

Human Rights Commission
Human Rights and Discrimination
Commissioner



The Secretary of the House Standing Committee on Health and Ageing
House of Representatives
Parliament House
Canberra
ACT 2600

Email: haa.reps@aph.gov.au

Dear Sir/Madam

Inquiry into Breastfeeding

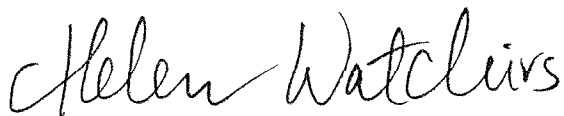
I note that your Committee is inquiring into and will report on "*how the Commonwealth government can take a lead role to improve the health of the Australian population through support for breastfeeding.*"

I am enclosing by way of submission to your Inquiry a speech that I gave at the Australian Lactation Consultants Association International Conference in Melbourne on 27 October 2006, titled *The relevance of a human rights framework in building a breastfeeding-friendly culture*. I urge the Committee to pay due regard to the ways in which Australia needs to meet its international human rights obligations in relation to promoting and supporting breastfeeding. The Commonwealth Government has a crucial leadership role to play in this area.

My office regularly receives complaints, not always formal complaints, about the barriers to breastfeeding that women can face both at work and in other areas of public life – some of these are detailed in the attached paper. I also note that today the Human Rights and Equal Opportunity Commission published "*Its About Time: Women, men, work and family – Final Paper 2007*". This reminds us again that we still lack a national paid maternity leave scheme, and that this is a failure of support for women who want to establish and continue breastfeeding their babies (see page 82 in particular).

I wish you well with this important inquiry and look forward to receiving your report.

Yours sincerely



Dr Helen Watchirs
ACT Human Rights and Discrimination Commissioner
7 March 2007

**Australian Lactation Consultants Association International
Conference 27 October 2006**

**‘The relevance of a human rights framework in building a
breastfeeding friendly culture in Australia’**

**Speech given by Dr Helen Watchirs, ACT Human Rights and
Discrimination Commissioner, with research and writing by Jenny
Earle, Senior Adviser, ACT Human Rights Office**

Ladies and gentlemen thank you for inviting me to speak to you this evening. I acknowledge the traditional owners of the land on which we meet today, the Kulin Nation. I respect their continuing culture and the contribution they make to the life of this city and region.

Introduction

First I want to locate our anti-discrimination laws in the larger international human rights picture. Human rights have symbolic and real impact as a visible and empowering focus for social and political change – they provide specific foundations for addressing political and social wrongs. Breastfeeding is at the intersection of many human rights in major international treaties agreed to under the auspices of the United Nations. As you would already know, the UN was founded by the UN Charter in 1945 and dedicated to achieving world security and peace. The horrors of World War 2 - genocide, hunger, displacement, and disease – gave us the will to commit to common standards, in order to prevent war and atrocities reoccurring. We wanted a world community that spoke and listened to each other, rather than maimed and killed each other in formal battles or terrorism. These human rights treaties include:

- the *Universal Declaration of Human Rights* (1948) (which has a comprehensive list of civil and political, economic, social and cultural rights, - article 25 states that motherhood and childhood are entitled to ‘special care and assistance’),
- The separation of rights into two categories was an accident of history of the Cold War and reflected the opposing ideologies of the USA (championing traditional civil liberties) and the then USSR (focusing on implementation of socialist equality in living standards).

- (a) the *International Covenant on Civil and Political Rights* (1966) – it protects rights, such as not to have one’s privacy or family unlawfully or arbitrarily interfered with;
- (b) the *International Covenant on Economic, Social and Cultural Rights* (1966) – it expressly includes health as a human right, but has suffered from being given the ‘poor relations’ status in relation to legal enforceability;
- both sets of rights are included rather than separated in more recent treaties, such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and the *Convention on the Rights of the Child* (1989);
- various International Labour Organisation (ILO) conventions.

Australia is a signatory to these international human rights conventions and bound to implement them. The ACT was the first jurisdiction in Australia to have a statutory Bill of Rights, the *Human Rights Act 2004*, Victoria now has the *Charter of Rights and Responsibilities Act 2006*, and there are active campaigns for a national Bill of Rights to more effectively implement our international human rights obligations.

Health as a human right

I do not need convince you of the importance of breastfeeding to the health of both mothers and babies. The strength of the evidence for the health benefits underlies the World Health Organisation’s recommendation for six months exclusive breastfeeding, the *1990 Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding*, and the extensive advocacy of breastfeeding by international health and human rights organisations. A recent report by UNICEF highlights the importance of the international human rights framework, and the work of human rights activists in expanding our understanding of the human rights dimensions of breastfeeding. It reports that child malnutrition is the cause of about half of their deaths, and breastfeeding saves six million childrens’ lives annually from pneumonia and diarrhoea.¹

Health is a fundamental human right indispensable for the exercise of other human rights, including life.² It is recognised in numerous international treaties including:

¹UNICEF, *1990–2005 Celebrating the Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding*: <http://www.unicef-icdc.org/publications/pdf/1990-2005-gb.pdf>.

