



A Charter

protecting the rights
of all Australians



Law Council
OF AUSTRALIA

Policy Statement



Law Council Policy on a Federal Charter or Bill of Human Rights

The Law Council of Australia supports the development of a charter or bill of rights at the federal level.

Such an instrument should reflect both the rights and the corresponding responsibilities of all Australians.

Why do we need a specific federal human rights instrument?

The existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. Insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by which the arms of government are bound. Some further dedicated form of or vehicle for human rights protection is needed.

What human rights should be protected?

Australia has an obligation to protect and promote all rights contained in the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. In principle, no differentiation should be made between those categories of rights when setting out the nature, content and scope of Australia's obligations.

Should human rights be subject to limitation or restriction?

Certain rights, namely the right to life, freedom from torture, freedom of religion and freedom from slavery are non-derogable. All other rights may be subject to restrictions provided that such restrictions are:

- ◇ prescribed by law;
- ◇ necessary to achieve a purpose recognised as legitimate and justifiable in a free and democratic society; and
- ◇ proportionate to (that is the least restrictive means of achieving) that legitimate end.

What does 'protection' entail?

Ideally, either all rights recognised as warranting protection by law or at least a subset of those rights should be constitutionally entrenched and thus protected from interference or abrogation by any future parliament. However, recognising that achieving constitutional reform of this kind in the short term is highly unlikely, in the interim the articulation and protection of rights under ordinary statute is regarded as providing an improved form of rights protection.

A person should have the right to bring proceedings against a public authority for a violation of his or her human rights and to seek appropriate relief, excluding damages. Such a right does not arise where a law expressly requires that the act be done or decision be made in a manner that is incompatible with a human right.

Who is bound to observe human rights?

Ideally, all individuals, public and private entities should be bound to observe human rights. However, recognising that such a proposition may cause unnecessary alarm in the context of a legal order where formal rights protection has to date been limited, it is accepted that, for the time being, only public authorities (and entities and persons performing public functions) should be bound to observe human rights.

What does this mean for the executive arm of government?

Any federal human rights instrument must require the executive arm of government to comply with the human rights contained therein with a view to promoting a culture of respect for human rights within government. It must also require the adoption of measures designed to set benchmarks against which executive action can be tested. This should include, but should not necessarily be limited to, requiring that:

- ◇ all government agencies and departments take human rights into account in the policy process, for example, by publishing internal Human Rights Action Plans, and by reporting annually on compliance; and
- ◇ all Cabinet submissions be accompanied by a Human Rights Impact Statement.

What does this mean for the Courts?

Courts should be required to interpret legislation in a way that is compatible with human rights, so far as it is consistent with the statute's purpose.

Any charter or bill of rights should empower a court to declare a law to be incompatible with the rights protected under the charter. Such declaration should not operate to invalidate the law, but it should require a response from parliament.

What does this mean for Commonwealth Parliament?

Any charter or bill of rights should require that all draft legislation introduced to parliament must be accompanied by a Human Rights Compatibility Statement.

How should public consultation proceed?

The Law Council supports comprehensive public consultation on the need for a specific federal human rights instrument. The form of consultation adopted in the development of the *Victorian Charter of Human Rights and Responsibilities* is a useful model to follow.



A Charter

protecting the rights
of all Australians



Law Council
OF AUSTRALIA

19 Torrens Street
Braddon ACT 2601

P. +61 2 6246 3788
F. +61 2 6248 0639

www.lawcouncil.asn.au