

Human Rights Act for Australia

Explanatory Information

5 October 2005

A Human Rights Act for Australia - Introduction

New Matilda is proud to present its draft Human Rights Bill to the Australian community.

This draft Bill seeks to honour Australia's obligations under a range of international human rights instruments including the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).

New Matilda believes that Australia must have a Human Rights Act. We are now the only Western country that does not have one and recently our human rights record has been disappointing. This campaign developed out of despair about the degrading treatment of asylum seekers coming to Australia and alarm about the far-reaching powers granted under anti-terror legislation.

The presentation of the draft Bill marks the commencement of the consultation phase of the campaign. The explanatory memorandum that follows seeks to provide information on the draft Bill.

We hope that individuals and community organisations will contribute to the consultation process. We encourage contributions to be made through the website (www.newmatilda.com/humanrightsact). We also encourage community organisations to hold forums and submit the views of their members and supporters. We are happy to assist in this process in any way we can.

When considering the draft Bill we ask you to consider five questions:

- 1) Do you support the draft Human Rights Bill that New Matilda has prepared?
- 2) Does the draft Bill protect the appropriate mix of human rights?
- 3) Does the balance struck in the Bill between the executive, the parliament and the courts provide adequate and appropriate protection of human rights?
- 4) Does the draft Bill provide appropriate remedies for unlawful infringement of human rights?
- 5) Do you think we have missed anything?

We will amend the draft Bill having regard to the comments made during the consultation phase. The second phase of the campaign will involve collecting petitions and generating support in the community for the Human Rights Bill. We will then begin meeting with all of the political parties and seeking sponsors for the Bill. Our aim is to have the Human Rights Bill tabled and debated in parliament by October 2006.

If you require further information, please do not hesitate to contact us at humanrightsact@newmatilda.com or visit www.newmatilda.com/humanrightsact.

Yours faithfully,

Susan Ryan AO
Chair, Campaign Committee

John Menadue AO
Chair, New Matilda

Explanatory information about the draft Human Rights Bill

Who is protected by the draft Bill?

Section 7 provides that only individuals possess human rights. The rights may be exercised by all people in Australia.

What rights are included in the draft Bill?

The draft Bill seeks to honour Australia's obligations under a range of international human rights instruments including:

- (i) The International Covenant on Civil and Political Rights, 1966;
- (ii) The International Covenant on Economic, Social and Cultural Rights, 1966;
- (iii) The International Convention on the Elimination of All Forms of Racial Discrimination, 1965;
- (iv) The International Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- (v) The International Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984;
- (vi) The International Convention on the Rights of the Child, 1989;
- (vii) The International Convention Relating to the Status of Refugees, 1951.

The language of specific rights has been adjusted from these international instruments to ensure clarity in the context of Australia. The experiences of the United Kingdom, New Zealand, South Africa and Canada have also been taken into consideration to ensure that the draft Bill reflects the most appropriate language for the protection of rights by Australian courts. Appendix 1 identifies where each of the rights in Part 3 have been drawn from.

The rights protected by the draft Bill are in Part 3. Civil and political rights (ss 11-37) are separated from the economic, social and cultural rights (ss 38-42).

Civil and political rights are primarily rights to participate in democratic processes including freedom of speech and religion, freedom of association, the right to vote, and rights that protect citizens from the arbitrary use of power by the state including the right to equality before the law, the right to a fair trial and the right to liberty.

Economic, social and cultural rights include access to social security, education and health. These rights are resource dependent and subject to progressive realisation. The draft Bill acknowledges this and requires the Courts to treat these rights differently. We are particularly keen to receive feedback about whether such rights should be included; in what form; and with what degree of enforceability if any.

How are rights protected by the draft Bill?

The draft Bill seeks to protect human rights through a variety of mechanisms.

Interpretation: Section 50 requires courts, as far as possible, to interpret primary and subordinate legislation in a way that is compatible with the rights in Part 3. Thus, where there is a choice between two interpretations that both achieve the purpose of the

primary or subordinate legislation in question, the interpretation that is consistent with human rights must prevail. In a situation where the interpretation consistent with human rights will not achieve the purpose of the primary or subordinate legislation, that interpretation cannot prevail. This is similar to the Australian Capital Territory's (ACTs) *Human Rights Act 2004*.

Declarations of Incompatibility: Section 52 empowers courts to issue Declarations of Incompatibility. The purpose of the declaration is to draw to the attention of the Government and the Parliament a finding of incompatibility by the Court.

