

**Redfern Legal Centre
National Human Rights Consultation Submission**



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1 Background to Redfern Legal Centre

- 1.1 The Redfern Legal Centre (**RLC**) is a community legal centre based in Redfern, New South Wales. RLC is run pursuant to a vision of a just society which respects human rights and enables equal participation by all. As well as providing free legal services to the local community of Redfern and its surrounds, RLC is committed to improving referral and co-operation throughout community and legal organisations and to seeking positive change in law, policy and administration which leads to decreased social disadvantage.
- 1.2 One of the goals specific to RLC, is to identify the inequalities in laws, the legal system, administrative practices and society as a whole that affect RLC's clients and disadvantaged people generally, and to work for social and legal change to remove those defects and inequalities and enhance respect for human rights. The National Human Rights Consultation Australia (**National Consultation**) provides an opportunity for RLC to comment on how human rights are applicable to RLC's clients, how these human rights are currently protected or breached, and how such protections may be more fully enhanced so as to mitigate future breaches.
- 1.3 RLC provides general advice and casework on issues with regards to domestic violence, credit and consumer debt, tenancy, employment and unfair dismissal, motor vehicle and property damage, fines, child residency and contact, police complaints and discrimination. Nine percent of RLC's clients in the 2007/2008 year were Aboriginal or Torres Strait Islander, with 33% from culturally and linguistically diverse backgrounds.¹ In 2007 to 2008, RLC opened 1208 new files, had contact with 1411 people through its Women's Domestic Violence Court Assistance Scheme, 2506 people within its Tenancy section and had its Credit and Debt legal team provide at least some initial advice to approximately 1751 people.
- 1.4 Arising out of its goals and objectives, its unique location within inner-city Sydney and the specific legal advice and services RLC provides to many of Australia's most disadvantaged people RLC is in a fortunate position when it comes to commenting on human rights norms within Australia. However, as the case examples show, the human rights situation as it pertains to many of RLC's clients is bleak, and it is a day-to-day experience of RLC's solicitors that they will face situations in which the human rights of their clients have been found to be non-existent. In saying this, it is not RLC's intention to immediately dismiss Australia's common law heritage, nor government legislative initiatives which have sought to protect common law and internationally recognised rights.
- 1.5 Rather, in making this submission RLC seeks to add to the rich history of national debate in relation to how best to protect the rights of Australia's more disadvantaged people. In accordance with its aim to provide clients with information and skills which will enable them to take control of their lives, RLC believes that if its submission will in some way add to, or enhance, the avenues through which its clients can lead more positive and engaging lives then it will have aptly fulfilled its objectives in this instance.
- 1.6 We thank the Committee for giving RLC the chance to make this submission.

¹ Redfern Legal Centre, Annual Report 2007-8, at page 14

2 Human Rights and Redfern Legal Centre

RLC Clients and their Rights

- 2.1 Human rights are important to RLC's clients. This is because RLC's clients are confronted with infringements of their human rights on a daily basis. These infringements may be lawful when analysed from a human rights jurisprudential perspective, but the socio-economic and culturally diverse backgrounds of RLC's clients make them increasingly vulnerable to rights violations. Whether they are housed in government-funded housing, reside in areas with a high police presence or are under court orders in relation to medical and other treatment, a high level of contact with government agencies and employees make RLC's clients susceptible to decisions which affect their lives with little or no participation themselves. The case studies contained in Section 5 are examples of this.
- 2.2 RLC provides legal advice and policy analysis, amongst other things, in a number of key areas. These areas include: credit and debt, tenancy and housing, domestic violence against women and student advisory services (including undergraduate, postgraduate and TAFE). RLC also provides general legal advice on issues ranging from sexual assault, guardianship, prisoners' rights and Aboriginal stolen wages. It is clear that, excluding much of the advice given with regards to credit and debt and domestic violence, most of the advice and policy work undertaken includes issues of interaction between RLC clients and government departments. In addition, the advice sought from RLC often comes at a time when clients' human rights have just been breached, or are in clear danger of being breached in the near future.

RLC Casework and a Rights Analysis

- 2.3 During the 2007/2008 year, examples of casework and the attendant human rights issues included:
- 2.3.1 RLC represented a tenant in an application to the Supreme Court of NSW relating to the eviction of the tenant from his Housing NSW residence as a result of rent arrears. The eviction occurred whilst an appeal in relation to the cancellation of the clients Housing NSW subsidy was before the Housing Appeals Commission. The case raises human rights issues, inter alia, the protection of the family, home and privacy² and the right to adequate housing³.
- 2.3.2 RLC represented a victim of sexual assault in relation to an application to court that her subpoenaed counselling notes not be available to the perpetrator or his legal representatives at the trial. The case raises issues with regards to the right to privacy and interference of the client's personal correspondence⁴ and the right to a fair trial⁵.
- 2.3.3 RLC assisted a number of women with regards to the removal of their children by the Department of Community Services (**DoCS**) with a view to ensuring that proper steps are taken by DoCS in regards to care and protection proceedings, the treatment by DoCS of individuals and families in the investigation and preliminary stages and the treatment of families in

² International Covenant on Civil and Political Rights (**ICCPR**), Article 17 and Article 23, and International Covenant on Economic, Social and Cultural Rights (**ICESCR**), Article 10(1)

³ Article 11(1), ICESCR

⁴ Article 17(1), ICCPR

⁵ Article 14(1), ICCPR

subsequent contact and maintenance arrangements. The cases involved rights regarding the treatment of family as the fundamental unit of society⁶ the interference of the family unit⁷, and the countervailing interests with regards to the rights of the child⁸.

2.3.4 RLC worked with the Mudgin-gal Aboriginal Women's Centre in order to consider ways of strengthening the relationship between women and children in the local Aboriginal community and the justice system so that victims of sexual assault and child victims of violence could see it as worthwhile to engage with police and the courts. Such community liaison work continually involves rights with regards to liberty and security of person⁹ and the rights of the child¹⁰.

2.3.5 RLC continued to work with local Aboriginal community members who had been removed from their families as children, including Aboriginal workers who were eligible to seek compensation through the Queensland Redress Scheme. Such work involves a historical acknowledgment of human rights abuses which occurred well into the 1980's and involves serious allegations, amongst others, with regards to slavery¹¹, forced and compulsory labour¹², liberty and security of person¹³, cruel, inhuman and degrading treatment¹⁴, the freedom of thought, conscience and religion¹⁵ and equal protection before the law¹⁶.

'Rights in Redfern - Community Consultation'

2.4 Noting the relevance of human rights to its clients, RLC conducted a public forum on 7 May 2009 in order to gauge the Redfern community's feelings about the National Consultation. The 'Rights in Redfern - Community Consultation' took place at the Redfern Town Hall and gave participants from the local area an opportunity to engage in a debate about their human rights. All participants were supportive of the proposed introduction by the Federal government of further safeguards that may enhance the fulfilment and increase the protection of their human rights. Some of the questions and answers from the forum are recorded below.

