

OUTSIDE CLASSROOMS AND COURTROOMS

The Good News on Human Rights

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It is customary, in any discussion about the implementation of human rights laws, to quote Eleanor Roosevelt:¹

Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

An important idea can be drawn from this ubiquitous citation. The realisation of human rights is not just about the enactment of grand legislative schemes or the development of internationally accepted norms. In fact, these high-level processes are fairly meaningless unless brought to life in small acts that take place in the day to day lives of ordinary people.

This idea remains as relevant today in Australia as it was in 1948 when Roosevelt chaired the committee that drafted and approved the *Universal Declaration of Human Rights*. A more modern articulation is to be found in the Victorian Attorney-General's second reading speech on the *Charter of Human Rights and Responsibilities Act (2006)* (Charter):²

Whether you are a man or a woman, young or old, whether you live in Mildura, Moe, Melton or Mordialloc, whether you are living with a disability, whatever your income or your background or your religion — this bill is about those rights and values that belong to all of us by virtue of our shared humanity.

Both quotes seek to emphasise community ownership of the human rights framework and the practical difference that the use of human rights principles can make. The focus is on the role of human rights in everyday life, rather than in courtrooms or classrooms.

There is great merit in concentrating on the practical effects of human rights frameworks, rather than on the law or theory. Theoretical or legal defences of human rights are certainly easier to construct. After all, does anybody object to freedom, respect, equality and dignity? However, human rights sceptics tend not to care about the theory; their concern is with the practical effect of human rights laws. Similarly, human rights agnostics are more likely to see the value of human rights when they are made meaningful and

compelling through positive, real life stories. The challenge is therefore to demonstrate that human rights actually have the capacity to improve lives.

This article provides real life examples of how the Charter has been used since it came into full effect just over a year ago. It is based on a project run by the Human Rights Law Resource Centre (HRLRC) aimed at identifying and collating a number of 'good news stories' which show how human rights legislation has been used to address disadvantage and promote human dignity. After a brief discussion of the background of the project, several of these good news stories are discussed and analysed.

Background

UK Experience

The Charter is based in part on the British *Human Rights Act 1998* and lessons can be learned from the UK's experience. Lord Bingham, former Senior Law Lord of the United Kingdom explained that the *Human Rights Act*:³

has attracted much media criticism in the UK, particularly in the tabloid and right-wing press and in sections of the Conservative party. Much of this criticism has been the product of misrepresentation and misunderstanding and there is a tendency to blame the Act for almost anything of which the public disapprove.

The UK's *Human Rights Act 1998* is a much maligned instrument. A 2006 review of the implementation of the Act found that 'a number of damaging myths about human rights have taken root in the popular imagination.'⁴

Growing antipathy towards the *Human Rights Act 1998* formed the impetus for the British Institute for Human Rights to collect a series of cases where 'ordinary people going about their day to day lives are benefiting from the law, without resorting to the law.'⁵ The stories, contained in the BIHR publication *The Human Rights Act: Changing Lives* are further described as showing 'how groups and people themselves are using not only human rights law, but also the language and ideas of human rights to challenge poor treatment and to negotiate improvements to services provided by public bodies.'⁶

The HRLRC has used the British Institute of Human Rights' publication as a model for its project.

The HRLRC Project

The HRLRC and other human rights organisations in Australia have taken note of the UK's experience and are aware of the need to defend Victoria's *Charter*

REFERENCES

1. Eleanor Roosevelt (Speech delivered to the UN Commission on Human Rights, United Nations, New York, 27 March 1958).
2. Victoria, Second Reading of the *Charter of Human Rights and Responsibilities Act 2006*, Hansard, 4 May 2006.
3. Lord Bingham, 'Dignity, Fairness and Good Government' (See article, this issue, pp 74–79).
4. Department of Constitutional Affairs (UK), *Review of the Implementation of the Human Rights Act (2006)*.
5. British Institute of Human Rights, *The Human Rights Act – Changing Lives* (2nd ed, 2008) 5.
6. *Ibid.*

