage natural resources. Government bodies are continually making decisions under these laws about land use and development that impact not only on the natural environment, but on the lives of people affected by those actions. For example, decisions made by Government to permit extractive industries that may lead to water pollution has the potential to impact on the health and access to water for communities living in the vicinity of that industry. Decisions made that deliberately exclude members of the public from participating in that process can mean that communities most affected by a decision, and the environmental damage that goes with it, are excluded from having their views heard.

Correspondingly, in such circumstances there may be a breach of a number of different human rights, including the right to life, the right to health, the right to adequate housing, the right to water, the right to food, the right to culture, the right to participate in public life, and the right to freedom of speech. Thus, environmental degradation can have a direct effect on human rights, and conversely the violation of human rights may lead to the degradation of the environment. Yet, as the law in Australia currently

¹⁹ Human Rights Law Resource Centre, *The National Human Rights Consultation – Engaging in the Debate* (2009), <tinyurl.com/puv7n4> on 19 May 2009

²⁰ Which implements Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination 1965* opened for signature 21 December 1965, 660 U.N.T.S. 195 (entered into force 4 January 1969).

²¹ Which implements Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women 1979* opened for signature 18 December 1979, 1249 U.N.T.S. 13 (entered into force 3 September 1981).

²² See Justice Brian Preston, 'The Environment and its Influence on the Law' (2008) 82 *Australian Law Journal* 180, and also 'Lets Talk About Rights' toolkit prepared by the Australian Human Rights Commission <<http://www.hreoc.gov.au/letstalkaboutrights/info.html>> at 19 May 2009.

²³ The *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 3 (entered into force 1 March 1976).

stands, there is no requirement for any government bodies to consider the human rights implications of the decisions it makes in the context of the environment.

There are many examples of situations where human rights are either violated or ignored in the environmental context. The current laws that regulate and protect the environment are often inadequate in ensuring that broader social and environmental concerns are considered equally with economic imperatives. These laws also fail to consider human rights implications. Examples and case studies serve to best illustrate this relationship between human rights and the environment, and how environmental laws in Australia are currently failing to ensure that human rights are not breached in environmental contexts.

Due to the fact that States and Territories carry the primary responsibility for environmental matters, the examples and case studies below for the most part involve issues associated with State and Territory laws and government bodies. However, they nevertheless serve to illustrate the relationship between human rights and the environment. Additionally, because of the Federal Environment Minister's role under the *Environment Protection and Biodiversity Conservation Act (1999)*, and the Federal Government's role in addressing climate change, there remains an important decision-making role for Federal Government in matters of national environmental significance that may raise similar human rights issues in the future.

Human rights implications in decision-making about development

Environmental controversies can arise in the context of proposed development, particularly in respect of extractive industries such as mining, given the tension between the economic, environmental and social impacts of these projects. Government decision-makers are charged with the responsibility of balancing a number of competing factors, and economic considerations frequently prevail. Sometimes, this can be in spite of, and at the expense of, valid and serious concerns about environmental and social impacts of a project.

Environmental laws across the States and Territories often permit citizens to take court action to challenge the legality of government decisions, providing one avenue for citizens to hold Governments accountable and try to intervene in these circumstances. However, Governments have, from time to time, resorted to using 'special legislation' which is enacted deliberately to avoid the application of their own environmental protection laws or to render litigation challenging the validity of a decision futile, particularly in controversial cases.²⁴

Case Study: The MacArthur River Mine expansion, Northern Territory²⁵

In 2003, owners of the MacArthur River Mine (MRM) proposed to expand the operation of their zinc, lead and silver mine in a remote area of the Northern Territory (NT), which would involve the rerouting of the MacArthur River. Serious environmental damage and public health concerns, as well as cultural concerns, were raised by both environmentalists and Traditional Owners in the area. Despite being initially rejected by the NT EPA with serious concerns raised by the NT Environment Minister, after pressure from the Federal Government, the NT Minister for Mines approved the mine expansion. Traditional Owners challenged the legality of this decision, and succeeded in the Supreme Court of NT, only to have legislation introduced into the NT Parliament just two days later, designed to enable the mine expansion to go ahead despite the Court decision. The legislation passed quickly. A further challenge in the Federal

²⁴ See the examples give in Jeff Smith 'Abiding by the Umpire's Decision: Special Legislation and the Planning System in NSW and Australia' (2008) 85 IMPACT! 15

²⁵Based on the article Kirsty Ruddock, 'Justice in the Northern Territory?' 7(2) *Indigenous Law Bulletin* 21, 21 – 24.