Question: Are these human rights sufficiently protected and promoted now?

"There a number of current examples of the lack of adequate protection of human rights: the suspension of the Racial Discrimination Act in the Northern Territory; the failure over many decades to give Indigenous Australians self-determination, and adequately support appropriate education, health services, housing, community infrastructure, cultural and identity programs; the treatment of refugees and asylum seekers; the lack of support for people with disabilities, and particularly their carers; and the failure to set decent standards of respect for people who are different in any way, particularly the demonisation and vilification of Muslim people."

⁶ Article 23, ICCPR

⁷ Article 17(1), ICCPR

⁸ See the Convention on the Rights of the Child 1989 (CROC).

⁹ Article 9(1), ICCPR

¹⁰ Article 24(1), ICCPR, see also CROC

¹¹ Article 8(1), ICCPR

¹² Article 8(3), ICCPR

¹³ Article 9(1), ICCPR

¹⁴ Article 7, ICCPR

¹⁵ Article 18(1) and 18(2), ICCPR

¹⁶ Article 26, ICCPR. It should also be noted that various attendant breaches of rights under the ICESCR could also be raised in regards to children removed from their families, and with regards to Aboriginal workers whose wages held in trust by the Queensland government have gone missing. See Kidd, R *Trustees on Trial: Recovering the Stolen Wages*, Aboriginal Studies Press, ACT, 2007

Question: Are there any circumstances in which you think that a person's human rights should be suspended? If so, when?

"No. Not when they're in prison; not when they're mentally ill; not when they have an intellectual disability. In every circumstance the human rights of every individual must be respected and honoured."

Question: How could Australia better protect and promote human rights?

"Implementing human rights policies within other policy frameworks."

"By having a Bill of Rights from which a new "Fair Go" culture can emerge."

"This current review should lead to a statute but it should also provide a process for ongoing review of the legislation itself and also of the bureaucratic process put in place."

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

"We need occasional, well publicised seminars in which politicians, bureaucrats, journalists and business people are educated about human rights."

"Government agencies like DoCS, DoH, the police are the ones most likely to disregard human rights of the poor people in Redfern."

3 A Bill of Rights, Human Rights Act or a Charter of Rights?

3.1 The enactment of legislation to give effect to human rights, or the entrenchment of human rights in the Federal Constitution has variously been referred to as a Bill of Rights, a Bill of Rights Act, a Human Rights Act or a Charter of Rights and Responsibilities. For the remainder of this submission RLC has referred to Federal legislation that would give effect to human rights as a 'Human Rights Act'.

Constitutional Change

3.2 RLC notes that the National Consultation has specifically excluded from the debate the possibility for the entrenchment of human rights via amendment to the Australian Constitution. RLC submits that a move to amend the Constitution in order to give effect to human rights protections would need bi-partisan support and a significant groundswell of support from the Australian community. However, despite Australia's long history of failed political debate with regards to a Human Rights Act (including Constitutional amendment), and the current opposition to the introduction of a Human Rights Act amongst the Australian community, RLC does not believe that such a move should be ruled out in the future. In this regard, RLC refers to the situation in

Canada before the introduction of the Charter of Rights and Freedoms in the Canadian Constitution in 1982.¹⁷

- 3.3 Noting the scope with which the Federal government has limited the National Consultation, RLC has framed its submission by focusing on the possibility that a Human Rights Act will be similar to legislative initiatives in the ACT¹⁸, Victoria¹⁹, New Zealand²⁰ and the UK²¹. RLC has also at various times referred to South Africa's Bill of Rights and Canada's Charters of Rights and Responsibilities but qualifies these references in light of the constitutional status of human rights in these countries, and the concurrent effect this has on the remedies available to those whose rights have been breached, including the powers of the courts to strike down as invalid any incompatible legislation. Instead, RLC has focused on the potential for a Human Rights Act to produce a 'human rights dialogue' which has been the guiding principle behind the *Human Rights Act 2004 (ACT)*, the *Charter of Rights and Responsibilities 2006 (Vic)* and the *Human Rights Act 1998 (UK)*. The *Bill of Rights Act 1990 (NZ)* is also premised on similar principles.

Dialogue Models

- 3.4 RLC is supportive of a Human Rights Act that seeks to give effect to a human rights dialogue. In such a vein, a dialogue Human Rights Act seeks to limit the power the judiciary has to strike down legislation, thus promoting the legislature as the central component of a functioning democracy. RLC views such a dialogue model as striking the necessary balance between the interests of elected officials, the executive and the judiciary. At the same time, RLC submits that a Human Rights Act needs to provide sufficient enforceability mechanisms in order to efficiently promote human rights in the legal sphere. RLC's clients represent one of the most disenfranchised communities in Australia, and their ability to rely on and enforce their rights under a Human Rights Act will be important if a Human Rights Act is to have any real effect on their lives.
- 3.5 RLC notes that the *Human Rights Act 2004 (ACT)*, the *Charter of Rights and Responsibilities Act 2006 (Vic)* and the *Human Rights Act 1998 (UK)* all create a compatibility regime in the event that a court is unable to construe legislation so as to be compatible with human rights. The court is able to rule that a piece of legislation is incompatible with a human right, and refer the matter to the legislature to be examined and to request a response. The regimes in Australia, New Zealand and the UK differ slightly in scope, but all allow a declaration of incompatibility to be made by a court and referred to the relevant Attorney-General. RLC is supportive of such a regime, but notes that its clients will not be protected in the event that a statement of incompatibility is made, and notes a significant lapse of time can occur between a court declaration of incompatibility and the necessary response.

Legislative Interpretation and Remedies

- 3.6 RLC supports a Human Rights Act that provides for judicial interpretation of existing legislation so as to be compatible with human rights, and which provides for the ability

¹⁷ In Canada, human rights legislation enacted in 1960 was subsequently entrenched in the Canadian Constitution in 1982. The only remedy provided for in the 1960 Canadian Bill of Rights was the ability for courts to reinterpret Canadian legislation in line with human rights. The Bill of Rights was considered extremely ineffective during its 22 year lifespan. In 1982, the Charter of Rights and Freedoms was inserted into the Canadian Constitution and despite opposition at the time, is now frequently referred to by the Canadian polity with patriotic fervour.