The realisation of human rights is not just about the enactment of grand legislative schemes or the development of internationally accepted norms ... these high-level processes are fairly meaningless unless brought to life in small acts that take place in the day to day lives of ordinary people.

against similar forms of attack. More broadly, a strong case for human rights legislation is timely as the Federal Government (along with a number of State governments) considers how best to improve human rights protection and promotion in Australia.⁷

In order to combat the perpetuation of the myths and misperceptions that have dogged the UK's human rights legislation – and to strengthen the implementation and regard for the Victorian *Charter* and the case for an Australian *Human Rights Act* – the HRLRC decided to create a database of 'good news stories' similar to those collected by the British Institute of Human Rights.

Such stories are not readily available. They are, by their very nature, small scale, one-off instances that tend not to be caught by official reports and publications, nor are they regularly reported in the media. In order to find out more about how the *Charter* was being used and to what effect, the HRLRC drew on its existing relationships with community sector organisations.

The HRLRC asked organisations to provide examples of where the *Charter* has been used to address disadvantage and promote human dignity. The HRLRC also made a record of the instances where it provided advice or assistance to groups seeking to use the *Charter*. Some organisations, such as the Victorian Council of Social Services and the Victorian Equal Opportunity and Human Rights Commission record and report on the use of the *Charter*.⁸ Case studies contained in their reports are also included in the HRLRC database.

The stories collected by the HRLRC, a number of which are outlined below, show how the language and ideas of human rights can be used by a broad array of people and groups to negotiate better service delivery; to challenge inflexible or inappropriate government policy; and to improve organisational structures and operations. These stories are the best evidence that the *Charter* is making a positive difference close to home.

The stories

Eight human rights good news stories, including a brief analysis of how the *Charter* has caused or contributed to the positive outcome, are set out below.⁹ These stories illustrate the *Charter's* capacity to:

- (a) support commonsense decision-making;
- (b) facilitate access to vital services;
- (c) encourage constructive organisational change; and
- (d) promote substantive equality.

The stories provide a snapshot of how the *Charter* is operating as a tool in front-line advocacy and as a catalyst for organisational change.

The Charter supports commonsense decision-making

The *Charter* requires that the particular circumstances of individuals be taken into account in decision-making.¹⁰ It therefore provides a means to challenge blanket policies and procedures that result in unfair and inappropriate outcomes.

The *Charter* articulates standards upon which to base these challenges. Human rights laws reflect basic principles that are so fundamental they have received public and official support from the vast majority of countries, despite significant political, social and cultural differences.¹¹ Even those who challenge the utility of human rights legislation rarely object to the principles on which human rights are based.¹²

By supporting an individualised, principled and practical approach to decision-making, the *Charter* promotes commonsense outcomes in the first instance and provides an avenue by which unfair and inappropriate decisions can be challenged.

*1. Provision of appropriate medical services*¹³

A middle aged woman with an acquired brain injury required urgent therapy to treat severe contractures of her left hand. The contractures caused considerable pain and suffering and were resulting in deterioration of her hand. Although the woman had been waiting for therapy for over three years, she was not considered a priority because she is aged over 50. If appropriate medical services were not provided, it was likely that radical surgery would be required, possibly resulting in severing the tendons in her fingers or even amputation of the hand.

The woman's advocates argued that a lack of adequate medical services potentially raised concerns in relation to the right to non-discrimination (section 8), protection from cruel, inhuman or degrading treatment (section 10), right to privacy (section 13) and the right to security of person (section 21).

The *Charter* arguments served to highlight and challenge the extreme effect that the blanket age-based policy had in this particular case. As a result, the advocates were able to obtain one-off funding for urgently needed therapy.

7. For more information see <http://humanrightsconsultation.gov.au/> at 12 May 2009.

8. See, for example, Victorian Council of Social Service, *Using the Charter in Policy and Practice* (July 2008) reported in Victorian Equal Opportunity and Human Rights Commission, 'Your Rights, Your Stories' <http://humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/> at 12 May 2009.

