



**The Law Society  
of New South Wales**

170 Phillip Street, Sydney NSW 2000  
Australia; DX 362 Sydney  
Tel (02) 9926 0333 Fax (02) 9231 5809  
ACN 000 000 699 ABN 98 696 304 966  
www.lawsociety.com.au

Our Ref: MT:ssh:1291786

15 June 2009

National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Chairperson,

**Re: National Human Rights Consultation**

The Law Society's Human Rights Committee (the Committee) appreciates the opportunity to make the enclosed submission to the National Human Rights Consultation.

The Law Society of New South Wales is the professional association representing the solicitors of New South Wales. The Law Society has two primary responsibilities: it acts as the profession's licensing and regulatory authority and also represents the interests of its members.

The Law Society is a constituent body of the Law Council of Australia (LCA) and supports the LCA Policy in favour of a federal Bill of Human Rights and its written submission to the National Consultation Committee. The Society's submission provides some additional comments, particularly from a New South Wales perspective, from those put forward by the LCA and its position differs in some respects.

As detailed in the enclosed submission, the Committee considers that the range of remedies available for a breach of human rights should include a limited right to damages and that the catalogue of rights to be protected include those rights contained in the ICCPR, the ICESCR and the other international human rights instruments to which Australia is a party.

The Committee supports the Model Human Rights Bill 2009 prepared by the Human Rights Act for Australia Campaign Inc, and notes that this Model Bill was developed after the LCA's Policy had been adopted by the Directors and after the LCA's written submission to the National Consultation Committee.

The features of the Model Bill are broadly similar to those prepared in the LCA Policy, with the exception of the types of remedies available for a breach of human rights, which extends to damages under the Model Human Rights Bill 2009.



The Committee believes that such a measure would enhance the protection of human rights and freedoms in Australia. The Committee also believes this would provide a clear and agreed statement of the core values that underpin our democratic system of government in Australia with the aim of ensuring that fundamental human rights are sufficiently protected. The Committee's further views follow in the enclosed submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Tidball', with a long horizontal stroke extending to the right.

**Michael Tidball**  
Chief Executive Officer



**The Law Society  
of New South Wales**

170 Phillip Street  
Sydney NSW 2000  
DX 362 Sydney  
Tel (02) 9926 0333  
Fax (02) 9231 5809  
[www.lawsociety.com.au](http://www.lawsociety.com.au)

---

ACN 000 000 699

# **Submission to the National Human Rights Consultation**

Contact:

Sarah Sherborne-Higgins  
Executive Officer  
Human Rights Committee  
Telephone: 02 9926 0354  
Email: [ssh@lawsocnsw.asn.au](mailto:ssh@lawsocnsw.asn.au)

---

*The Society's Human Rights Committee ('Committee') has responsibility, to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society Council on any proposed changes. The Committee is also responsible for formulating new policy, with respect to human rights, and, when appropriate, anticipating needs arising from economic, political, professional and social change.*

**1. Which human rights (including corresponding responsibilities) should be protected and promoted?**

---

The Committee believes that human rights are:

- *inherent* - they belong to everyone because of their common humanity;
- *inalienable* - people cannot give them up or be deprived of them by governments;
- *universal* - they apply regardless of distinctions such as race, sex, language or religion.

The Committee believes that Australia has an obligation to protect and promote all rights contained in the international human rights treaties to which it is a party. These include, but are not limited to, the following instruments:

- the International Covenant on Civil and Political Rights (ICCPR);<sup>1</sup>
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>2</sup>
- the Convention on the Prevention and Punishment of the Crime of Genocide;<sup>3</sup>
- the Convention on the Elimination of all Forms of Racial Discrimination;<sup>4</sup>
- the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;<sup>5</sup>
- the Convention on the Elimination of All Forms of Discrimination Against Women;<sup>6</sup>
- the Convention on the Rights of Persons with Disabilities;<sup>7</sup>
- the Convention on the Rights of the Child;<sup>8</sup> and
- the Convention Relating to the Status of Refugees.<sup>9</sup>

---

<sup>1</sup> [1976] Australian Treaty Series (ATS) 5.

<sup>2</sup> [1980] ATS 23.

<sup>3</sup> [1951] ATS 2.

<sup>4</sup> [1975] ATS 40,

<sup>5</sup> [1989] ATS 21.

<sup>6</sup> [1983] ATS 9.

<sup>7</sup> [2008] ATS 12.

<sup>8</sup> [1991] ATS 4.

<sup>9</sup> [1954] ATS 5.

The Committee considers that civil and political rights on the one hand and economic, social and cultural rights on the other are equally deserving of protection. The Committee submits that the Consultation should not be persuaded that economic, social or cultural rights should be subject to differential treatment. It is often argued that the best way to secure civil and political rights is to ensure that people can attain their economic and social rights. This is particularly important for the disadvantaged in the community – those who are homeless, living in poverty or without access to services such as clean drinking water and unpolluted environments.