¹⁸ See the *Human Rights Act 2004 (ACT)*

¹⁹ See the *Charter of Rights and Responsibilities Act 2006 (Vic)*

²⁰ See the *Bill of Rights Act 1990 (NZ)*

²¹ See the *Human Rights Act 1998 (UK)*

to commence legal proceedings arising out of acts of public authorities that have contravened human rights. Such provisions have been found to complement each other, and RLC submits that the ability to reinterpret legislation in light of human rights protections is a robust way of giving effect to RLC's clients' rights. RLC submits that the examples below suggest that the ability for judicial interpretation of legislation to give effect to human rights will create impetus for government departments to formulate policy that takes into account their statutory obligations in relation to human rights. This will have particular effect on decisions made in relation to government housing, mental health and families and child welfare.

3.7 RLC supports a robust Human Rights Act that provides sufficient remedies for breaches by public authorities²² so as to give effect to Australia's obligations under Article 2(3)(a) of the International Covenant on Civil and Political Rights (**ICCPR**).²³ The *Human Rights Act 1998* (UK) enables a court to provide any remedy it considers appropriate including compensation.²⁴ The *Human Rights Act 2004* (ACT) provides for any remedy it deems appropriate except damages²⁵, and the *Charter of Rights and Responsibilities Act 2006* (Vic) allows for the award of any remedy which is already available to a person as a result of a finding of unlawfulness in regards to the action of a public authority.²⁶ RLC queries the desirability of legislative ambiguity with regards to remedies such as that found in the *Bill of Rights Act 1991* (NZ), which, having fallen silent as to what remedies might be available in the event of a breach, nevertheless led to the judicial creation of a direct cause of action against the government and the right to damages.²⁷ RLC supports a Human Rights Act that provides for remedies, including the right to damages for breaches of human rights by public authorities.

3.8 RLC acknowledges that a Human Rights Act will not be a panacea to the problems faced by its clients. And nor is it likely to lead to a flood of litigation in courts and tribunals. Rather, RLC submits that a Human Rights Act will have a more indirect but vital role in changing the way government departments interact with the Australian public, by bringing human rights considerations into the decision making process.

4 What rights should be protected?

The ICCPR and ICESCR

4.1 RLC services clients from lower socio-economic backgrounds, with a significant proportion from Aboriginal and culturally and linguistically diverse backgrounds. RLC supports the inclusion in a Human Rights Act of civil and political rights set out in the ICCPR. RLC submits that rights protection should not be restricted to these civil and political rights, but moves for the inclusion in a Human Rights Act of the rights found in the International Covenant on Economic, Social and Cultural Rights (**ICESCR**),

²² There are differences throughout the legislation in Australia and the world as to the definition of a 'public authority'. RLC would support an expansive definition of public authority which would include companies contracted to the government to carry out work of a governmental nature, or on behalf of the government.

²³ Article 2(3)(a) relevantly states, "Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity."

²⁴ *Human Rights Act 1998* (UK), section 8. Note that compensation is only available where no other remedy is appropriate.

²⁵ *Human Rights Act 2004* (ACT), section 40C(4)

²⁶ *Charter of Rights and Responsibilities 2006* (Vic), section 39(1)

²⁷ See for example, *Simpson v Attorney-General* [1994] 3 NZLR 667 (Baigent's Case)

including the right to minimum standards of housing, health, clothing and food, and the right to education.²⁸

- 4.2 RLC notes that such rights are often best left to political will and policy formulation. Such rights have been referred to as 'broadly formulated programmes for governmental policies in the economic, social and cultural fields.'²⁹ RLC refers to recognition within the ICESCR itself in relation to the constraint placed on State parties in fulfilling their obligations under the covenant as a result of the availability, or lack of, resources within their national boundaries.³⁰ Further, and as a result of such reasoning, traditional legal remedies for a breach of some ICESCR rights are often viewed as either inappropriate or at best impractical'.³¹
- 4.3 RLC refers to, and commends, the report of the ACT Bill of Rights Consultative Committee 'Towards an ACT Human Rights Act', and its recommendation that the ACT incorporate ICESCR rights including the right to self-determination, the right to work and just conditions of work, the protection of the family, the right to adequate food, clothing and housing, the right to health and the right to education.³² RLC refers to ICESCR General Comment 9 (19th Session) 1998³³ and supports the contention that the judiciary is already often called upon to provide judgment on, and analysis of, serious policy issues. RLC submits that the rights set out in the ICESCR are in many ways more vital to its clients' everyday lives, and notes that their ability to procure sufficient housing, shelter, food and clothing is often shaped by government departmental decisions which, as the examples below highlight, have a knock-on effect in relation to rights under the ICCPR. That is, rights such as the right to liberty, privacy and for the home to be free from arbitrary incursion (ICCPR rights) need to be underpinned by the rights to home, food or clothing (ICESCR rights).
- 4.4 RLC submits that by giving effect to ICESCR rights the judiciary would not develop into a quasi arbiter of government policy. Rather, in giving effect to ICESCR rights the judiciary would be asked to weigh and compare the competing interests between a person's human right on the one hand, and the inherent limits placed on such a right on the other. Such limits may include the lack of resources available to

²⁸ Other rights may include specific rights for women, the right to a clean environment, matters involving prostitution or exploitation, family responsibilities, and specific rights for victims of crime, asylum seekers, migrants and homosexuals. These are all examples of rights which Australian's have asked be included in either state or federal bills of rights. See for example, the ACT Bill of Rights Consultative Committee, 'Towards an AC Human Rights Act - Report of the ACT Bill of Rights Consultative Committee', May 2003

²⁹ E. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights', 9 *Neths. Ybk. Int. L.* 69 (1978), at 103, quoted in Steiner, H.J and Alston, P, *International Human Rights in Context: Law, Politics, Morals*, 2nd Ed, Oxford University Press, Oxford, 2000, at 277

³⁰ Article 2(1), ICESCR

³¹ Steiner, H.J and Alston, P, *International Human Rights in Context: Law, Politics, Morals*, 2nd Ed, Oxford University Press, Oxford, 2000

³² Despite these recommendations these ICESCR rights were not included in the *Human Rights Act 2004* (ACT). The major reason for a refusal by the ACT government to include protection of these rights was that it would provide the judiciary the opportunity to become involved in government policy making. That is, decisions made by judges with resource allocation implications were decisions best left to the legislature, and elected representatives.

³³ It was noted that, "It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competencies of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would this be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society."

