

## A Human Rights Act: protecting all Australians

The Councils for Civil Liberties support a constitutionally-entrenched federal Bill of Rights for all Australians. The Councils also support the interim measure of instituting a statutory Human Rights Act: to encourage a rights culture in Australian; and to provide Australians with the opportunity to become accustomed to the idea of a Bill of Rights.

Australian law, as it currently stands, does not protect even the most fundamental rights that Australians assume they have. For example, the law does *not* protect freedom of religion or freedom of speech. A Bill of Rights, however, will protect these fundamental rights and freedoms.

There have been several attempts to pass a statutory Human Rights Act in Australia in the past.<sup>1</sup> In March this year the Chief Minister of the ACT, Mr Jon Stanhope MLA, successfully secured the passing of Australia's first Human Rights Act.<sup>2</sup> That Act adopts into ACT law much of the *International Covenant on Civil and Political Rights*.<sup>3</sup>

The Councils for Civil Liberties strongly encourage the federal Parliament to follow the example of the ACT Legislative Assembly and to pass a statutory Human Rights Act to protect the rights and freedoms of all Australians.

## Why a Human Rights Act?

A Human Rights Act will protect the rights and freedoms of all Australians, which are currently inadequately protected by the law. It will adopt into Australian law the rights which are now widely accepted around the world as universal and fundamental human rights. It will help to strengthen Australian democracy and multiculturalism by promoting tolerance and understanding between Australians. It will also provide Australians with a document in which they can read their rights and freedoms in plain English.

There are many well-rehearsed arguments against a Bill of Rights. Most of them dissolve away when you consider that Australia is now the only common law country in the world without a Bill of Rights. The UK<sup>4</sup> and New Zealand<sup>5</sup> now both have statutory Bills of Rights. Canada, Fiji, India, South Africa and the United States have constitutional Bills of Rights. Democracy has not collapsed in those nations. The citizens of those countries do not live in chains. The governments of those nations are not paralysed by activist courts. Respect for the courts and the rule of law has not deteriorated.

One of the most regular arguments heard in Australia against a Bill of Rights is that we do not need a Bill of Rights because our rights are adequately protected by the common law and the Constitution. This is simply not true.

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<sup>1</sup> Government initiatives include: Human Rights Bill, introduced by Lionel Murphy in 1973; and the Australian Human Rights Bill, introduced by Lionel Bowen in 1985. Individual members have unsuccessfully introduced Bills of Rights into Parliament: Human Rights Bill by Senator Janine Haines in 1982; the Parliamentary Charter of Rights and Freedoms Bill by Senator Meg Lees in 2001; and the Australian Bill of Rights Bill by Dr Andrew Theophanous, also in 2001.

<sup>2</sup> *Human Rights Act 2004* (ACT) was passed on 2 March 2004 and comes into force on 1 July 2004.

<sup>3</sup> Australia ratified the *International Covenant on Civil and Political Rights* in August 1980. It was signed by the Fraser government.

<sup>4</sup> *Human Rights Act 1998* (UK).

<sup>5</sup> *Bill of Rights Act 1990* (NZ).

As the Chief Justice of the ACT recently noted at the National Press Club,<sup>6</sup> this argument plays upon the ignorance of the law among the Australian people. Almost every freedom that Australians assume they have is not actually protected in Australian law. Neither the common law nor the Constitution guarantee freedom of speech,<sup>7</sup> freedom of religion,<sup>8</sup> one-vote-one-value,<sup>9</sup> trial by jury<sup>10</sup> or freedom from discrimination, among many other fundamental human rights.<sup>11</sup>

In the words of Chief Justice Higgins:

Fundamental rights like a right to the equal protection of the law, or the right to peaceful assembly or freedom of conscience - rights that we all assume we have and take largely for granted - simply do not exist at law.<sup>12</sup>

How many Australians actually know this? If they did, they would certainly be in favour of a Bill of Rights to ensure such protections.

Another argument made against a Bill of Rights is that it takes power from the democratically-elected Parliament and places it in the hands of unelected judges. The beauty of a statutory Bill of Rights is that, as an Act of Parliament itself, the Parliament can override the Act whenever it is “demonstrably justified in a free and democratic society”.<sup>13</sup>

## The ACT Human Rights Act

The ACT has recently been through a lengthy process of community consultation to come up with a Human Rights Act (‘HRA’) that has wide popular support.<sup>14</sup> It comes into force on 1 July 2004. It is Australia’s first Bill of Rights.

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<sup>6</sup> Justice Terence Higgins, Chief Justice of ACT Supreme Court, “Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative” (Speech delivered at the National press Club, Canberra, 3 March 2004)

<<http://www.supremecourt.act.gov.au/content/pdfs/HigginsCJSpeech3March04.pdf>> at 2 April 2004.