² Committee on Economic, Social and Cultural Rights, *General Comment 14* (22nd Session, 2000).

- the *Universal Declaration of Human Rights* - Article 25;
- the *International Covenant on Economic, Social and Cultural Rights* - Article 12 guarantees “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”.

There has been a growing international health and human rights movement that became active in the 1990s, firstly around HIV/AIDS issues, but now broadened in scope, and centred at the Francois Bagnoud Centre for Health and Human Rights, in the Harvard School of Public Health.³ Recently, the ACT Human Rights Office hosted a visit to Canberra of the UN Special Rapporteur on the Right to an Adequate Standard of Health, Professor Paul Hunt, who emphasised women’s health issues and the needs of children in the realization of the right to health. I understand that he also spoke at a function organised by the Human Rights Resource Centre in Melbourne, as well as other parts of Australia. His first report in 2003 on the Right to Health proposes measuring progressive implementation of this right using four important principles:

- availability (for example, the existence, affordability and location of services);
- accessibility (such as non-discriminatory services);
- acceptability (for example, quality); and
- adaptability (such as relevance of service to the population in overcoming barriers, such as family responsibilities).⁴

Article 12 (2)(a) of the International Covenant on Economic, Social and Cultural Rights specifically requires measures to improve maternal and child health.⁵ These measures can include maternity leave and other maternity protection at work - maternal and child health is one of the rationales for the *International Labour Organisation Maternity Protection Convention*.⁶ There is evidence that the length of paid maternity leave is a significant factor in women’s decision about whether to start and when to stop breastfeeding. If six months breastfeeding is optimal for health of mother and baby, then a period of at least six months paid maternity leave (which is

³ J. Mann, S. Gruskin, M.A. Grodin and G.J Annas, (eds) *Health and Human Rights: A Reader* (1999).

⁴ *The Right of Everyone to the Enjoyment of the Highest Available Standard of Physical and Mental Health*, UN Doc. E/CN.4/2003/58, 13 February 2003.

⁵ CESCR *General Comment No. 14*, and Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 24*.

⁶ 2000 No. 183 - Australia has not ratified because of its lack of commitment to paid maternity leave.

the norm in many European countries) may be an effective strategy for promoting or at least facilitating exclusive breastfeeding.

Children's rights

The *UN Convention on the Rights of the Child* specifically mentions the importance of breastfeeding in ensuring the child's right to the highest attainable standard of health in Article 24. It is also implicit in other articles of the Convention, including:

- the requirement that the best interests of the child should be the primary consideration in all actions concerning children - Article 3; and
- the provision that guarantees a child's right to an adequate standard of living which includes nutrition - Article 27.

One children's rights commentator has said that "of all the 'ready made' solutions to immediately improve the health of infants worldwide, breastfeeding is one of the safest, cheapest, most readily available, universally attainable and feasible."⁷

National governments are 'State Parties' (the formal term) to human rights treaties – they have the primary responsibility to:

- disseminate positive information about breastfeeding;
- promote breastfeeding through the health-care system, media and schools; and
- protecting the public from propaganda and misinformation through implementation of the Convention, including scrutinising multinational corporations' inappropriate marketing of breast-milk substitutes in developing countries, where most tap water is not sterile.⁸

When breastfeeding is no longer the norm the necessary skills are not being passed down through the generations, so the Government's duty under Article 24 is to ensure that parents are adequately informed about the advantages of breastfeeding is very important. Of course there are some areas of tension between mother's and children's rights, in areas such as female prisoners breastfeeding their infants up to certain ages, and HIV-infected breast-milk. In the later case, WHO/UNICEF policy is that replacement feeding is only recommended when it is *acceptable, feasible, safe and*

⁷ Elaine Petitot-Cote, *Child Rights and Health: NGOs Making a Difference, An Analysis of the CRC Committee's Concluding Observations, 1993–2003*, IBFAN-GIFA (2005).

⁸ See UNICEF, *Convention on the Rights of the Child Implementation Handbook*.

sustainable – in developing countries this is not often the case, and recent research show that exclusive, rather than mixed, breastfeeding may significantly reduce the risk of HIV-transmission from mother to child.⁹ However, in developed countries, for example Camden in London, there has been litigation concerning HIV testing and breastfeeding of infants.¹⁰

Children's health and wellbeing has been increasingly the focus of policy debates on work and family, and specifically on paid maternity leave. Paid maternity/paternity leave and family sensitive working conditions clearly meet the needs of both children and working parents.¹¹ The UN Committee monitoring the Convention on the Rights of the Child considers country reports by States Parties, and has expressed its concern that in Australia:

“women working in the private sector are not systematically entitled to maternity leave, which could result in different treatment between children of State employees and those working in other sectors... The Committee encourages the State Party (the Australian Government) to review its legislation and make paid maternity leave mandatory in all sectors, in light of the principle of the best interests of the child”.¹²

These issues have been extensively canvassed by Pru Goward, the Federal Sex Discrimination Commissioner in the *Time to Value: Proposal for a National Paid Maternity Leave Scheme* report in 2002, and in the more recent *Striking the Balance* Discussion Paper.