It was further noted that "...a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the covenant...by the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned...in order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."

government, competing interests of others in need of government support and the reasonableness of government decisions having taken such limits into account. RLC submits that human rights jurisprudence from around the world suggests that the judiciary is often unwilling to become involved in questions of government resource allocation, and will only do so if it is fundamentally clear that a human rights breach has occurred despite the availability of resources and government ability to distribute them.³⁴

Indigenous-specific rights and Minority Rights

- 4.5 RLC acknowledges the right to self-determination set out in both the ICCPR³⁵ and ICESCR³⁶, the right for ethnic, religious and linguistic minorities to enjoy their own culture, language and religion, and supports the inclusion of Indigenous-specific rights in a Human Rights Act. RLC submits that a reference to Indigenous Australians within a Human Rights Act will highlight the unique position that Indigenous Australians hold in this country's history.
- 4.6 In the ACT, the Bill of Rights Consultative Committee argued against the inclusion of the right to self-determination in the *Human Rights Act 2004 (ACT)*, instead recommending that a specific reference to Indigenous Australians living within the ACT be made in its Preamble. In Victoria, specific reference to the unique rights held by Indigenous Australians was included in both the Preamble and again at section 19(2) to the *Charter of Rights and Responsibilities 2006 (Vic)*. RLC supports the inclusion of a reference to the unique position that Indigenous Australians hold within this country in a Preamble to a Human Rights Act, and also supports the inclusion of Indigenous specific rights within the body of a Human Rights Act. RLC believes that the inclusion of Indigenous-specific rights within a Human Rights Act should follow consultation with the Indigenous community.
- 4.7 RLC notes that no strict definition of self-determination exists in International law and that it is debateable, in lieu of a Treaty or other form of agreement, as to whether the inclusion of the right to self-determination will provide any effective safeguards for the protection of Indigenous Australians outside of the rights already provided for in the ICCPR and the ICESCR.

5 Are our clients' rights sufficiently protected?

- 5.1 Set out below are some examples of how RLC clients' human rights have been breached in the past. Some of the examples provide evidence that, currently, avenues for redress exist when RLC clients' human rights have been breached. However, such redress is only available to a limited extent and the remedies and rights of review often fail to take into account the potential for, or past breach of, RLC clients' human rights. The below examples highlight the ways our clients come into contact with government departments, officers and agencies, and the ways in which decisions are made without sufficient regard to human rights considerations.

³⁴ See for example *Dagi v BHP (No. 2)* [1997] 1 VR 428; *Eldridge v. BC* [1997] 3 SCR 624; and *Krishnan v Andhra Pradesh* [1993] 4 LRC 234

³⁵ Article 1(1), ICCPR

³⁶ Article 1(1), ICESCR

Housing

Case Study 1

An RLC client was living in a Housing NSW home and receiving a government housing subsidy. The client had previously been homeless for 10 years. The client was a consistent hoarder of goods. When Housing NSW became aware of the goods at his home, the client was told that the goods posed a fire hazard and would need to be removed. The client failed to remove the goods, and received an eviction notice from the CTTT. The client had not been informed that CTTT proceedings had been commenced. After having the matter re-heard in the CTTT, an order was made for the man to remove the goods from his home and to allow Housing NSW fortnightly inspections. The man was subsequently evicted from his home for breach of CTTT orders and is now homeless.

- 5.2 The example above evokes the right set out at Article 11(1) of the ICESCR, where it states that:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

- 5.3 The example may also evoke the right set out at Article 17(1) of the ICCPR, which relevantly states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.³⁷

- 5.4 The right to housing at Article 11(1) of the ICESCR has faced intense judicial analysis, most notably because of the necessary balance that is sought between the right itself and the resources available to a government in order to sufficiently protect the right. Most cases from around the world in which the right to housing has been relied upon are cases in which a tenant faces the likelihood of homelessness should they be evicted from their home. This was the situation faced by our client.

- 5.5 Despite being given the opportunity to appear before the Consumer, Trader and Tenancy Tribunal (**CTTT**), Housing NSW were able to evict our client with the knowledge that, and despite of the fact that, homelessness was the likely result of the eviction and that the hoarded property was a physical manifestation of a mental illness. Housing NSW is given broad rights of eviction pursuant to the *Residential Tenancies Act 1987* (NSW). Housing NSW does not have a policy in relation to eviction on its website,³⁸ although they do have a policy in relation to the review of department decisions.³⁹ Reviews of departmental decisions can take into account whether or not a clients circumstance indicate that a decision was inappropriate, and

³⁷ RLC also notes that other rights have been invoked in situations involving potential homelessness, and refers to examples of citizens invoking the right to the support of family as the fundamental group unit of society, and the right to privacy.

³⁸ See 'Policies Overview', at <<http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/>>

³⁹ See 'Appeals and Review of Decisions - EST0015A', available at <<http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/Appeals+and+Review+of+Decisions+-+EST0015A.htm>>

whether the clients circumstances were fairly and appropriately taken into account.⁴⁰ The Housing NSW policies make no reference to tenants' rights to housing arising out of the ICCPR and the ICESCR.

- 5.6 RLC submits that Housing NSW lacks an understanding and appreciation of human rights. There is currently no policy which seeks to balance the department's right to evict tenants for breaches of department policy and statutory obligations⁴¹ and tenants rights under the ICCPR and the ICESCR, and the lack of such a policy is evident at times when decisions have deleterious effects on tenants' livelihoods, and especially in situations where the conduct of the tenant has not caused apparent harm to other tenants, and is the manifestation of underlying psychological condition. Were a Human Rights Act to provide for the right to a minimum standard of housing and/or the protection against the arbitrary interference with one's family and home, the balancing act between competing interests is likely to be brought back into line with contemporary international standards.
- 5.7 In the Victorian case of *Director of Housing v IF*⁴², the right to family and to privacy under the *Charter of Rights and Responsibilities Act 2006 (Vic)*⁴³ were evoked following the receipt by a government housing tenant of an eviction notice arising out of the tenants abusive interaction with his neighbours. The tribunal was asked to reconsider the right to terminate pursuant to the *Residential Tenancies Act 1997 (Vic)* in light of the rights protected under the *Charter of Rights and Responsibilities Act 2006 (Vic)*. The tribunal member agreed that the right to not have ones family life interfered with was evoked in the circumstances⁴⁴, but that this right needed to be balanced with the same rights of other residents within the housing complex who were subject to the tenant's abusive behaviour and the right to protection of the child in the neighbouring property⁴⁵.
- 5.8 In evoking the rights, the tribunal member referred to the limitation on those rights which were provided for by the right to eviction pursuant to the *Residential Tenancies Act 1997 (Vic)*. The tribunal believed that the restrictions were a necessary and reasonable limitation on the tenants' rights⁴⁶, noting that the Office of Housing also had to consider the rights and obligations of quiet enjoyment which it owed to other tenants. The tribunal next considered whether or not there were other less restrictive means by which the Office of Housing could achieve the same results, and found that there were not.⁴⁷ The tribunal nevertheless highlighted the possibility that the scope

⁴⁰ In reviewing a decision, the following issues can be taken into account:

1. Was the original decision consistent with Departmental policy?
2. Was the policy narrowly or harshly interpreted?
3. Do the client's circumstances indicate that the decision was inappropriate?
4. Were the client's circumstances and all relevant information fairly and properly considered?
5. Was there any bias or prejudice involved on the part of the original decision-maker?
6. Did any irrelevant information affect the decision?
7. Whether the original decision was made within the applicable legal framework
8. Whether any new relevant information is available.