At a minimum, the Committee considers that the following rights, conveniently contained in the ICCPR and ICESCR, should be legislatively protected in Australia:

- Right to life;
- Protection from torture and cruel, inhuman or degrading treatment;
- Freedom from forced work;
- Right to liberty and security of the person;
- Humane treatment when deprived of liberty;
- Special rights for children in the criminal process;
- Fair trial;
- Rights in criminal proceedings;
- Compensation for wrongful conviction;
- Right not to be tried or punished more than once;
- Freedom from retrospective criminal laws;
- Recognition and equality before the law;
- Privacy;
- Right to marry;
- Protection of the family;
- The rights of children;
- Freedom of thought, conscience, religion and belief;
- Peaceful assembly and freedom of association;
- Freedom of expression;
- Freedom of movement;
- Participation in public life;
- The rights of cultural, religious and linguistic minorities;
- Right to asylum;
- Protection in the event of removal, expulsion or extradition;
- Property;

- The rights of Aboriginal peoples;
- The rights of people with disabilities
- Education;
- Work;
- Adequate standard of living;
- Physical well-being and health; and
- Social security.

The legislative formulation for each of these rights in a Human Rights Act should reflect the requirements of international human rights law. For the avoidance of doubt, the Committee commends to the Consultation that it adopt the particular terminology of international human rights instruments to which Australia is a party.

The Committee acknowledges that the exercise of human rights implies corresponding responsibilities.<sup>10</sup> It notes that it is every individual's responsibility to respect the rights of others to ensure a society that functions for the common good and operates to capacity.

While the Committee would encourage the Consultation to adopt a progressive instrument, it cautions the Committee that an Act should only reflect such limitations as are permitted under international human rights law.

On June 25 1993, representatives from 171 States (including Australia) adopted by consensus the *Vienna Declaration and Programme of Action* of the World Conference on Human Rights. Clause 5 declares:

*All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.*

The Committee also notes that, pursuant to the Millennium Declaration, UN Member States 'will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development'. Among other commitments, UN Member States have also resolved to fully respect and uphold the Universal Declaration of Human Rights and to strive for the full protection and promotion in all countries of civil, political, economic, social and cultural rights for all.<sup>11</sup>

Finally, the Committee notes that the Charter of the United Nations<sup>12</sup> provides in Article 1 that one of the purposes of that organisation is cooperation 'in promoting and encouraging respect for human rights and for fundamental freedoms for all'.

<sup>10</sup> The National Human Rights Consultation could be usefully guided by UN General Assembly Resolution 53/144 (1999) on a Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

<sup>11</sup> UN General Assembly Resolution 55/2 (2000) on a UN Millennium Declaration, paragraphs 24-25

<sup>12</sup> [1945] ATS 1.

Article 55 commits the UN to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' and Article 56 provides that all Member States, including Australia, 'pledge themselves to take joint and several action in cooperation with the Organisation for the achievement of the purposes set forth in Article 55'.

## **2. Are these human rights currently sufficiently protected and promoted.**

The Committee believes that the current legal protections provided at the Federal level are not sufficiently protecting and promoting human rights in Australia.

Australia is now the only Western democracy without a constitutional or legislative national Bill or Charter of Rights. Most comparable western democratic states have sought to protect civil and political rights. However, the Australian Constitution and our common law offer very few human rights guarantees. International Covenants, Conventions and Treaties which Australia has ratified have no direct legal effect upon domestic law until specifically implemented by legislation.

Only a small number of human rights are protected at the Federal level. A handful of such rights exist in our Constitution (for example, freedom of religion and movement between the states and fair compensation for property confiscation). A few more rights exist in ordinary legislation. Examples include the provisions of the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* which have been enacted to ensure the elimination of discrimination on the basis of race, sex, disability and age respectively.

The need for comprehensive human rights legislation at the Federal level has been highlighted by a number of instances in Australia's past and recent legal history including:

- The lower life expectancy of Indigenous Australians;
- The over-representation of Indigenous Australians the prison population;
- Mandatory sentencing laws in some Australian jurisdictions;
- Unnecessary restrictions on freedom of speech - in defamation laws, weak whistleblower legislation and inadequate protection of journalistic sources.
- The presence of children in immigration detention, contrary to the Convention on the Rights of the Child;
- The introduction of anti-terrorism legislation that involves increased powers of surveillance, interrogation, and detention that abrogate human rights contrary to the ICCPR;
- The paucity of in-patient treatment of mentally ill Australians;
- The suspension of the *Racial Discrimination Act 1975* for the purposes of the Northern Territory National Emergency Response.