Women's rights

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), to which Australia is a party, notes that States Parties are already obliged to ensure that women and men enjoy on equal terms all political, social, economic and cultural rights. It recognises “the great contribution of women to the welfare of the

⁹ UNICEF, *1990–2005 Celebrating the Innocenti Declaration*, p.15.

¹⁰ Canadian HIV/AIDS Legal Network, *HIV/AIDS Policy and Law Review*, 5(1) Fall/Winter 1999 And see http://news.bbc.co.uk/1/hi/health/background_briefings/aids/455980.stm.

¹¹ *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, Geneva, (2002) p.253.

family”, the “social significance of maternity” and emphasises that women’s role in procreation should not be a basis for discrimination. According to the preamble, achieving equality involves “...the maximum participation of women on equal terms with men in all fields”. This does not mean women have to be treated the same as men - there is a large difference between formal legal, and substantive, equality. As said by Martin Luther King, “*If you start treating equally people who have been treated unequally, you capture them forever in their inequality*”. Women’s participation cannot be on equal terms unless their/our specific characteristics, including our capacity to bear and breastfeed babies, are respected and accommodated.

The Federal *Sex Discrimination Act 1984* was amended in 2003 to include breastfeeding – until then breastfeeding was covered under the Act as a characteristic that appertains generally to women. All anti-discrimination laws in States and Territories make it clear that measures to support women in relation to pregnancy, childbirth and breastfeeding do not discriminate against men – for example s.37 of the *Discrimination Act 1991* was inserted in 1997 in the ACT. Helen Szoke will talk to you later about Victorian provisions.

Article 11(2) of CEDAW specifically requires States Parties to take appropriate measures to prevent employment discrimination against women on the ground of maternity, including protection from dismissal and the right to paid maternity leave. It is well known, thanks to the campaigns of many women’s organisations, that Australia and the USA are the only developed countries that do not have a national government-funded scheme of paid maternity leave.

The right and opportunity to breastfeed is central to the issue of paid maternity leave and was a major part of the case for a national publicly funded scheme promoted by Pru Goward in her 2002 Report, *A Time to Value*. Many submissions to that inquiry emphasised the inconsistency of Federal Government policy that purports to encourage breastfeeding in accordance with WHO standards, while rejecting international standards on paid maternity leave.¹³ You will have already heard in this conference that research shows a positive association between the duration of time off

¹² Australia IRCO, Add 79, paras 17 and 31.

work and the duration of breastfeeding.¹⁴ Many women cannot afford to take enough leave to enable them to exclusively breastfeed for more than a few weeks. ABS data confirms that only around a third of women have access to paid maternity leave, and few of these would have more than 12 weeks.¹⁵

The International Labour Organisation Maternity Protection Convention has set a minimum period of fourteen paid weeks maternity leave, but Australia has not ratified this Convention.¹⁶ Although not technically a breach of CEDAW - because Australia has entered a reservation (an express 'opt out' clause) to the provision requiring paid maternity leave - the lack of a national paid maternity leave scheme undermines women's human rights, and detracts from efforts to improve breastfeeding rates, which is in the interests of mothers, babies and the wider community.¹⁷

The right to combine employment and breastfeeding is not only implemented through paid leave schemes, but also in flexible work arrangements and the provision of breastfeeding-friendly workplaces. The Australian Breastfeeding Association continues to do excellent work in promoting and recognising workplaces that support breastfeeding mothers in diverse ways – from work-based childcare, to breastfeeding breaks and facilities to feed their infants directly (for example when partners, family or carers can bring infants to visit work), and/or express and store milk. In 2005 the ACT Human Rights Office produced a leaflet on breastfeeding rights in partnership with the ABA, which also assisted us with circulating it extensively to the women in their networks who most needed to be aware of their rights. In 2005 the New Zealand the Human Rights Commission also published a pamphlet as well as a Report, *The Right to Breastfeed*, which contains seven core principles.¹⁸

¹³ HREOC, *A Time to Value: Proposal for a National paid Maternity Leave Scheme* (2002) p.57.

¹⁴ Judith Galtry and Paul Callister, 'Assessing the Optimal Length of parental leave for Child and Parental Wellbeing: How Can Research Inform Policy?' (2005) 26 *Journal of Family Issues* 219-246.