Section 53 then requires that the declaration promptly be sent to the Commonwealth Attorney-General who must, within six months, table it in the Parliament with a written response explaining whether any action is intended and the reasons for that action or non-action. This mechanism creates a dialogue between the Parliament and the Courts while retaining the Parliament's sovereignty. This is similar to the mechanism for protecting rights in the United Kingdom's *Human Rights Act 1998*.

What happens to rights not contained in the draft Bill?

Section 8 recognises that this draft Bill does not protect all of the rights that an individual may have under domestic or international law. The purpose of this section is to ensure that the draft Bill is not used for limiting a right not protected by Part 3.

Can rights be limited under the draft Bill?

Rights may be limited under the draft Bill in a number of ways.

First, section 10 recognises that few rights are absolute and that limits may be placed on rights and freedoms. Whether a limit is reasonable depends upon whether it is proportionate to the achievement of a legitimate aim. Proportionality requires that the limitation be:

- necessary and rationally connected to the objective;
- the least restrictive in order to accomplish the object; and
- not have a disproportionately severe effect on the person to whom it applies.

Secondly, in the event of a public emergency, section 44 allows for derogation from certain rights. However, that section also identifies certain rights from which the parliament may not derogate.

Thirdly, whilst courts may issue Declarations of Incompatibility in respect of primary or subordinate legislation under the draft Bill, the declarations do not affect the validity of that legislation. Section 53(3) does, however, require the Attorney-General to provide a written response to the declaration to the House of Representatives.

What may courts consider when interpreting human rights?

Section 49 empowers courts to have regard to international law and jurisprudence relevant to a human right.

The rights in the draft Bill have been expressed in numerous international and regional human rights instruments. They have been incorporated into national Bills of Rights and have been subject to extensive interpretation at the international, national and regional levels.

International Law is defined in Article 38(1) of the Statute of the International Court of Justice to include international conventions; international custom as evidence of a

general practice accepted as law; the general principles of law recognised by civilised nations; and the judicial decisions of and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law. The opinions, decisions, views and judgments of the UN Human Rights Committee and the European Court of Human Rights are particularly relevant.

It is important to note, however, that section 49 does not make the decisions or interpretations of international courts or tribunals binding.

What role would the Attorney General have in proceedings under the draft Bill?

Section 57 requires a court to provide notice to the Attorney-General if it is considering making a Declaration of Incompatibility under the Act relating to federal law. This only applies where the Commonwealth is not already a party to the proceeding.

Section 58 provides the Attorney-General with an unqualified right to intervene in proceedings before a court that involve the application of the Act.

Can the Human Rights and Equal Opportunity Commission (HREOC) or a third party intervene in proceedings under the draft Bill?

Section 59 enables HREOC to intervene in a proceeding before a court that involves the application of the Act if it is granted leave of the court. The court may grant leave subject to conditions.

Section 60 similarly enables a third party to intervene in a proceeding before a court that involves the application of the Act if it is granted leave of the court. The court again may grant leave subject to conditions.

What does the draft Bill mean for public authorities?

Section 54 makes it illegal for public authorities to act in a way which is incompatible with a right laid out in the draft Bill. This does not apply if the public authority could not have acted differently. The section defines a public authority as a court or tribunal or a person or entity whose functions are of a public nature exercised on behalf of the Commonwealth.

Does the draft Bill include any remedies?

Where a court finds that a public authority has acted unlawfully, section 56 empowers it to grant relief or remedy, or make such an order, within its power, as it considers just and appropriate. The remedies may include:

- an order declaring that an act is unlawful and directing the public authority not to repeat or continue it;
- an order requiring the public authority to pay damages;
- an order requiring the public authority to redress any loss or damage suffered by the aggrieved person;
- an order declaring that it would be inappropriate for any further action to be taken in the matter.

How would the draft Bill affect new legislation?

Section 45 requires the Attorney-General to present a written statement to the House of Representatives with any new legislation that explains whether it is compatible with human rights. If the legislation is incompatible, the statement must explain how it is incompatible. The Attorney-General must provide his or her reasoning.

What human rights oversight will take place in the Parliament?

Section 46 creates a Joint Standing Committee on Human Rights. The Committee will have responsibility for:

- matters relating to human rights in Australia;
- considering and reviewing compatibility statements under the draft Bill;
- considering declarations of incompatibility made by courts under the draft Bill;
- reporting comments and recommendations, and an annual report of its deliberations and conclusions about matters it has considered to each House of Parliament and the responsible Minister.

When will the proposed Act be reviewed?

Section 62 requires the Attorney-General to review the first three years of operation of the Act and present a report to the Parliament. Section 63 requires that the Attorney-General conduct a second review five years after the first and present a report to the Parliament.