The New South Wales Council for Civil Liberties (NSWCCL) has compiled a list<sup>13</sup> of when and how Australia has breached the fundamental human rights (under the

<sup>13</sup> See [http://www.nswccl.org.au/issues/hr\\_violations.php](http://www.nswccl.org.au/issues/hr_violations.php) for further detail.

ICCPR) of people living in Australia. The NSWCCCL notes that since 1990 the United Nations Human Rights Committee (UNHRC) has heard almost fifty complaints against Australia.

Although the Commonwealth Senate Standing Committee for the Scrutiny of Bills operates to assess legislative proposals against a set of accountability standards there is no requirement for it to consider whether or not Bills comply with international human rights standards.

The Consultation now has the rare opportunity to remedy Australia's human rights deficiencies by recommending the implementation of a Human Rights Act. The Committee encourages the Consultation to consider what legacy it wishes to leave and what path it wishes to set for Australia.

### **3. How could Australia better protect and promote human rights?**

---

#### A Human Rights Act for Australia

The Committee strongly believes that human rights should be comprehensively protected by way of a federal Human Rights Act (alternatively called a Charter of Rights and Responsibilities).

The Committee supports such legislation for Australia because it would:

- Recognise and protect the fundamental human rights of all people in Australia;
- Improve the respect for human rights promoted, fulfilled and protected by our Executive Government;
- Improve government policy and decision making by considering human rights when drafting legislation, developing policy and delivering services;
- Provide novel regulatory mechanisms and greater parliamentary flexibility in addressing the position of particular social groups;
- Protect economically and socially vulnerable and disadvantaged people who are more likely to have their rights breached;
- Eliminate the human rights controversies for which Australia has historically been criticised within the international community;
- Ensure that human rights issues are first considered in Australia, possibly obviating the need to go to the human rights monitoring mechanisms of the United Nations;
- Assist Australia to meet its international human rights obligations;
- Create the opportunity for Australia to set a high standard of human rights practices within the Pacific Rim and South-East Asian region;
- Clearly distinguish, in legislation, the differing human rights responsibilities of government from those of individuals and other private actors;
- Help Australians become more aware of their rights and responsibilities and help create a more respectful, responsible society.



The Committee considers that the National Human Rights Consultation may be usefully guided by the practice of other States. Although the United Kingdom (UK) has in recent times been heavily influenced by a distinctive legal environment, it is appropriate to have regard to its experiences and upon which many of Australia's common law traditions are based. The 2006 *Review of the Implementation of the Human Rights Act* in the UK found that:

- The Human Rights Act has had a significant, but beneficial, effect upon the development of policy by central Government.
- Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, has improved transparency and Parliamentary accountability.
- The Human Rights Act leads to better policy outcomes, by ensuring that the needs of all members of the UK's increasingly diverse population are appropriately considered. It promotes greater personalisation and therefore better public services<sup>14</sup>.

The Committee believes that the experience of the U.K confirms that this is a highly successful and efficient means of enhancing human rights protections for Australia.

#### Operation of the Act

The Committee supports the Model Human Rights Bill 2009 prepared by the Human Rights Act for Australia Campaign Inc (HRAA), which has already submitted that model to your Consultation<sup>15</sup>.

The characteristics of the Model Bill include:

- A statutory legislative model rather than one that is constitutionally entrenched;
- Protection for rights contained in the ICCPR, the ICESCR and the other Conventions we refer to above;
- A requirement that Federal courts must interpret legislation so far as possible compatibly with its purpose, consistent with the Human Rights Act.
- That certain rights cannot be restricted or limited, such as the right to life, freedom from torture, freedom of religion and freedom from slavery, but notes that other rights are resource dependent and subject to progressive realisation;
- A requirement whereby the Commonwealth Attorney General must present a written statement to the House of Representatives with any new legislation that explains whether it is compatible with human rights;
- Empowers the courts to make a finding of inconsistency, which the Human Rights Commission will send to the Commonwealth Attorney General. The Attorney is required to promptly table it in the Parliament and within six months provide a written response

---

<sup>14</sup> United Kingdom Department for Constitutional Affairs, *Review of Implementation of the Human Rights Act* (July 2006), [http://www.justice.gov.uk/guidance/docs/full\\_review.pdf](http://www.justice.gov.uk/guidance/docs/full_review.pdf) (1 April 2009)

<sup>15</sup> A copy of the Bill can be found at: [http://www.humanrightsact.com.au/ahrg/wp-content/uploads/2009/02/model-human\\_rights\\_bill\\_2009.doc](http://www.humanrightsact.com.au/ahrg/wp-content/uploads/2009/02/model-human_rights_bill_2009.doc)

explaining whether any action is intended and the reasons for that action or non-action;

- A requirement that public authorities act in a way which is compatible with the rights contained in the human rights legislation;
- Where a court finds that a public authority has acted unlawfully, it has the power to grant relief or remedy, or make such an order, within its power, as it considers just and appropriate.
- A court's power to award damages is limited to cases where an aggrieved person would otherwise not receive just satisfaction for the wrong done.