Court against the Minister for Environment, who approved the expansion under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) was successful, but a fresh approval was then issued.

A number of human rights issues are raised by this case. The mine expansion had the potential to cause serious environmental harm, affecting the health and well-being of those Aboriginal communities living near the mine. Human rights that had the potential to be breached as a result included the rights to health, life and to culture, as well as the 'right to a clean and healthy environment'. There was also a failure to respect participatory rights, such as the right to participate in public affairs, in the way that the government ensured the ongoing operation of the mine by passing special legislation to defeat the successful challenge to the Government's decision-making processes.

Taking a human rights based approach in this situation may have led to a different outcome. For example, if the Federal Environment Ministers who made a decision in this case was required to consider human rights, it is possible that more weight would have been given to the public health and environmental impacts of the MRM expansion as well as the cultural impacts for the Traditional Owners. Further, if there had been requirement to scrutinise bills on the part of the Territory to ensure that they are consistent with human rights, perhaps the 'special legislation' may not have passed so rapidly and without comment in the NT Parliament, given the way the legislation operated specifically to defeat public participation, and facilitated the project with its serious health, environmental and cultural implications, to proceed.

Questions

- The MacArthur River Mine case raises a number of potential human rights issues. Do you think there would have been a different outcome if government decision-makers had been required to consider human rights?
- Can you think of other instances where similar environmental or public health issues are, or have been, raised, that have human rights implications?

The human rights implications of climate change

To date, the debate about climate change has been significantly focused on the environmental and economic challenges that it represents. However, the human rights implications of climate change are becoming increasingly recognised. On a global scale, international climate change negotiations have involved a longstanding debate on matters of equity between developed and developing nations, in determining the allocation of responsibility for mitigating climate change. This also extends to the consideration of the equity issues raised in relation to the capacity of developing nations to adapt to climate change, which has been for the most part caused by industrialised nations. Further, the rights of those individuals and communities that may be forced to migrate due to the impacts of climate change is an issue that is also growing rapidly in recognition and concern.

On a more local scale, issues of justice and inequality in the climate change context are also becoming more prevalent in the public debate. Those individuals and communities who are already socially and economically disadvantaged and marginalised are likely to have a more limited capacity to adapt to the impacts of climate change (for example, if forced to relocate) and will be most affected by extreme climate events²⁶ (as Hurricane Katrina recently demonstrated). For example, the introduction by the

²⁶ See for example: <http://www.abc.net.au/news/stories/2009/04/21/2548027.htm> (21/4/09)

Federal Government of its proposed Climate Pollution Reduction Scheme has raised alarms that it will hit low-income households the hardest, as it is likely to create increased household bills.²⁷

Climate change will also have a disproportionate impact on Indigenous people in Australia, given the threats it poses, as a result of their fundamental relationship to the land, on their health and well being. Indigenous Australians also risk being disengaged from participating in, and being consulted on, Australia's responses to climate change. Indigenous communities are also much more vulnerable to climate change due to their already existing social and economic disadvantage.²⁸

Thus, climate change perhaps presents the most pressing example of where a human rights based approach to environmental matters may provide the most equitable way to resolve the complex issues that arise, particularly for those most vulnerable to its impacts.

Example: Climate Change, Coal Mining and the Right to Food

There is currently a dispute in the Caroon region in NSW, one of the most fertile food growing regions in Australia, between farmers and coal miners about the use of land in the region.²⁹ Mining uses significant amounts of water, inevitably damages the structure of soil and the landscape, and results in pollution (of both air and water). The soils in this region are particularly fertile. An already arid nation, Australia is predicted to become even drier as a result of climate change, which will further impact on this situation. With the continued expansion of coal mining in this area, the use by mining of the ever dwindling water supply may mean that the agriculture industry in the region is no longer viable. This may have a severe impact on food security for NSW (and for Australia).

Exploration for further mining is ongoing, to the concern of local farmers. A number of human rights, including the right to water, the right to food and the right to a clean and healthy environment, are raised in this situation. However, the current planning system in NSW has meant that, to date, the NSW Government has failed to consider the broader social and environmental impacts of coal mining in this region, and whether mining is even appropriate.