¹⁵ *Pregnancy and Employment Transitions*, ABS Cat 4913.0, November 2005 (Released 23/10/2006)

¹⁶ ILO C183, 2000.

¹⁷ Australia has also been criticised for not signing and ratifying the latest Optional Protocol to CEDAW that would enable the treaty monitoring body to consider individual complaints against countries (called 'communications').

¹⁸ NZ Human Rights Commission, *The Right to Breastfeed* (2005):

http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/04-Aug-2005_22-49-29_RighttoBreastfeed.pdf

ACT Complaints

At the ACT Human Rights Office we generally receive several breastfeeding discrimination complaints a year.¹⁹ Of course bringing a formal complaint is a stressful undertaking when you are recovering from birth and adjusting to a new baby. In 2003, we conciliated a complaint in which a mother alleged that her employer would not accommodate her need to breastfeed her child during work hours, and had discouraged her from returning to work on reduced hours at the date that she wished. At conciliation the employer agreed to provide the complainant with a written apology, a reference and allowed her to work shorter hours for a specified period upon her return to work. It agreed to change its equal opportunity policy to provide employees with breastfeeding facilities, lactation breaks and flexible work options, consistent with the recommendations of the Australian Breastfeeding Association. The employer paid the woman \$5,000 in compensation for hurt, humiliation and distress, and 5 weeks pay (being the period she would have liked to have returned to work).

Women are asserting their right to breastfeed in all areas of public life, not just employment. Last year, the Human Rights Office handled a Canberra case in which two women were allegedly stopped from breastfeeding their babies in the self-service café of a women's only gym. Several reasons were reported by the press for this occurring, including that it breached the gym's 'no-children' and 'members only' policies, public and occupational health and safety problems with hot water, alternative venues with the gym, including the crèche and baby changing rooms (although the women pointed out that you wouldn't want to eat your meals in a toilet). The case made headlines around Australia and internationally, as both parties presented and defended their respective sides.²⁰ The case was referred to the Discrimination Tribunal, and media reports have stated that it has been recently settled, but the terms of the agreement are confidential.²¹ The women were

¹⁹ Julie Whitmore, Senior Investigator/Conciliator, ACT Human Rights Office, for providing summaries of the cases described here. Further information is in the annual reports of the Human Rights Office available on the website www.hro.act.gov.au

²⁰ Sydney Morning Herald, 'Last drinks as gym declares breastfeeding mothers unfit' 28 July 2005.

²¹ Canberra Times, 14 October 2006.

represented by a pro bono barrister, and given legal assistance from the Women's Legal Centre of the ACT to run this lengthy case.

I am pleased to be able to report at this Conference that we have just negotiated a new *Babes in Arms Policy* that will end potential discrimination against breastfeeding mothers and increase their opportunities to enjoy the performing arts. After receiving enquiries from the public concerning the ticketing policy that required tickets to be bought for infants unless a performance was 'child-designated' - which meant breastfeeding mothers who wanted or needed to take their infants had to buy two tickets for one seat - my Office conducted an 'own motion' investigation. As a result, the venue has agreed to introduce a new policy that nursing mothers with infants up to 12 months of age will be admitted without needing to purchase a separate ticket. Management were persuaded by the statement in the World Health Organisation's Global Strategy that "*mothers and babies form an inseparable biological and social unit*",²² as a rationale for distinguishing breastfeeding babies from older, less dependent children for policy purposes. The venue has also shown local and national leadership in promoting good Babes in Arms Policies for other performing arts centres.

Conclusion

In the ACT we have been able to effectively use the international human rights framework to create a more breastfeeding friendly-culture. Both our *Discrimination Act 1991* and *Human Rights Act 2004* provide a legal basis for recognising breastfeeding as a human right. The ACT is only a small jurisdiction with a population of about 330,000, so there is a long way to go. I look forward to the day when we have a national bill of rights, but meanwhile I encourage you all to use the international human rights framework and local anti-discrimination laws in your breastfeeding advocacy and support work. Our Fact Sheet on Breastfeeding and Human Rights is available on our website at www.hro.act.gov.au. I would also like to pay tribute to the ACT Human Rights Office staff, Jenny Earle and Julie Whitmore, who researched and drafted our materials on breastfeeding as a human right.

I urge you to help promote women's rights generally, and specifically a national paid maternity leave scheme to enable better take up rates and longer periods of breastfeeding. In conclusion, using the words of Eleanor Roosevelt, 'great minds discuss ideas; average minds discuss events, small minds discuss people' – tonight I think that we have discussed important ideas about human rights, but rooted in our everyday experiences of real events such as breastfeeding, and connected with people we know and love, our children and mothers.

²² WHO, *Global Strategy on Infant and Young Child Feeding* (2003).