The Model Bill requires the Attorney-General to initiate a review after the first three years of operation. The Committee believes it important that the review also consider whether:

- Additional human rights should be included as human rights under the Act;
- Auditing of public authorities to assess compliance with human rights should be regular and mandatory;
- Further provision should be made in the Act with respect to proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful because of the Act.

The Committee also believes that the Human Rights Act should be given extraterritorial application and govern any officer of the Commonwealth or Australian citizen anywhere in the world. This inclusion would eliminate the possibility in the future of extraordinary renditions or outsourcing of torture where the victims or their families would otherwise have no recourse under the Human Rights Act.

The HRAA Model Bill states that the Australian Human Rights Commission (AHRC) may intervene in a proceeding with the leave of the Court. The Committee asks that the Consultation consider giving the AHRC the power to undertake litigation like a natural person to enforce the Act or fund such litigation. Often those subject to human rights violations cannot afford to enforce their rights because such violations have lead to their impoverishment. Enabling the AHRC to undertake or fund litigation in such circumstances would offer added protection to those most vulnerable. Alternatively, consideration could be given to including a provision that legal aid be granted to persons having a right to enforce the Act, subject to appropriate means and merits tests.

The Model Bill does not include many of the rights contained in the Declaration on the Rights of Indigenous Peoples, because although the Declaration has recently been endorsed by the Australian government, it does not yet have the status of a ratified treaty. The Committee nevertheless asks the Consultation to consider including the rights in the Declaration which have not otherwise been included in the Model Bill, because we view the uplifting of the living circumstances of Indigenous Australians as a vitally important priority of such legislation.

Finally, the Model Bill does not attempt to apply the proposed Act to the States. The Committee believes that it should apply to State laws, to the extent that the federal Constitution allows. However, we note that to the extent that a federal

Human Rights Act purported to apply to the workings of the institutions of the States which are integral to their functions, like the State parliaments and the State courts, it may be unconstitutional. Any provision in the Act applying it to State laws would therefore need to be carefully drafted.

### Impact on the Legal System

The Committee notes that during the National Human Rights Consultation process there have been suggestions that such legislation would give more power to judges and lawyers<sup>16</sup>. The Committee unequivocally rejects this suggestion.

The "tidal wave of litigation" argument is not substantiated by overseas or local experience.

When human rights legislation first came into operation within the UK, English courts adopted a cautious approach in exercising their powers when applying legislation. Similarly, it has been noted that the A.C.T. Human Rights Act has not had a divisive or costly impact on the Territory in its first five years of operation. Legal practitioners are not regularly using this legislation in unpredictable ways before the courts. Indeed, the legislation is already exerting a beneficial influence on the workings of government and the development of new laws and more effective policy-making<sup>17</sup>.

The Model Bill supported by the Committee does not empower Australian judges to strike down legislation that they consider inconsistent with the Human Rights Act. The Australian judiciary would only have the power to make findings of inconsistency. The Canadian Charter of Rights and Freedoms operates in a similar way, despite being constitutionally entrenched<sup>18</sup>. The Committee commends to the National Human Rights Consultation certain comments made during the *Review of the Implementation of the Human Rights Act* by the UK Department of Constitutional Affairs (2006) which noted that "*the Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary*".

The Committee believes that the stronger protection of human rights following the introduction of such an Act may not lead to any net increase in litigation because, as in the UK, the Parliament is likely to respect its provisions when formulating legislation. In those circumstances the number of applicants likely to feel the need to take legal action may be reduced and its main impact may be a change to the culture of public service decision-making.

Finally, the Committee submits that a federal Human Rights Act would most importantly enhance the position of disadvantaged minorities, the protection of which is the mark of a civilised community.

---

<sup>16</sup> See 'Opposition makes case against bill of rights' *Lawyers Weekly* 30 March 2009 Electronic <[http://www.lawyersweekly.com.au/blogs/top\\_stories/archive/2009/03/30/opposition-makes-case-against-bill-of-rights.aspx](http://www.lawyersweekly.com.au/blogs/top_stories/archive/2009/03/30/opposition-makes-case-against-bill-of-rights.aspx)> (1 April 2009) and Carr, B, 'Bill of Rights is the wrong call' *The Australian newspaper* 9 May 2009, 20.

<sup>17</sup> Gabrielle McKinnon, Regulatory Institutions Network, ANU: *The ACT Human Rights Act 2004: Impact on Case Law, Legislation and Policy*, July 2005; Gabrielle McKinnon, "The A.C.T. Human Rights Act: Two Years On", Address to Regulatory Institutions Network, ANU Conference, Australian Bills of Rights – The A.C.T. and Beyond, 21 June 2006.

<sup>18</sup> *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11