See <<http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/Appeals+and+Review+of+Decisions+-+EST0015A.htm>>

⁴¹ See the *Residential Tenancies Act 1987 (NSW)*.

⁴² [2008] VCAT 2413 (18 November 2008)

⁴³ See Section 13 - Privacy and Reputation

⁴⁴ *Charter of Rights and Responsibilities 2006 (Vic)*, section 13(a)

⁴⁵ *Charter of Rights and Responsibilities 2006 (Vic)*, section 17

⁴⁶ *Charter of Rights and Responsibilities 2006 (Vic)*, section 7(2)

⁴⁷ The decision by the Victorian Department of Housing had been to serve on the tenant a Notice to Comply pursuant to the *Residential Tenancies Act 1997 (Vic)*. The Notice did not seek to evict the tenant, but rather provided the right to the Department of Housing to evict the tenant if the tenant continued to breach the *Residential Tenancies Act 1997 (Vic)* following service of the Notice.

for review of government decisions was widened as a result of the *Charter of Rights and Responsibilities Act 2006* (Vic).⁴⁸

- 5.9 In *Director of Housing v TP (Residential Tenancies)*⁴⁹, the test of proportionality between rights again surfaced in relation to the eviction of a tenant by the Victorian Office of Housing arising out of the use of a cannabis plant on the property by the tenants husband. The tenant had four children, and there was a serious likelihood that the tenant would be faced with homelessness in the event of eviction. The tribunal member found against the Office of Housing, on the basis that the provision of the *Residential Tenancies Act 1997* (Vic), breach of which the Department had relied in order to evict the tenant, had not been contravened.⁵⁰ The tribunal member went on to consider an interpretation of the *Residential Tenancies Act 1997* (Vic) in a manner consistent with the *Charter of Rights and Responsibilities 2006* (Vic).
- 5.10 The tribunal considered whether the Office of Housing's right to evict pursuant to section 250 of the *Residential Tenancies Act 1997* (Vic)⁵¹ could be read consistently with the rights set out under sections 13 and 17 of the *Charter of Rights and Responsibilities 2006* (Vic). Interestingly, the tribunal noted that even if the tenant had been found to have used her premises for an illegal process, thus contravening section 250 of the *Residential Tenancies Act 1997* (Vic), a decision to evict would require an assessment of proportionality. Such a review would include an assessment of the length of the tenant's use of the premises, the fact that the tenant had four children and the possibility that the tenant and her children would become homeless if evicted.
- 5.11 Such jurisprudence makes it clear that government policy in relation to evictions will need to be brought into line with human rights standards.⁵² RLC submits that a Human Rights Act will help create tighter controls on eviction decisions, especially in situations involving tenants who have not directly breached the rights of their neighbours, and in situations involving tenants likely to face homelessness following eviction. In addition, RLC makes reference to other Housing NSW policies regarding subsidies, the succession of tenancy⁵³, allegations of rental rebate fraud, occupancy and domestic violence. RLC does not have the space or time to review all of these policies and how they might be affected in light of a Human Rights Act. Nevertheless,

⁴⁸ See the UK case of *Doherty & Ors v Birmingham City Council* [2008] UKHL 57 (30 July 2008). In this case the House of Lords considered the right to the respect of one's home and privacy pursuant to section 8 of the Human Rights Act 1998 (UK). The House of Lords suggested that in provoking administrative law principles of *Wednesbury unreasonableness* in reviewing a decision to evict a tenant a court would need to take into account the tenant's rights under the *Human Rights Act 1998* (UK).

⁴⁹ [2008] VCAT 1275 (24 June 2008)

⁵⁰ The relevant provision being section 250, which provides for eviction, "...if the tenant has used the rented premises or permitted their use for any purpose that is illegal at common law or under an Act."

⁵¹ This section states:

250. Use of premises for illegal purpose

(1) A landlord may give a tenant a notice to vacate rented premises if the tenant has used the rented premises or permitted their use for any purpose that is illegal at common law or under an Act.

(2) The notice must specify a termination date that is not less than 14 days after the date on which the notice is given.

⁵² Such possibilities have been confirmed in other cases around the world. In South Africa, the South African Constitutional Court has ruled that where tenants face the possibility of homelessness if evicted, the public authorities seeking to evict must consult with the tenants to consider other alternative solutions to the problems or issues they are seeking to deal with by evicting the tenants. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg CCT 24/07* [2008] ZACC 1 (19 February 2008). The same principles have been found to exist by the European Court of Human Rights whereby it ruled that the eviction of a woman was a breach of her right to respect for private life and the home where the authority seeking to evict her knew that she could face homelessness as a result and had not sought to ensure that she had adequate alternative housing. See *Stankova v Slovakia* [2007] ECHR 7205/02 (9 October 2007).

⁵³ RLC makes specific reference to *Stankova v Slovakia* [2007] ECHR 7205/02 (9 October 2007). In this case, the tenant lived with her father and two children when her father died. She subsequently sought to have the tenancy transferred into her name. The housing authority denied her the right to have the property transferred into her name, arguing that that she could move into her son's one-room flat. The court considered issues of legitimacy, necessity and proportionality and stated in its reasoning that, "...to leave the flat without being provided with any alternative accommodation produced effects which were incompatible with her right to respect for her private and family life and for her home, regard also being had to the special protection of children and juveniles."

RLC suggests that a Human Rights Act will provide the impetus for Housing NSW to consider its policies in light of human rights concerns.

Police

Case Study 2

A 60 year old woman had been driving home with her partner and grandchild when she approached her driveway. In the driveway stood a plain-clothed policeman and a plain-clothed policewoman who were interviewing a pedestrian. The woman asked the man and woman (who she did not realise were police officers) to move, and in doing so used swear words.

The police approached the woman's side of the car and shone a light in her eyes. The woman asked the officer to stop shining the light and sought to exit the car. The police blocked the car door from opening at which point the woman threw a McDonald's drink container at the police officer. The woman was arrested and during her arrest had her head beaten against the top of the car and lost two teeth.

The woman was later released from custody without charge but was charged three days later with common assault, resisting arrest and assault against a police officer. The charge of assault against a police officer was dismissed. The woman was found guilty of common assault and resisting arrest. RLC made a complaint to the NSW Ombudsmen with regards to the actions of the police.

The NSW Ombudsmen, and subsequently the Redfern Local Area Command refused to investigate the claim on the basis that the woman had an alternative means of redress in that she could have raised the issue of police conduct during the Hearing of the charges against her.

