

Law Council of Australia

# Federal Human Rights Charter

Policy Position

November 2020



Law Council  
OF AUSTRALIA

## Introduction

The Law Council of Australia considers that more effective legal protection of human rights in Australia at the Commonwealth level is urgently needed. Australia is the only democratic nation to not have a constitutional or statutory bill or charter of rights.<sup>1</sup> The Law Council's longstanding position has been that guarantees of human rights should be included in the Commonwealth Constitution, as this would provide more effective protection against legislative infringement of those rights. The Law Council continues to adhere to that view. The Law Council notes that many of the United Nations human rights treaty bodies have consistently called for the incorporation into Australian law of the guarantees contained in the principal United Nations human rights treaties.

The Law Council considers that, pending the adoption of constitutional guarantees, the introduction of a statutory charter of human rights would be a positive step towards better protection of human rights and may help pave the way towards their constitutional protection.

The Law Council therefore supports the enactment of a Human Rights Act by the Commonwealth Parliament. The Act should give effect to Australia's international human rights obligations and should draw on but not be limited by the experience to date of similar human rights legislation in Australian jurisdictions and in other comparable jurisdictions. Australia has obligations to respect, protect and fulfil all of the human rights in the international human rights treaties to which it is a party.

## Rights to be protected

A Human Rights Act should include guarantees of civil, political, economic, social and cultural rights and should be primarily based on Australia's obligations under the International Covenant on Civil and Political Rights,<sup>2</sup> the International Covenant on Economic, Social and Cultural Rights<sup>3</sup> and the other principal United Nations human rights treaties to which Australia is party.<sup>4</sup> The Law Council would also support the inclusion of the rights in the United Nations Declaration on the Rights of Indigenous Peoples, if Indigenous

---

<sup>1</sup> Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Vintage, 2009) 43.

<sup>2</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>3</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>4</sup> These are the Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987); Convention on the Elimination of All Forms of Racial Discrimination, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); Convention on the Rights of Persons with Disabilities, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

peoples support such an inclusion. The starting-point for the Act should be the international formulation of those rights, adapted as appropriate to the Australian context.

### **Permissible limitations on rights**

The Act should recognise, in the form of a general limitations clause, that many rights may be subject to reasonable and proportionate restrictions if these are clearly demonstrated to be necessary for the achievement of a legitimate purpose such as protecting the rights of others. The Act should also make clear that some human rights are absolute and not subject to limitation, for example the right not to be subject to torture or to cruel, inhuman or degrading treatment.

### **Who should enjoy rights protection**

The Act should guarantee human rights to natural persons only, and not to corporations or other juridical entities.

### **Interpretive clause**

The Act should include a provision which requires all primary and subordinate Commonwealth legislation to be interpreted, so far as is reasonably possible, in a manner that is consistent with human rights. This interpretive obligation would apply to both existing and future legislation. Such a provision should require courts, tribunals and others interpreting legislation to depart from accepted interpretations of legislative provisions where this is reasonably possible and does not fundamentally undermine or distort the purpose of the legislation. The achievement of a human rights-compatible interpretation should be the predominant consideration. The Act should provide that those interpreting it should take into account relevant international material, including the interpretations adopted by the United Nations human rights treaty bodies.

### **Statements of compatibility**

The Law Council considers that all proposed primary and subordinate legislation, including Commonwealth legislation adopting State or Territory legislation as part of a cooperative scheme or otherwise, should be accompanied by a detailed statement of compatibility of human rights which explains how the legislation promotes or limits the enjoyment of human rights and how any restrictions on the enjoyment of a right are justified. Statements of compatibility should provide a sufficiently detailed and evidence-based rationale for the encroachments on any rights. The Law Council notes that this would parallel the requirements for the preparation of statements of compatibility under the *Human Rights*

*(Parliamentary Scrutiny) Act 2011* (Cth) and considers that the Parliamentary Joint Committee on Human Rights established by that Act should perform a similar scrutiny role under a Human Rights Act, with its mandate and practice modified in light of experience to strengthen the impact of the Committee's work.

### **Duty on public authorities**

A Human Rights Act should include explicit duties on public authorities to act compatibly with human rights, and to give proper consideration to human rights in the development of policy and the making of decisions. 'Public authority' should be broadly defined with reference to a body's legal or institutional status, or functions performed, and should also extend to public and private bodies other than Commonwealth bodies where those bodies carry out functions on behalf of the Commonwealth. An 'opt-in' provision for non-public authorities should also be included.

### **Independent direct right of action**

The Law Council considers that there should be a direct and independent right of action where a person alleges that they have been the victim of a violation of the rights guaranteed under the Human Rights Act. It may also be appropriate to consider the possibility of a process offering conciliation or mediation of human rights complaints, without prejudice to the right to bring legal proceedings. This may involve conferring on the Australian Human Rights Commission the power to receive and conciliate complaints of violations of rights guaranteed under the Human Rights Act.

The Law Council also considers that in appropriate cases public bodies such as the Australian Human Rights Commission or public interest groups should be granted standing to initiate proceedings, as well as to intervene or act as amicus in proceedings brought by other persons.

### **Remedies**

Where a violation of a guaranteed right is established, an effective remedy should be available that affords appropriate and adequate reparation for the wrong suffered. This might include compensation in an appropriate case, declaratory or injunctive relief, as well as other remedies. Courts and tribunals should be given the power to order such remedies as are 'just and appropriate' and in doing so should take into account the types of remedies

recognised by international human rights law as appropriate and adequate reparation for human rights violations.<sup>5</sup>

### **Procedural matters – costs**

The Law Council considers that many cases invoking the guarantees under a Human Rights Act are likely to raise matters of general public interest. It considers that the risk of adverse costs orders may pose a barrier to the adjudication of such issues and supports the availability of protective costs orders for cases which involve human rights issues of public importance. An additional option would be to permit a court to make a costs order in relation to a claim brought under the charter only in limited circumstances, such as when the application or response is made vexatiously, or without reasonable prospect of success.

### **Review of the legislation**

The Law Council considers that, given the dynamic nature of developments in the field of human rights, the operation of a Human Rights Act should be reviewed within a reasonable period after its commencement, possibly after five years and then again after ten years, in order to improve its coverage and operation in light of experience.

---

<sup>5</sup> Subject to constitutional limits, this might include conferring on the courts the power to make a formal declaration of inconsistency with human rights, giving rise to an obligation on the executive government to respond to this declaration in the Parliament.