<sup>7</sup> the High Court has only implied a very limited subset of freedom of speech in the Constitution: freedom of political communication. See *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television v Cth* (1992) 177 CLR 106.

<sup>8</sup> despite the short-hand that many constitutional scholars use, s 116 of the Constitution does not guarantee freedom of religion. It only prohibits the *Commonwealth* from establishing a national religion, imposing any religious observance, etc. This leaves the *States* free to do as they wish. So Queensland could make Christianity compulsory and New South Wales could outlaw Islam. See *Kruger v Cth (Stolen Generations Case)* (1997) 190 CLR 1, 125 (Gaudron J); see also *Union Steamship Co of Australia v King* (1988) 166 CLR 1 (State governments have absolute plenary power).

<sup>9</sup> see *AG (Cth); Ex rel McKinlay v Cth* (1975) 135 CLR 1 (Murphy J dissenting).

<sup>10</sup> s 80 of the Constitution mandates a jury for “trial on indictment”. Since Parliament defines which crimes are indictable, effectively Parliament decides when trial by jury will be available. See *Kingswell v The Queen* (1985) 159 CLR 264, 276-7 (Gibbs CJ, Wilson & Dawson JJ).

<sup>11</sup> e.g. no right to principled conscientious objection to military service: see Chief Justice Higgins, n 6, 12.

<sup>12</sup> Chief Justice Higgins, n 6, 14.

<sup>13</sup> *Human Rights Act 2004* (ACT) s 28. The wording is adopted from the *Canadian Charter of Rights and Freedoms* (1982) s 1. The wording also appears in the *Bill of Rights Act 1990* (NZ) s 5. See also ACT Bill of Rights Consultative Committee, n 14 below, [4.40]-[4.52]. Note also that the *Canadian Charter of Rights and Freedoms* (1982) includes a ‘notwithstanding provision’ (s 33), allowing a Parliament to expressly override a right – however such an express provision expires after five years: s 33(3).

<sup>14</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: report* (May 2003), <<http://www.jcs.act.gov.au/prd/rights>>.

The HRA is largely a faithful adoption of the *International Covenant on Civil and Political Rights* ('ICCPR') into the law of the ACT.<sup>15</sup> A list of the rights included in the HRA is available at the end of this document.<sup>16</sup>

The HRA is based on existing interpretative statutory models in the UK and New Zealand. When interpreting ACT law, an interpretation consistent with human rights is to be preferred "as far as possible".<sup>17</sup>

A "reasonable limits" proportionality provision reserves the Legislative Assembly's power to override any of the rights in the HRA when it is "demonstrably justified in a free and democratic society".<sup>18</sup>

The HRA does not provide individuals with a right to sue for compensation or relief when their human rights have been breached. Instead the ACT Supreme Court may, when it finds in a proceeding before it that an ACT law is inconsistent with a human right, issue a declaration of incompatibility.<sup>19</sup> Such a declaration does not affect the validity of the offending law, nor does it force the government to change the law. It only requires the Attorney-General to table a written response to the declaration in the Legislative Assembly within six months.

## The way forward

The Councils for Civil Liberties strongly encourage the Australian federal Parliament to pass a *statutory* Human Rights Act. Constitutional change in Australia is notoriously difficult. Past attempts to put constitutional Bills of Rights to referendum have failed due to the ease with which a scare campaign can be run.<sup>20</sup>

The Canadian experience of first introducing a statutory Bill of Rights provides an excellent model. The statutory *Canadian Bill of Rights 1960* allowed the Canadian people to overcome their scepticism about, and fear of, codified rights. It gave them time to get used to the idea of a Bill of Rights. A generation later, the Canadian people were confident enough to take the next step: entrenching those rights in the Constitution.<sup>21</sup> This is a model the federal Parliament should seriously consider for Australia.<sup>22</sup>

In the short term, the federal Parliament should examine the *Human Rights Act* introduced recently in the ACT. That Act would only require a few alterations to serve as a useful model for a federal Human Rights Act.<sup>23</sup>

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<sup>15</sup> much to the despair of some human rights advocates, it does not include the economic, social and cultural rights. The Consultative Committee recommend the inclusion of these rights, but the ACT government rejected that proposal. They were excluded to achieve a broader consensus. These rights are sourced from the *International Covenant on Social, Cultural and Economic Rights*.

<sup>16</sup> see page 5 below.

<sup>17</sup> *Human Rights Act 2004* (ACT) s 30.