Case Study 3

A woman was approached at her home by police who assumed that she was a person named in an arrest warrant. The woman denied that the person named in the warrant was her. The police left her home without making an arrest. Four police officers subsequently attended her home and again the woman sought to prove to the police that the woman in the arrest warrant was not her. The police left without making an arrest.

Two policewomen subsequently arrived at the woman's premises and arrested her, leaving her 8 year old child in the care of a 23 year old man. The woman was placed in the police patrol wagon with no seatbelts. On the way to the police station the woman broke her wrist and suffered injuries to her face as a result of the drive. The woman was later found to not be the person named in the arrest warrant and was released from custody later that evening.

The woman filed a suit for unlawful imprisonment and trespass. The matter settled out of court. The terms of settlement were in favour of the woman. During the course of the proceedings, the police produced the arrest warrant on which they had relied in arresting the woman. The name and the birth date on the arrest warrant were similar to that of the woman's, but were not identical.

5.12 Pursuant to clause 9(1) of the ICCPR:

Everyone has the right to liberty and security of person. No one shall be subject to arbitrary arrest or detention.

5.13 Case Studies 2 and 3 raise the issue of liberty and arbitrary detention. Contact with local police officers is a frequent occurrence for many of our clients. In most situations similar to Case Study 2, our clients are faced with arrest and detention without charge. It is often difficult to discern how the police officers involved in such altercations procure the necessary belief that arrest and detention is reasonable in the circumstances. In NSW, the right to affect an arrest with and without a warrant exists pursuant to sections 101 and 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (Law Enforcement Act)* respectively.⁵⁴

5.14 Actions taken by the police under the *Law Enforcement Act* are subject to common law and statutory principles of reasonableness. Section 99(3) of the *Law Enforcement Act* sets out the restrictions that apply when an arrest is made for the purpose of taking proceedings against a person.⁵⁵ Sections 230 and 231 of the *Law Enforcement Act* allows for the use of force as is reasonably necessary to exercise a function under the *Law Enforcement Act*⁵⁶, including the use of force reasonably necessary to affect an arrest under the *Law Enforcement Act*.⁵⁷

5.15 The powers to use force are wide and vague, providing police officers with sufficient discretion as to when and how they use them, and further as to when they affect an arrest. The NSW Force 'Code of Practice for CRIME ((Custody, Rights, Investigation, Management and Evidence)' refers to the use of reasonable force, but does not define the term and suggests that the reasonableness of the force will depend on the circumstances as they exist at the time.⁵⁸ The code suggests that police should be mindful of the right of individuals to be free before making an arrest, but there is no reference to the right to liberty as the right exists under the ICCPR.

5.16 RLC submits that the lack of clear and concise reference to the right to liberty within police policy manuals with regards to arrest and the use of force suggest that the powers of police are used with scant regard for individuals' rights, and suggests that there is considerable scope for the right to liberty to be included in police decision making processes before the police use force or make an arrest. Case Study 2 illustrates the need for an individual's right to liberty to be given adequate

⁵⁴ Section 99 relevantly states:

"(1) A police officer may, without a warrant, arrest a person if:

(a) the person is in the act of committing an offence under any Act or statutory instrument, or

(b) the person has just committed any such offence, or

(c) the person has committed a serious indictable offence for which the person has not been tried."

⁵⁵ Section 99(3) relevantly states:

(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

⁵⁶ See section 230 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, which states, "It is lawful for a police officer exercising a function under this Act or any other Act or law in relation to an individual or a thing, and anyone helping the police officer, to use such force as is reasonably necessary to exercise the function."

⁵⁷ See section 231 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, which states, "A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest."

⁵⁸ Available at <http://www.police.nsw.gov.au/about_us/acts_and_legislations/legislation_list/code_of_practice_for_crime>, at page 10

consideration by the police. If this had been the case, it is unlikely the arrest would have occurred, the surrounding circumstances being that noting that our client was not a concern to other community members and she was initially unaware that the officers were from the NSW police, the police officers were blocking her driveway, and the fact that the McDonald's drink container did not actually make contact with a police officer.

- 5.17 How human rights principles might apply to actions taken by government agencies was addressed in *Kracke v Mental Health Review Board*⁵⁹. After reviewing international jurisprudence on human rights, Justice Bell set out the context in which the *Charter of Rights and Responsibilities Act 2006* (Vic) would impact on government decisions. The first step was to highlight the right which was infringed, and to consider that right in light of the justification and proportionality provisions of the *Charter of Rights and Responsibilities Act 2006* (Vic), which relevantly provide that a human right can be subject to such reasonable limits as can be demonstrably justified in a free and democratic society.⁶⁰
- 5.18 The limitation must be both proportional and legal⁶¹. In applying this analysis to the example above, it is clear that the right to deprive someone of their liberty through the power of arrest is a necessary limitation. Nevertheless, Justice Bell also noted that in situations where a limitation is open to interpretation and discretion, such a discretion must be interpreted itself so as to be compatible with human rights law. That is, in applying their discretion as to whether or not to arrest a citizen pursuant to the *Law Enforcement Act*, police officers must act, where it is reasonably possible to do so, in accordance with human rights principles.
- 5.19 RLC submits that in arresting our client and using force that led to the loss of two teeth, the NSW police acted outside norms of conduct that could be considered compatible with human rights. Our client suffered from medical conditions which included two frozen shoulders, diabetes, and had previously suffered a number of heart attacks. The arrest and detention of clients in similar situations is all too common to RLC clients, and the enactment of a Human Rights Act may provide the impetus for local police to address their policies in relation to discretionary arrest. In this regard RLC notes the comment in the ACT Consultative Committee's report, 'Towards an ACT Human Rights Act' in relation to police policies that have been reviewed in the UK following the implementation of the *Human Rights Act 1998* (UK).⁶²
- 5.20 As a human rights concern, RLC also refers to Article 9(2) of the ICCPR, which relevantly states:

⁵⁹ [2009] VCAT 646 (23 April 2009)

⁶⁰ In full, section 7(2) of the *Charter of Rights and Responsibilities Act 2006* (Vic), states:

(2) 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.

⁶¹ Lisa Mortimer, Human Rights Law Legal Resource Centre, Case Note <available at

<http://www.hrlrc.org.au/year/2009/kracke-v-mental-health-review-board-2009-vcat-646-23-april-2009/>>

⁶² At paragraph 4.65 of their report, the ACT Consultative Committee noted that, "The United Kingdom Association of Chief Police Officers (ACPO) established a Human Rights Working Group to review its recommended policies and training, with the aim of giving effect to human rights at all levels of the service. ACPO developed national human rights training packages, and a strategy for auditing human rights-compliance of policies. The Home Office also launched a re-draft of the Codes of Practice under the Police and Criminal Evidence Act 1984, which govern the exercise of police powers of custody, stop and search, arrest procedures, identification and police interviews."

Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

- 5.21 RLC notes that according to our client the police initially had no intention of charging her with an offence. According to our client's evidence, on the night of the incident the police told her that they would not be charging her and that she would be able to return home. It was only after RLC had contacted the local police station for more information with regards to the use of force to enact the arrest that the woman was charged with assault and resisting arrest. The conduct of the police in not charging the woman on the night of the incident, and only laying charges 3 days later following an inquiry into their conduct by RLC, raises serious issues with regards to police propriety.
- 5.22 Case Study 3 entails the breach of a number of human rights, including the right liberty and security of the person⁶³, the right when deprived of liberty to be treated with humanity and with respect to the inherent dignity of the human person⁶⁴, the right to not be subject to arbitrary or unlawful interference with privacy, family, home or correspondence⁶⁵, acknowledgment that the family is the fundamental group unit of society and is entitled to protection⁶⁶ and the right of the child to such measures of protection as are required by his status as a minor⁶⁷.
- 5.23 Our client in Case Study 3 was awarded damages in an out of court settlement with the NSW police. Our client had commenced proceedings for a cause of action in false imprisonment and trespass. These common law principles enabled the woman to recover damages for the injuries she suffered as a result of the unlawful conduct of the NSW Police. Nevertheless RLC submits that the extent to which the common law will protect human rights is limited. In this regard RLC refers to Baigent's Case⁶⁸, a High Court of New Zealand case involving the procurement of a warrant in reliance upon incorrect information from an informant. Initially the Plaintiff had commenced proceedings in negligence but the case was dismissed. Carolyn Evans has noted that:

The required test in this case was not whether the procuring of the warrant had been an interference with the property and privacy rights of the Baigents. The test was whether the warrant had been obtained maliciously without reasonable and probably cause. The high standard required by the common law meant that no remedy was available in tort and several of the other actions of the police were protected by statutory immunity or through the high standards required by the common law for particular breaches.⁶⁹

- 5.24 In Case Study 3, the police had the power to arrest our client pursuant to sections 101⁷⁰ and section 10⁷¹ of the *Law Enforcement Act*. The ability to make an arrest

⁶³ Article 9(1), ICCPR

⁶⁴ Article 10(1), ICCPR

⁶⁵ Article 17(1), ICCPR

⁶⁶ Article 21(1), ICCPR and Article 10(1), ICESCR

⁶⁷ Article 24(1), ICCPR, and reference is also made to rights set out in the CROC.

⁶⁸ *Simpson v Attorney General* [1994] 3 NZLR 667 (Baigent's Case)

⁶⁹ Evans, C, 'Human Rights Act and Administrative Law' (Paper presented at the Conference Assessing the First Year of the ACT Human Rights Act, ANU, 29 June 2005)

⁷⁰ Section 101 relevantly states:

Power to arrest with warrant

(1) A police officer acting in accordance with a warrant issued under any Act or law may arrest or deal with the person named in the warrant in accordance with the warrant.

(2) The police officer may take action whether or not the warrant is in his or her possession

⁷¹ Section 10 relevantly states:

Power to enter to arrest or detain someone or execute warrant

10 Power to enter to arrest or detain someone or execute warrant

immediately provokes the attendant right to liberty and security of the person, and the proportionality test between these rights and any reasonable limitation on them would need to be considered. RLC submits that the power to arrest a person on the basis of a warrant issued for that person's arrest would necessitate a finding that the person being arrested is the person named in the warrant. A failure to sufficiently ensure that the arrestee is the person so named, and further to carry out an arrest despite obvious differences between the details contained in the warrant and the personal details of the arrestee, suggests a blatant disregard for human rights norms.

- 5.25 The rights of arrestees and those subject to police searches arising out of defective or ill-conceived warrants have been considered in a number of ACT decisions. In *R v Caruso*⁷² the court referred to the rights set out in the *Human Rights Act 2004* (ACT) and noted the court was required to give effect to those rights when interpreting legislation. The court found that the issuance of warrants in the incorrect format and without the required wording raised continual issues regarding the breach of human rights. The court referred specifically to the right to liberty and to be free from arbitrary arrest, the importance of the rights and the lack of reference to them by judicial officers issuing warrants which were invalid. Crispin J suggested that the admissibility of evidence obtained through invalid search warrants would come under continued scrutiny in the future as the courts in the ACT were called upon to give weight to the human rights set out in the *Human Rights Act 2004* (ACT).
- 5.26 In *R v Welch*⁷³ the question arose as to whether an arrest warrant had been issued legally pursuant to principles set out in section 212(1)(b) of the *Crimes Act 1900* (ACT). Higgins CJ found that the arrest in that case had been unlawful. The right to liberty pursuant to section 18 of the *Human Rights Act 2004* (ACT) was referred to only obligingly at paragraph 40 of his judgment, and did not play a causative role in his reasoning.⁷⁴ Nevertheless, the reference to such a right within a discussion with regards to rights of arrest and the limits placed upon such rights, provides sufficient impetus to suggest that police practices with regards to arrest, with or without a warrant, will need to be reviewed should a Human Rights Act give effect to the right to liberty and to be free from arbitrary detention.

Children and Families

Case Study 4

An Aboriginal woman who was the sole provider to seven children, the youngest being less than 1 year old, had malicious accusations made against her by an Aunt. The Aunt had previously taken out an Apprehended Personal Violence Order (**APVO**) against the woman, and the accusations were forwarded to the Department of Community Services (DoCS). The woman's children were immediately taken away from her. A short while later, after which it seemed DoCS had investigated the allegations and found them to be unsubstantiated, the woman's children were returned to her.

(1) A police officer may enter and stay for a reasonable time on premises to arrest a person, or detain a person under an Act, or arrest a person named in a warrant.

(2) However, the police officer may enter a dwelling to arrest or detain a person only if the police officer believes on reasonable grounds that the person to be arrested or detained is in the dwelling.

(3) A police officer who enters premises under this section may search the premises for the person.

⁷² [2006] ACTSC 45

⁷³ [2009] ACTSC 35 (6 April 2009)

⁷⁴ *R v Welch* [2009] ACTSC 35 (6 April 2009), paragraphs 39, 40 and 41.