If required to take a human rights based approach in these circumstances, arguably the NSW Government would be required to more broadly consider whether coal mining should continue to proceed in this region, given the impacts on farmers, and the community more broadly, access to clean water, potential health impacts, the need for food security, and more broadly, the right to a clean and healthy environment for those communities living in the area.

Example: Climate Change and Sea Level Rise

It is widely acknowledged that among developed nations, Australia will be one of the most severely affected by climate change. Given the proportion of our population residing in coastal areas, the

²⁷ See, for example PIAC's submission on Climate Policy: <http://www.piac.asn.au/publications/pubs/09.04.09-EWCAP-Submission%20to%20Climate%20Policy%20Senate%20Select%20Committee.pdf>

²⁸ Australian Human Rights Commission, *Native Title Report 2008*. See particularly Chapter 5, 'Indigenous peoples and climate change' and 'case study 1- climate change and the human rights of Torres Strait Islanders' <http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/> on 19 May 2009.

²⁹ Marian Wilkinson, 'Small farmers take fight to mighty miner' *Sydney Morning Herald* (Sydney) 13 April 2009 <<http://www.smh.com.au/national/small-farmers-take-fight-to-mighty-miner-20090412-a3zf.html?page=-1>> on 19 May 2009. See also Kirsty Ruddock and Felicity Millner, 'Can we eat coal? Human rights and coal mining' (2008) 86 *IMPACT!* 7

consequences of sea level rise are a serious concern. In addition, increased instances of storm surges and flooding are predicted.

There are many potential human rights concerns in the context of sea level rise. The 'sea change' phenomenon has resulted in coastal communities changing dramatically in socio-economic makeup, with social disadvantage already endemic in Australian coastal communities. There will be varying levels of capacity for individuals and communities to relocate, or take measures to protect their properties, in response to rising sea levels, further exacerbating existing inequalities. Governments are unlikely to willingly compensate land owners for any damage associated with climate change related coastal hazards such as sea level rise.³⁰ Further, rising sea levels and flooding give rise to other risks including the salinisation of freshwater sources impacting on the availability of drinking water, the destruction of infrastructure, enhanced exposure to disease and the potential toxic contamination of water if contaminated sites are inundated.³¹ In the context of the Torres Strait Islands, the problem is already a real one as sea level rise and extreme climatic events are already occurring.³² For them, the implications are particularly far-reaching in terms of the impacts on their culture and way of life if they eventually are forced to relocate and relinquish their connection with their traditional lands, as well as the impacts on infrastructure, health, water resources and biodiversity.³³

Governments are currently grappling with how to address these risks from a policy perspective. Taking a human rights based approach, Government would be required to consider the implications that such policy choices have on the human rights of those individuals that are likely to be affected: the right to life, the right to housing, the right to water, the right to food, the right to health, the right to culture, and the right to a clean and healthy environment. These are particularly critical for Australia's Indigenous populations. In the context of sea level rise, active public participation in decision-making processes to determine the best local options for adapting will also be critical. A conceptual framework that could guide Government responses to climate change from a human rights perspective may lead to the improved development and application of policy in this area - moving the focus of adapting to sea level rise from science and economics, to include the human rights implications.³⁴

³⁰ For example, the NSW Government's recent Draft Sea Level Rise Policy Statement indicates that the government has no intention of compensating owners of land affected by coastal hazards or flood risks: see <http://www.environment.nsw.gov.au/resources/climatechange/09125DraftSLRpolicy.pdf>

³¹ See Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report (Summary for Policymakers)* (2007) 13 <http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf> at 20 May 2009. See also EDO NSW's submission on the NSW Draft Sea Level Rise Policy Statement, available at: <http://www.edo.org.au/edonsw/site/policy.php#1>

³² For example, see 'Sinking without trace: Australia's climate change victims', *The Independent* (London) 5 May 2008 <<http://www.independent.co.uk/environment/climate-change/sinking-without-trace-australias-climate-change-victims-821136.html>> on 20 May 2009.

³³ See discussions in Donna Green and Kirsty Ruddock, 'Could litigation help Torres Strait Islanders Deal with Climate Impacts?' (2009) 9 *Sustainable Development Law and Policy* 23 <<http://www.wcl.american.edu/org/sustainabledevelopment/documents/09winter.pdf?rd=1>> at 20 May 2009; Owen Cordes-Holland, 'The Sinking of the Strait: The Implications of Climate Change for Torres Strait Islanders' Human Rights' (2008) 9 *Melbourne Journal of International Law* 405 <<http://www.austlii.edu.au/au/journals/MelbJIL/2008/16.html>> on 20 May 2009. The AHRC's *Native Title Report 2008* also considers in depth the human rights implications of climate change on Torres Strait Islanders <http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/pdf/casestudy1.pdf> on 20 May 2009.