9. The full database of stories is at <http://hrlrc.org.au/content/topics/national-human-rights-consultation/case-studies/#victoria> at 12 May 2009.

10. This is implicit in section 38 of the *Charter* which requires that public authorities give proper consideration to, and act compatibly with, human rights. The European Court of Human Rights has held that human rights should be interpreted and applied in a manner which renders them 'practical and effective, not theoretical and illusory': *Goodwin v United Kingdom*, application no 28957/95, 11 July 2002 at [74] (ECtHR). It is open to Victorian Courts to adopt this principle of interpretation.

11. At the World Conference on Human Rights held in Vienna in June 1993, 171 countries reiterated the universality, indivisibility and interdependence of human rights, and reaffirmed their commitment to the Universal Declaration of Human Rights: 'World Conference on Human Rights: Vienna Declaration and Program of Action', A/CONF.157/23 (12 July 1993).

12. See, for example, George Brandis, 'The debate we didn't have to have: the proposal for an Australian bill of rights' (Address to the James Cook University Law School, Townsville, 14 August 2008).

13. HRLRC *Bulletin* (December 2007) <http://hrlrc.org.au/files/DL4EVD83ZT/HRLRC%20Bulletin%20-%2012.07.pdf> at 12 May 2009.

2. Protecting privacy and family¹⁴

A 23 year old Iraqi refugee with a severe intellectual disability was placed in unsuitable supported accommodation. There were no Arabic speaking workers in the accommodation facility, the young man's ability to observe his religion (by, for example, eating Halal food) was limited and his contact with his family was restricted. After a visit home, it became apparent that he was frightened of another resident with whom he shared a room and was otherwise lonely, bored and unhappy. Both the young man and his family felt that he could be better cared for in his home.

The young man's advocate raised the *Charter* with the relevant public authority, including the rights to protection of families and children (section 17), cultural rights (section 19) and freedom of religion (section 14). The *Charter* provided an authoritative articulation of the importance of the young man's diverse needs and interests.

The young man was not forced to return to the inappropriate accommodation facility and was allowed to reside in his family home.

3. Pregnant single mother avoids eviction into homelessness¹⁵

A pregnant single mother with two children was living in community housing. The landlord was a registered housing association under the *Housing Act 1983* (Vic) that provides community housing to low-income Victorians on behalf of a local council and is assisted by substantial public funding.

The woman was given an eviction notice which did not provide any reasons for the eviction, or allow her to address the landlord's concerns. *Charter* rights to privacy (section 13) and protection of families and children (section 17) were used to negotiate with the landlord to prevent an eviction into homelessness and to reach an alternative agreement.

In this case, the *Charter* provided an effective tool for introducing notions of fairness and decency into negotiations.

Using the Charter to gain access to vital services

The stories collected by the HRLRC reflected the unsurprising reality that people who are already marginalised or disadvantaged are more likely to experience difficulty accessing vital services. By articulating rights that apply to all, regardless of age, disability or other factors, the *Charter* seeks to remedy this imbalance. Further, by imposing specific obligations on public authorities, the *Charter* legitimises and gives force to requests for support and assistance.

4. Child with autism gains entitlement to disability assistance¹⁶

A 13 year-old boy with Asperger Syndrome was ineligible to receive disability support services because a Victorian Government department did not consider Asperger Syndrome and other Autism Spectrum Disorders to be a 'disability'. The child's mother applied to VCAT for a review of the DHS decision and advocated for an inclusive and contextual interpretation

of 'disability', in light of the rights contained in the *Charter*, including the right to privacy (section 13), protection of families and children (section 17) and equality before the law (section 8).

Before the application proceeded to hearing, the Victorian Government issued a media release advising that it had decided to acknowledge Autism Spectrum Disorders (including Asperger Syndrome) as a disability under the Act and thereby entitle Victorians with autism to disability assistance. The Government committed to back this announcement by \$2.75 million in additional funding.