<sup>18</sup> *Human Rights Act 2004* (ACT) s 28. The wording is adopted from the *Canadian Charter of Rights and Freedoms (1982)* s 1; also, the *Bill of Rights Act 1990* (NZ) s 5. See also ACT Bill of Rights Consultative Committee, n 14, [4.40]-[4.52].

<sup>19</sup> *Human Rights Act 2004* (ACT) s 32.

<sup>20</sup> for example, when Prime Minister Bob Hawke unsuccessfully tried in September 1988 to introduce one-vote-one-value and rights to trial by jury, religious freedom or compensation on just terms.

<sup>21</sup> *Canadian Charter of Rights and Freedoms* forms Part I of the *Constitution Act 1982* (Canada).

<sup>22</sup> see also George Williams, 'Energies Better Spent on Rights than a Republic', *The Australian* (Sydney), 17 April 2001: reproduced at <[http://www.nswccl.org.au/docs/html/BoR\\_Williams.php](http://www.nswccl.org.au/docs/html/BoR_Williams.php)>.

<sup>23</sup> several rights from the ICCPR were not included in the ACT HRA because they relate to matters solely within the power of the Commonwealth: e.g. freedom of movement (ICCPR Article 12).

Where the ACT *Human Rights Act* refers to a Human Rights Commissioner,<sup>24</sup> that position could be performed by the existing federal Human Rights Commissioner.<sup>25</sup>

Where the ACT *Human Rights Act* provides for Declarations of Incompatibility issued by the ACT Supreme Court,<sup>26</sup> we would prefer that the Courts be able to declare such provisions invalid and inoperative, as is the case in Canada.<sup>27</sup>

Finally, we believe that all emergency measures that involve a suspension of rights or freedoms, in order to deal with a recently arisen threat to our society, should be limited to a specific period of time and should therefore need to be formally re-enacted if the threat continues. Such a clause is included in the *Canadian Charter* and states that any law that expressly overrides a fundamental right or freedom automatically expires after five years.<sup>28</sup>

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## Contacts

For further information, please contact the NSW Council for Civil Liberties on (02) 9660-7582 and ask to speak to an office bearer.

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## Endorsements

This policy document is endorsed by:

- New South Wales Council for Civil Liberties
- University of New South Wales Council for Civil Liberties

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<sup>24</sup> *Human Rights Act 2004* (ACT) Pt 6.

<sup>25</sup> *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 8B.

<sup>26</sup> *Human Rights Act 2004* (ACT) s 32.

<sup>27</sup> *Canadian Charter of Rights and Freedoms (1982)* s 24.

<sup>28</sup> *Canadian Charter of Rights and Freedoms (1982)* s 33.

## Rights included in the Human Rights Act

This list is based on Schedule 1 of the *Human Rights Act 2004* (ACT).

right	HRA section	ICCPR article
right to recognition as a person	8 (1)	16
right to enjoy rights without distinction etc	8 (2)	2 (1)
equality before law and equal protection	8 (3)	26
right to life <sup>29</sup>	9 (1)	6 (1)
protection from torture and cruel, inhuman or degrading treatment etc	10	7
protection of family	11 (1)	23 (1)
protection of children	11 (2)	24 (1)
protection of privacy and reputation	12	17 (1)
freedom of movement <sup>30</sup>	13	12 (1)
freedom of thought, conscience and religion	14 (1)	18 (1), (3)
no coercion to limit religious freedom	14 (2)	18 (2), (3)
peaceful assembly	15 (1)	21
freedom of association	15 (2)	22
right to hold opinions	16 (1)	19 (1)
freedom of expression	16 (2)	19 (2), (3)
taking part in public life	17	25
right to liberty and security of person	18 (1)-(7)	9
no imprisonment for contractual obligations	18 (8)	11
humane treatment when deprived of liberty	19	10 (1),(2)(a)
children in the criminal process	20	10 (2)(b),(3)
right to a fair trial	21	14 (1)
rights in criminal proceedings	22 (1)	14 (2)
minimum guarantees for those charged	22 (2)	14 (3)
rights of children charged with an offence	22 (3)	14 (4)
right of appeal to a higher court	22 (4)	14 (5)
compensation for wrongful conviction	23	14 (6)
right not to be tried or punished more than once	24	14 (7)
protection from retrospective criminal laws	25	15 (1)
freedom from forced work and slavery	26	8 (1), (2), (3)(a), (3)(c)
rights of minorities	27	27

- note:**
- 'HRA' stands for *Human Rights Act 2004* (ACT).
  - 'ICCPR' stands for *International Covenant on Civil and Political Rights*.

<sup>29</sup> subject to the common law definition that life begins at birth: *Human Rights Act 2004* (ACT) s 9(2).

<sup>30</sup> this is freedom of movement within the ACT only, but it includes the right to enter and exit the ACT.