³⁴ HREOC (now the Australian Human Rights Commission) prepared a paper arguing for a 'human rights approach' to effectively address the threats to human rights resulting from climate change and providing remedies. See Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change' (2008) <<http://www.humanrights.gov.au/about/media/papers/index.html>> on 20 May 2009.

Questions

- Do you think a human rights based approach is appropriate in the context of climate change?
- Can you think of other instances where climate change impacts already, or are likely in the future to, give rise to human rights implications?

Environmental campaigners and protest rights

Another area of human rights arises in the context of whether the law in Australia adequately protects the rights of environmental activists and protestors. In Australia, we often assume that we are guaranteed the freedom to speak our mind without the threat of adverse legal consequences, with the only limitations provided by defamation laws that seek to balance freedom of speech with the need to protect the reputation or privacy of individuals. However, as we noted earlier, the law in Australia has limited protection of human rights.

Recent developments in Australia suggest that the rights and freedoms associated with peaceful protest actions are being targeted in the context of environmental campaigning. Unfortunately, there are many examples of the treatment of activists who peacefully protest against logging operations (such as charges of 'intimidation' brought by police) that potentially amount to an infringement of their rights to freedom of speech and to peacefully protest. Stronger human rights protections might ensure that there is greater respect for the rights of protestors, in the context of the criminal justice system.

There has also been a rise in court actions filed by corporations that aim to intimidate or discourage environmental campaigners or activists from voicing their concerns, called 'strategic litigation against public participation' (*SLAPP suits*). A SLAPP suit achieves its purpose because of the great expense, anxiety and stress placed by litigation on the defendant(s). It also has a 'chilling' effect on wider public debate, by discouraging debate, silencing criticism and protest and curtailing public participation in the political process.

In response to SLAPP suits, there have been few attempts in states across Australia to introduce legislation to protect human rights, particularly the right of public participation, from this kind of litigation.³⁵ However, the ACT recently passed the *Protection of Public Participation Act 2008 (ACT)*³⁶ which applies to any case seeking damages³⁷ and allows a court to order the plaintiff to pay a financial penalty if the case was commenced for an improper purpose, in relation to conduct constituting public participation. This provides a limited deterrent for SLAPP suits, as it is not framed as a positive right to public participation and has the difficult requirement of proving that the motivation for the litigation is improper.³⁸

Case Study: The 'Gunns 20' Litigation³⁹

By far the largest and most controversial SLAPP suit to date in Australia is the case referred to as the 'Gunns 20'. In 2004, logging and wood chipping company Gunns Limited sued 20 environmental activists, green organisations (as well as their individual staff members), and members of the Greens party for \$6.4

³⁵ See discussion in Michael Bozic 'Slip, Slop, SLAPP: It's Time for Action' (2008) 85 *IMPACT!* 8, 8-9; and in Greg Ogle, 'Gunning For Change: The Need for Public Participation Law Reform' (2005) <http://www.wilderness.org.au/articles/pdf/Gunning_for_Change_web.pdf> on 20 May 2009

³⁶ Available at <<http://www.legislation.act.gov.au/a/2008-48/current/pdf/2008-48.pdf>>

³⁷ Subject to certain exceptions. Section 8(2)(a) specifically permits defamation claims.

³⁸ See Greg Ogle, 'Gunning For Change: The Need for Public Participation Law Reform' (2005).

³⁹ See the website: <http://www.gunns20.org> for further detail about the case.

million in damages. The claim, which was 216 pages long (although subsequently amended on a number of occasions after being struck out by the Court), sought damages for disruption of its logging operations in Tasmania (by protests and blockades), and in respect of allegations made that its woodchip piles could be harmful to health. It was issued just days before Gunns announced its plans to build a major pulp mill.

The proceedings are ongoing against some, but not all, of the original defendants. Gunns has recently agreed to pay the Wilderness Society \$350,000 to settle its case against them. However, Gunns has also recently filed a new case against 13 activists seeking damages for disruptions to the operation of a woodchip plant.⁴⁰ This suggests the company intends to continue to use litigation to respond to the actions of forest campaigners seeking to protect Tasmania's native forests.