The President of the Autistic Family Support Association commented that she did not think that the policy change would have occurred without bringing the litigation.

5. Access to health care for involuntary mental health patient¹⁷

An involuntary mental health patient was seeking access to medical treatment in relation to a liver condition. Advocates for the patient considered that a lack of adequate medical services may raise human rights issues under the Victorian *Charter*, including the right to life (section 9), protection from cruel, inhuman or degrading treatment (section 10), right to privacy (section 13), the right to security of person (section 21) and right to humane treatment in detention (section 22). The advocates raised the *Charter* arguments with hospital management and negotiated to arrange for a medical appointment for the inpatient.

The Charter encourages constructive organisational change

The introduction of the *Charter* has encouraged government bodies and other organisations to adopt a human rights-based approach to policy delivery and service development.¹⁸ By adopting a human rights approach, organisations can ensure that human rights are protected before a breach occurs. The *Charter* also provides a 'common language through which the policy and practice of all organisations can be objectively measured against universal benchmarks and minimum standards'.¹⁹

In addition to these benefits, there is substantial research which suggests that a human rights-based approach can increase effectiveness and efficiency and enable Government and organisations to better manage risk and realise new opportunities.²⁰

6. Protecting the right to vote²¹

After the *Charter* came into operation, an organisation that provides services to people with disability implemented a new system in which its routine assessment of client needs included explicit consideration of their human rights through the use of a mandatory Human Rights Checklist. Any issues identified by staff were then referred to the organisation's Human Rights Committee for review, with the Committee making recommendations to the person's case manager.

14. Interview with Youth Affairs Council of Victoria (Telephone interview, January 2009).

15. HRLRC *Bulletin* (June 2008) <hrlrc.org.au/files/702ZTIZ93C/HRLRC%20Bulletin%20-%2006.08.pdf> at 12 May 2009.

16. HRLRC *Bulletin* (December 2008) <hrlrc.org.au/files/DL4EVD83ZT/HRLRC_Bulletin__12_08.pdf> at 12 May 2009.

17. HRLRC *Bulletin* (December 2007) <hrlrc.org.au/files/DL4EVD83ZT/HRLRC%29Bulletin%20-%2012.07.pdf> at 12 May 2009.

18. Section 38 of the *Charter* provides that public authorities must give proper consideration to and act in accordance with *Charter* rights.

19. Victorian Equal Opportunity and Human Rights Commission, *From Principle to Practice: Implementing the Human Rights Based Approach in Community Organisations* (2008), 6.

20. *Ibid*; Victorian Equal Opportunity and Human Rights Commission (2007), *The 2007 Report on the operation of the Charter of Human Rights and Responsibilities: first steps forward*; The UK Ministry of Justice (2008), *Human Rights Insight Project*, Ministry of Justice Research Series 1/08, January 2008.

21. Victorian Council of Social Service, *Using the Charter in Policy and Practice* (July 2008), reported in Victorian Equal Opportunity and Human Rights Commission, 'Your Rights, Your Stories' <humanrightscommission.vic.gov.au/human%20rights/your%20rights%20your%20stories/> at 12 May 2009.

By supporting an individualised, principled and practical approach to decision-making, the Charter promotes commonsense outcomes in the first instance and provides an avenue by which unfair and inappropriate decisions can be challenged.

Through the implementation of these new processes, the service became aware of a number of clients with intellectual disabilities whose ability to exercise their right to vote had been restricted, engaging their rights to recognition and equality before the law (section 8) and to take part in public life (section 18).

The *Charter* drew attention to a problem that may otherwise have gone unnoticed and the service took immediate steps to support its clients to make individual decisions about how they would vote.

7. Recognising cultural rights²²

An Aboriginal community services organisation noticed in its dealings with state and local government partners that, since the introduction of the *Charter* — which enshrines cultural rights and acknowledges that 'Aboriginal persons hold distinct cultural rights' (section 19(2)) — there has been a shift in thinking around cultural diversity and the inclusion of Aboriginal people in programs.