- 5.27 The situation set out in Case Study 4 is a fairly regular occurrence for many of our clients. RLC has been working closely with its clients and DoCS in order to come a clearer understanding of the ways in which DoCS makes decisions about removing children from the care of their parents. RLC notes that the decisions made by DoCS are made with the interests of the child as a main concern, but submits that there are numerous circumstances whereby DoCS has failed to take into account relevant information and various rights under the ICCPR and ICESCR which may have ameliorated their initial assessment of child risk.
- 5.28 Powers to remove children deemed at risk are set out in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (**Care and Protection Act**). Under the Care and Protection Act, the Director-General, on forming the opinion that a child is at risk, may take whatever action it deems necessary to promote the safety, welfare and well-being of the child or young person.⁷⁵ This may include using a power of removal which is set out under Chapter 1 of Part 5 of the Care and Protection Act.
- 5.29 The Director-General may order the removal of a child pursuant to section 43(1) of the Care and Protection Act if the Director General is of the opinion that a child is at an immediate risk of harm and that an apprehended violence order would not be sufficient to protect the child.⁷⁶ After a child is taken for the purposes of exercising the Director-Generals power under section 43(1) of the Care and Protection Act, the child may be returned to its parents, or other place of residence or carer at the Directors-General discretion, and in determining whether or not to return the child, the Director-General must consider a number of matters.⁷⁷
- 5.30 The example at Case Study 3 evokes the right set out at Article 17 of the ICCPR which relevantly states:
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'
- 5.31 The example also evokes the rights at Article 23 and Article 24 of the ICCPR which relevantly state:
- Article 23
1. The family is the natural and fundamental group of society and is entitled to protection by society and the state.....
- Article 24

⁷⁵ Section 34 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which provides that, "If the Director-General forms the opinion, on reasonable grounds, that a child or young person is in need of care and protection, the Director-General is to take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child or young person."

⁷⁶ Section 43(1) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides that:

(1) If the Director-General or a police officer is satisfied, on reasonable grounds:

(a) that a child or young person is at immediate risk of serious harm, and

(b) that the making of an apprehended violence order would not be sufficient to protect the child or young person from that risk,

the Director-General or police officer may (without the need for any authority other than that conferred by this subsection) remove the child or young person from the place of risk in accordance with this section.

⁷⁷ Section 50(3) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which includes:

(a) any views expressed by the child or young person as to whether he or she wishes that power to be exercised,

(b) any views expressed by the child or young person as to whether he or she intends to return to the care and protection of a parent,

(c) whether the exercise by the Director-General of that power is likely to protect the safety, welfare and well-being of the child or young person,

(d) whether the failure by the Director-General to exercise that power is likely to endanger the safety, welfare and well-being of any other person.

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such methods of protection as required by his status as a minor, on the part of his family, society and the state.

- 5.32 It is clear that the powers conferred on DoCS by the New South Wales Government in relation to the removal of children from their parents or carers is a necessary limitation on the rights set out in the ICCPR and the ICESCR. Further, it is likely that the powers available under the *Care and Protection Act* are powers flowing from the Government's obligations under the Convention on the Rights of the Child (**CROC**).
- 5.33 Were a Human Rights Act to be enacted, the power of DoCS to remove children pursuant to the *Care and Protection Act* would need to be read in light of Article 17 of the ICCPR. These conflicting rights and obligations were considered in the matter of *RK & AK v United Kingdom*.⁷⁸ This matter involved a claim brought against a hospital and paediatrician following the incorrect diagnosis of a non-accidental injury to a child, which led to the child being separated from its parents. The court held that public authorities were not to be held liable for the mistake in medical and/or social welfare assessments that lead to child protection measures where there was a genuine and real concern for the safety of the child in the circumstances.
- 5.34 In doing so, the Court was asked to weigh and balance the right of the child, with the right of the parents to non interference with their family and home life, and to highlight the necessary limitations on such a right which were held to be reasonable in the circumstances. A Court found that there was no breach of the parent's right to respect for their private and family life as there were valid reasons for the authorities in taking the measures that they did, and that the measures were proportionate to the aim of protecting the child. RLC accepts that policy in relation to child protection and care must be based on the primary concern of the child's health. Nevertheless, RLC notes that the European Court of Human Rights noted in that case that the authorities had been provided with no sufficient explanation for the injuries to the child at the time.
- 5.35 At the same time, RLC refers to numerous cases in which children have been removed from the care of the parents seemingly without sufficient evidence. RLC further notes that in *RK & AK v United Kingdom*, the European Court of Human Rights did consider that the hospital nurse should have taken further notes and conferred more extensively with the parents as to the cause of the child's injury. The applicants' complaints in that case focused on the manner in which the professionals, being both medical and legal staff, had suspected that they were guilty of injuring the child from the outset. RLC submits that in Case Study 4 above, the NSW Department of Housing may have been unduly biased in giving effect to their powers under the *Care and Protection Act* as a result of their failure to properly confer with the mother as to the issues raised by the aunt, and in their reliance on the fact that the aunt had at the time had an apprehended personal violence order out against the mother.

6 Do we need a Human Rights Act? - Summary and Conclusion

- 6.1 RLC supports the introduction of a Human Rights Act. RLC believes a Human Rights Act will have a positive impact on the way government departments interact with RLC clients. The introduction of a Human Rights Act will assist in promoting a culture of

⁷⁸ [2008] ECHR38000(1)/05 (30 September 2008)

human rights in the legislature, judiciary and the executive. Presently, Australia is the only comparable nation that has not enacted federal human rights legislation. RLC urges the Federal Government to enact legislation that includes rights outlined in the ICCPR and the ICESCR.

- 6.2 RLC submits that in addition to its failure to give effect to its international treaty obligations, a continual failure by Australia to legislate to protect human rights will place Australia in an anomalous position in relation to international comparative jurisprudence. All countries with a common law tradition, except for Australia, have now incorporated a Human Rights Act into their legal system. If Australia does not introduce a Human Rights Act, comparative analysis between legal systems will become more difficult as international jurisprudence develops towards placing greater emphasis on rights and obligations in lieu of practice and procedure.
- 6.3 Most importantly, the examples provided in this submission suggest that the human rights of Australians are frequently breached. The introduction of a Human Rights Act will create an impetus for both State and Federal governments to introduce policies compliant with human rights. Such policies will provide guidance as to the appropriate weight to place on human rights, and any necessary limitation on those rights, when making decisions. The result of which will be to prevent breaches of human rights. The examples provided herein demonstrate the lack of appropriate human rights considerations in current NSW government departments' policy and decision making frameworks in relation to housing, the police and community services.
- 6.4 At the same time as implementing a Human Rights Act, RLC urges the Federal Government to initiate a national community awareness campaign to promote the rights to be protected by the Human Rights Act and the ways in which such protection can help Australians. In addition, RLC suggests that the Federal Government institute a wide ranging educational campaign for the judiciary and other legal officers in relation to the ways in which human rights will impact on legislative interpretation.
- 6.5 RLC thanks the Committee for giving it the opportunity to make this submission.

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