The concerns here are that there is inadequate protection of freedom of speech, the right to peaceful assembly, and the right to public participation. If Australia had stronger protections for these human rights, there may be more protection available for the campaigners being subject to such litigation. For example, if the defendants were able to raise human rights arguments in the Court proceedings, the case may have been resolved more quickly, and the commercial torts (wrongs) pleaded in the case (such as the tort of interference with trade and business by unlawful means) would have to be considered in the context of the protection of human rights (not simply the 'economic rights' of the company making the claim).

Indeed, the explicit protection of human rights in Australian legislation could deter SLAPP suits of this nature from being commenced. Alternatively, a 'culture of human rights' that may be created by stronger human rights protections could lead to greater impetus for the introduction of specific 'anti-SLAPP' legislation.

Questions

- Have you, your organisation or anyone you know, ever experienced interference with rights associated with environmental protest and advocacy activities?
- Do you think these problems could be avoided if Australian law articulated human rights such as the right to free speech, freedom of association and peaceful assembly, and the right to public participation?

This selection of examples and case studies demonstrates the interconnectedness and indivisibility of human rights and environmental protection. A healthy environment is necessary for the enjoyment of many human rights, and conversely human rights violations can lead to the degradation of the environment. In this context greater protection of human rights in Australia, providing scope for the use of a human rights based approach by Government bodies, has the potential in many circumstances to lead to better environmental decisions, and to the development of more just laws and policy in the environmental context.

⁴⁰ See Matthew Denholm, 'Gunns lodges writ against 13' *The Australian* (Sydney), 8 January 2009 <<http://www.theaustralian.news.com.au/story/0,,24885908-5006788,00.html>> on 20 May 2009.

TERM OF REFERENCE 3:

How could Australia better protect and promote human rights?

What options are there for better protecting human rights in relation to the environment?

As the above discussion and case studies have highlighted, enhanced protection of human rights in Australia may present better outcomes in environmental matters, particularly in the development of laws and policy and through decision-making processes. A human rights based approach is also likely to improve government accountability, and may lead to more environmentally sustainable and just outcomes.

The final TOR of the Consultation seeks views on what would be the best ways to protect human rights in Australia. There are a number of possible ways this could be achieved. Although the most commonly referred to is the possibility of legislation, other ways of better protecting and promoting human rights include the development of government policy on human rights, the preparation of government programs addressing specific areas of human rights, and education programs to better enhance public awareness and understanding about human rights.⁴¹

The matters raised in this TOR are more technical, in the sense that the TOR is broad enough to receive submissions on the specific model of legislation to be adopted by the Federal Government. However, we emphasise that it is not necessary to comment on each TOR in the Consultation, or comment at any particular level of detail, and that any submission on any TOR will be of value. Therefore, it is worthwhile making a submission recognising the relationship between human rights and the environment, and setting out any concerns you have about the protection of environmental rights in Australia, even if this submission does not extend to considering the exact model of protection that is appropriate.

Nevertheless, if you are interested in considering the benefits of a 'human rights act' and considering what form such legislation might take, the following sections of this Discussion Paper raise some relevant matters for consideration.

Benefits of a 'Human Rights Act'

Much of the discussion around the Consultation focuses on the outcome being legislation (a 'bill of rights', 'human rights act' or 'charter of rights'). As the Committee has specifically stipulated that the Federal Government will not support constitutional change to include a 'bill of rights' within the Australian Constitution, the strongest available option to better protect and promote human rights would be legislation.

There are a number of arguments for why a human rights act would be beneficial, which broadly include that it would:

- build a stronger 'culture of rights' in Australia;
- give rise to greater awareness amongst government employees of human rights and provide greater flexibility in their decision-making,

⁴¹ See the Australian Human Rights Commission Toolkit, <http://www.hreoc.gov.au/letstalkaboutrights/downloads/toolkit.pdf>

- be useful as an advocacy tool for individuals and groups; and
- ensure the prevention of human rights abuses before they happen.⁴²

Ideally, a human rights act would ensure that human rights are considered by all arms of the Federal Government. For example:

- Federal Parliament could be required to scrutinise how all new Bills are likely to impact on human rights;
- Federal Courts could be required to interpret legislation in line with human rights, and if this is not possible, to report this to the Parliament, and individuals could have the right to bring a case to Court in instances of breach of protected rights;
- Federal Government agencies could be required to consider human rights when making decisions, delivering services and developing policies.