One senior staff member who had been working with the government on a project aimed at developing the health, development, learning and wellbeing of Indigenous children commented that 'the Victorian *Charter* seems to have influenced the way Government works with Aboriginal people. They are certainly aware of cultural rights'. In this instance the *Charter* has served to refocus attention on an important area of concern.

The Charter promotes substantive equality

Under international law, the human right to equality and non-discrimination requires analysis of the effect (in addition to the form) of policies and practices.²³ It also recognises and obliges governments to address systemic discrimination.²⁴ While the substance of the *Charter* right to equality has not yet been fully explored in Victorian jurisprudence, international jurisprudence will be highly persuasive in its interpretation.²⁵

Recognition of the human right to equality (as it is understood under international law) can 'plug the gaps' in anti-discrimination laws and can open the eyes of public authorities to the more invidious forms of discrimination.

Human rights laws recognise the special needs of vulnerable groups, such as children and people with disability.²⁶ By emphasising a common humanity, the language and framework of human rights 'encourage[s] decision-makers, stakeholders and the public to look past the marginalized status of individuals belonging to disfavored groups'.²⁷

8. Recognising different needs and circumstances²⁸

Business owners in a regional CBD were calling on a local council to introduce a 'move on and stay away' by-law that would apply to those displaying antisocial behaviour. The council rejected the move on human rights grounds, saying that such a law would disproportionately affect already marginalised groups such as young people, homeless people and Indigenous groups and therefore have a discriminatory effect (section 8). The council also expressed the opinion that the by-law would restrict people's right to be in a public place (sections 13 and 12). Through its consideration of the *Charter*, the council was able to recognise and address the particular needs of groups who are often left out of decision-making processes.

Emphasising a common humanity²⁹

A prisoner in a Victorian prison was prohibited from attending the funeral of his step-father. The prisoner's mother and sister both expressed their wish that their son and brother attend the funeral, highlighting his role in holding the family together during a difficult time. The prisoner's advocate raised *Charter* arguments in relation to the protection of families and children (section 17) and arrangements were made for the prisoner to attend the funeral.

The right to equality was not raised in this case. However, non-discrimination constitutes a basic and general principle relating to the protection of all human rights.³⁰ Here, the *Charter* was used to ensure that the prisoner was entitled to equal protection of his human rights (save for those rights that were legitimately restricted by the circumstances of his incarceration).³¹

Conclusion

Real life stories such as those outlined in this article are perhaps the best advertisements for legislative protection of human rights. Of course, it is impossible to know the extent to which *Charter*-based ideas and advocacy were determinative of the outcome in these cases. It is likely that in most instances there were a range of factors — including financial, political and personal — at play. Nevertheless, it is fair to say that the *Charter* made an important contribution in key respects.

First, the *Charter* legitimised arguments based on commonsense notions of fairness, respect, equality and dignity. Without the *Charter* such arguments may still be made, but have no legal force or effect and are more easily dismissed on the basis of convenience or expediency. For example, the involuntary mental health

22. Interview with Victorian Aboriginal Community Services Association Ltd (VACSAL) (Telephone interview, February, 2009).

23. See, for example, Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN Doc A/59/38 (2004) [10].

24. See, for example, Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/CN.12/2005/4 (2005), at paras 18-21; Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), at para 6-8; Human Rights Committee, *General Comment No 18: Non-Discrimination*, UN Doc HRI/GEN/1/Rev.1 at 26 (1994), at [5].

25. Section 32(2) of the *Charter* provides that international law may be considered in interpreting a statutory provision. As the *Charter* has only been in full effect for a short time, international jurisprudence is often the best (and sometimes only) guide to interpretation of *Charter* rights.

26. Specific treaties have been adopted to address the particular needs of certain groups, for example, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1249 UNTS 13 (entered into force on 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Section 32(2) of the *Charter* provides that international human rights law is relevant to the interpretation of Victorian legislation.