Consultation questions

In the first stage of the campaign New Matilda wishes to consult widely on its draft Bill. This consultation will be conducted through New Matilda's website (www.newmatilda.com). New Matilda is particularly interested in learning your views on the following five questions.

Do you support the draft Human Rights Bill that New Matilda has prepared?

Here we would like to know if you are fully in support of the draft Bill, generally supportive but with some concerns, or unsupportive. This is an important question for our ability to move forward. We need to be able to gauge whether we have the correct draft Bill or whether we need to make significant changes. If you support the draft Bill, or oppose it, please let us know.

Does the draft Bill protect the appropriate mix of rights?

The draft Bill protects a mix of civil and political rights as well as economic, social and cultural rights. Not all countries do this. For instance, the United Kingdom and the ACT only protect civil and political rights. We would like to know whether you think that we should protect both. We would also like to know whether rights are expressed clearly and appropriately, and whether we have missed any.

Does the balance struck in the draft Bill between the executive, the parliament and the courts provide adequate and appropriate protection of human rights?

The draft Bill is based on the dialogue model for protecting rights. Individuals may bring matters before the courts, which are empowered to issue Declarations of Incompatibility. These declarations are then sent back to the parliament via the Attorney-General and the Parliament may either respond to the declaration or ignore it. Other safeguards are created such as the requirement that the Attorney-General prepare and provide compatibility statements with all new legislation and the creation of the Joint Standing Committee on Human Rights.

Does the draft Bill provide appropriate remedies for unlawful infringement of human rights?

The draft Bill provides a range of remedies in section 56. We are interested to know whether these remedies are appropriate or whether there should be remedies in the draft Bill at all. For instance, the ACT's *Human Rights Act 2004* does not contain any remedies.

Is there anything else you would like to tell us?

This is where you can tell us whether we have missed anything.

Appendix 1: Sections of the draft Human Rights Bill and their international sources

This table identifies the relevant international instrument and the particular section for each of the rights in the draft Human Rights Bill. In the table the International covenant on Civil and Political Rights is abbreviated to ICCPR and the International Covenant on Social, Economic and Cultural Rights is abbreviated to ICESCR.

Right	Source
Section 11 – Right to life	Article 6 ICCPR
Section 12 – Protection from torture and cruel, inhuman or degrading treatment	Article 7 ICCPR
Section 13 – The human genome	Article 7 ICCPR, UN Universal Declaration on the Human Genome and Human Rights.
Section 14 – Freedom from forced work	Article 8 ICCPR
Section 15 – Right to liberty and security of the person	Article 9 ICCPR
Section 16 – Humane treatment when deprived of liberty	Article 10 ICCPR
Section 17 – Children in the criminal process	Article 10 ICCPR
Section 18 – Fair trial	Article 14 ICCPR
Section 19 – Rights in criminal proceedings	Article 14 ICCPR
Section 20 – Compensation for wrongful conviction	Article 14 ICCPR
Section 21 – Right not to be tried or punished more than once	Article 14 ICCPR
Section 22 – Retrospective criminal laws	Article 15 ICCPR
Section 23 – Recognition and equality before the law	Article 16, 26 ICCPR, Article 2 ICESCR
Section 24 – Privacy	Article 17 ICCPR
Section 25 – Right to marry	Article 23 ICCPR
Section 26 – Protection of the family	Article 23 ICCPR
Section 27 – Children	Article 24 ICCPR

Section 28 – Freedom of thought, conscience, religion and belief	Article 18 ICCPR
Section 29 – Peaceful assembly and freedom of association	Article 22 ICCPR
Section 30 – Freedom of expression	Article 19 ICCPR
Section 31 – Freedom of movement	Article 12 ICCPR
Section 32 – Taking part in public life	Article 25 ICCPR
Section 33 – Cultural, religious and linguistic minorities	Article 27 ICCPR
Section 34 – Right to asylum	International Convention on Status of Refugees
Section 35 – Protection in the event of removal, expulsion or extradition	International Convention on Status of Refugees
Section 36 – Property	Article 17 ICCPR
Section 37 – The rights of indigenous peoples	Article 1, 27, ICCPR, Article 1 ICESCR
Section 38 – Education	Article 13 ICESCR
Section 39 – Work	Article 6 ICESCR
Section 40 – Adequate standard of living	Article 11 ICESCR
Section 41 – Physical well-being and health	Article 12 ICESCR
Section 42 – Social security	Article 9 ICESCR
Section 43 – Interpretation of economic and social rights	Article 2 ICESCR
Section 44 – Public emergency	Article 4 ICCPR

New Matilda would like to thank the members of the Human Rights Act Campaign Committee:

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