In the environmental context, the best impact of a human rights act is that it is likely to ensure that the potential human rights consequences of decisions that impact on the environment are given consideration, and may provide more flexibility for decision-makers in this regard. This is likely to arise in the context of decisions made under the EPBC Act⁴³, which in most circumstances sits alongside relevant approvals under State and Territory environment and planning laws. Furthermore, it would likely influence the operations of companies who require these approvals from the Federal Government, who would recognise they would have better chances of succeeding in obtaining requisite approvals if they respect human rights.⁴⁴ A human rights act would also be beneficial for any future environmental legislation made at the Federal level to be scrutinised for human rights implications, and legislation would also have to be interpreted by the Courts consistently with human rights.

While we acknowledge that as most environmentally related legislation exists at the State and Territory level, such that a Federal human rights act may have limited efficacy in the environmental context, there are still some valid reasons why it would nonetheless be beneficial. There is the potential to have 'opt in' clauses so the States and Territories could elect to be bound by the legislation. Alternatively, it may encourage States and Territories to develop their own human rights legislation. Finally, more broadly the 'culture of rights' engendered by a human rights act, together with education programs, could lead to a greater awareness of these matters for decision-makers at the State and Territory level, and could also provide a lobbying tool for advocates engaged in consultation and participation in environmentally relevant issues.

What would a Human Rights Act look like?

There are a multitude of matters to be considered when considering the detail of a 'human rights act'. What would this legislation look like? What rights and obligations should it establish, who should be responsible for complying with these, and how should it be enforced? While beyond the scope of this

⁴² See AHRC toolkit, *ibid*.

⁴³ *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Which, while are for environmentally significant actions, are limited (for example, impacts on World Heritage sites, nationally listed threatened species etc).

⁴⁴ For example, see comments made in relation to ramifications for the private sector in respect of the Victorian Charter of Human Rights and Responsibilities Act 2006 See Allens Arthur Robinson, 'Focus: Victorian Charter of Human Rights' 28 April 2009 <http://www.aar.com.au/pubs/ldr/focsrapr09.htm?min=true>

Discussion Paper to discuss in detail,⁴⁵ relevant matters that must be considered in determining a final structure for such legislation include:

- What rights would be included for protection?
- Whose rights would be protected?
- Who would the legislation place obligations and responsibilities on? How would the rights be applied? For example, human rights legislation in other jurisdictions (Victoria, ACT, the UK) require the Courts, Parliament and the Executive Government to all have responsibility for ensuring the protection of human rights.
- What would those obligations and responsibilities be?
- What 'remedies' would be available to those whose rights have been breached? For example, should individuals be able to make complaints to an independent body if they think their rights have been breached? Should individuals be able to sue for damages if they think their rights have been breached? Should human rights violations be able to be raised, if relevant, in any court proceedings?
- What, if anything, should accompany human rights legislation? For example, a comprehensive public education program, or education program for schools, about human rights?

Making a submission

The Committee is accepting submissions until the 15th of June 2009.

The Australian Network of Environment Defender's Offices will be making a submission. We are keen to engage with the community on the issues discussed in this Discussion Paper. For any further information or to discuss any of the issues raised in this Discussion Paper, please call **Nicola Rivers** at EDO Victoria on (03) 8341 3100 or via email at nicola.rivers@edo.org.au or **Gillian Duggin** at EDO NSW on (02) 9262 6989 or via email at gillian.duggin@edo.org.au.

For more information on the Consultation itself, refer to its website: www.humanrightsconsultation.gov.au

The Human Rights Law Resource Centre has produced a comprehensive report called 'Engaging in the Debate,' which discusses the Consultation. It can be accessed at:

www.hrlrc.org.au/content/topics/national-human-rights-consultation/materials-and-resources/#engaging%20in%20the%20debate

The Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) has also produced a toolkit to assist individuals and groups who wish to participate in the Consultation:

www.hreoc.gov.au/letstalkaboutrights/downloads/toolkit.pdf

⁴⁵ These are comprehensively set out and addressed in Human Rights Law Resource Centre, *The National Human Rights Consultation – Engaging in the Debate* (2009) 7 <<http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf>> at 19 May 2009