27. 'Introduction to Volume 3: Changing Perceptions About an Issue' in Cynthia Soohoo, Catherine Albisa and Martha Davis (eds), *Bringing Human Rights Home* (2008) xix.

28. Eugene Duffy, 'Move on Powers Rejected' *Bendigo Advertiser* (Bendigo), 22 August 2008.

patient with a serious liver condition may request access to medical services, but he is more likely to get an appointment if his request concerns the fulfilment of a legal obligation, rather than a broad discretion.

Second, the stories show that the *Charter* is being used by a broad range of people from marginalised or disadvantaged groups. These groups are often not heard in regular democratic processes and can be stigmatised and misrepresented by market or charity-based frameworks. Human rights laws offer a stronger platform on which these groups can participate in society and advance their individual and collective interests.

Third, the stories challenge the cynical proposition that the *Charter* benefits human rights lawyers who are out for power and money. As one commentator suggested in colourful terms:³²

like pigs sniffing for truffles, lawyers can smell the enticing waft of money and power in the air as they push open new legal industries. For the activists, it's about influence as they seek to move from the irrelevant fringe of political life to the centre of the action.

Council by-laws and supported accommodation arrangements are hardly glamorous epicentres of power. Significantly, very few of the stories collected

by the HRLRC involved lawyers and there is not a single case in which a lawyer received payment for their *Charter*-related work. If the *Charter* is a 'lawyer's picnic', it is dull picnic indeed.

Finally, these stories provide a compelling rebuttal to the argument that human rights laws are merely a 'self-indulgent Utopian fancy' emerging from 'law school common rooms and activist judges'.³³ The autistic child who gained access to disability services and the pregnant woman who avoided eviction into homelessness are unlikely to agree. The stories show that the *Charter* is, in essence, a practical tool which operates outside courtrooms and classrooms to advance common sense and common values.

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This article was the basis for a presentation at the Victorian Equal Opportunity and Human Rights Commission's Conference, *Everyday People, Everyday Rights* in March 2009.

29. Interview with Springvale Monash Legal Service (Telephone interview, February 2009).

30. Human Rights Committee, General Comment 18, *Non-discrimination*, Thirty-seventh session, 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 26 (1994).

31. Persons deprived of their liberty may not be 'subjected to any hardship or constraint other than resulting from the deprivation of liberty': Human Rights Committee, *General Comment No 21 (Replaces General Comment 9) concerning Humane Treatment of Persons Deprived of Liberty*, (2003) UN Doc HRI/GEN/1/Rev.6 at 153. This means that, other than by virtue of the fact of or necessities as a result of detention, a person detained in a Victorian prison retains all of their rights. See also Principle 5 of the *UN Basic Principles for the Treatment of Prisoners*, UN GA Res 45/111 (14 December 1990), which provides that '[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.'

32. Janet Albrechtsen, 'Keep power with the people', *The Australian* (Sydney), http://blogs.theaustralian.news.com.au/janetalbrechtsen/index.php/theaustralian/comments/keep_power_with_the_people/ at 12 May 2009

33. Brandis, above n 12; Brandis, quoted in Samantha Maiden, 'Human Rights Charter is Doomed: Carr', *The Australian* (Sydney), 10 December 2008.



MENTIONS

Young people & the criminal justice system: New insights & promising responses

Programs designed to divert young people from offending behaviour and entering juvenile detention can not only be more effective than putting a young person in custody but up to 50 times cheaper to run, according to a new report published by the community service organisation Mission Australia.

Mission Australia says diversionary programs designed to keep young people from re-offending can cut rates by more than half and reduce serious offences by close to two-thirds.

Mission Australia has called on state and territory governments to set targets to reduce the numbers of juveniles in detention and expand the number of successful diversionary programs.

Spokesperson Anne Hampshire said an upturn in the number of young people in custody, high levels of recidivism and the significant cost of locking young people up highlighted the need for alternatives to addressing offending behaviour.

For more information about this report, visit the Mission Australia website at missionaustralia.com.au