



# ***A Charter of Rights for Australia***

## **Position Paper**

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# Who we are

## Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

## Corporate Structure

ALA Ltd, trading as the Australian Lawyers Alliance, is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes National President in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by eleven paid staff who are based in Sydney.

## Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

## Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of individuals, especially the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, public interest and other, related areas of the law.

## Introduction

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Australia remains the only western democracy in the world that does not formally enshrine human rights either through legislation or into a constitutionally entrenched charter of rights.

This report outlines the arguments for and against comprehensive human rights coverage in Australia with reference to our international obligations. It addresses the types of rights that can be protected and how state jurisdictions are progressing in the move towards recognising human rights.

## Which model should be adopted?

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Reference is often made to a 'bill of rights' or a 'charter of rights'. There is no legal distinction between the two; however, many organisations in Australia favour the term 'charter' to avoid the many negative connotations associated with the American Bill of Rights. This report will use the term 'charter of rights' for that reason, unless particular state inquiries or authors used the term 'bill of rights'.

There are two methods of formalising human rights protections. Countries such as Canada and the United States (US) have their human rights protections constitutionally enshrined, while other jurisdictions such as New Zealand (NZ) and the United Kingdom (UK) have opted for a statutory enactment. The two states in Australia that have so far adopted human rights protections, the ACT and Victoria, also favoured statutory enactment, having been strongly influenced by the United Kingdom's *Human Rights Act 1998*.

Constitutionally entrenched bills are more steadfast and less susceptible to political interference, due to the difficulties inherent in altering them. However, constitutional bills such as in the US are often criticised for 'freezing' archaic rights, being inflexible and not adapting to changing community values. Because of this perceived rigidity (in part), constitutional amendments have been notoriously difficult to pass in Australia.

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Statutory enactments do not have this problem, as they can be modified and updated in the same way as any other piece of legislation to reflect community wishes, but they can also be quickly suspended or altered reactively in response to perceived threats or inflamed prejudices.

As in Canada, Australia could enact a statutory charter of rights which would allow for necessary adjustments before moving to have the charter constitutionally entrenched once the community was comfortable with its operation.

## **Arguments for and against human rights protections**

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Sir Anthony Mason AC KBE QC has declared his support for a statutory bill of rights of the kind in place in the UK and NZ. His case for such a bill reads:

The main arguments for a bill of rights are that it would bring Australia into line with the rest of the world and it would protect basic individual rights from interference by political (legislative and executive) interference. Other advantages are that principled judicial decision-making would replace political compromise and government and administrative decision-making, on policy and other issues, would necessarily have close regard to basic individual rights.

In presenting the opposing viewpoint, Sir Anthony writes:

The main arguments against a bill of rights are that the majority will should prevail, whatever the circumstances, that there is no need to provide further protection for basic rights, that a bill of rights is foreign to our traditions, that it gives too much power to the judges and that it will or may add to costs.

## ***Arguments made for a charter of rights for Australia***

- A charter of rights carries an important educative value, and gives the community a clear understanding of its basic rights and freedoms;
  - A charter of rights can create a mutual sense of obligation between the government and its citizens and, if created through significant community consultation and debate, is likely to be respected and adhered to;
  - Existing human rights protections are inadequate due to gaps in legislation, limited constitutional protections and the uncertainty of the application of the common law;
  - A framework of rights would lead to greater consistency in government policies and decision-making that is far more likely to be in line with human rights obligations;
  - Debates and discussions relating to laws could be tested against tangible rights rather than relying on vague notions of ethics, fairness and morality or international law, which are not intrinsically linked with our domestic legal system. Laws passed by parliament would also undergo greater scrutiny and restrictions on rights would require greater justification. Increased scrutiny would strengthen our democratic system by invigorating political debate;
  - A charter of rights provides checks and balances that can easily be referenced and understood by the community during times of emergency or instability. For example, many existing domestic laws that arguably violate a variety of rights were created reactively in response to domestic riots and national security threats;
  - A charter could create a recognisable avenue for citizens to seek recourse for abuses of power. Such a development would be particularly significant and empowering for various minority groups and the socially disadvantaged;
  - An increasing number of jurisdictions internationally have, or are in the process of enshrining basic rights and freedoms into their domestic legislation. Australia lags significantly behind the international community, being the only western country to not have either statutorily or constitutionally entrenched rights;
  - A charter of rights can facilitate a constructive dialogue between the judiciary and parliament, and assist with a clearer and more consistent interpretation and approach to human rights abuses;
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- Australia is a signatory to numerous international instruments which protect human rights. Incorporating these into domestic legislation would allow Australia to formally meet its international obligations and allow treaties to have direct application and relevance to domestic law.

### ***Arguments made against a charter of rights for Australia***

- A charter would increase the power of the courts at the expense of parliament, undermining parliamentary supremacy and leading to the politicisation of the judiciary;
  - Australia has a good human rights record, which demonstrates that the system in existence is successful. Parliamentary democracy is the most efficient way of maintaining checks and balances;
  - A charter would increase uncertainty in the law, as many human rights are vague or widely defined, requiring an unelected judiciary to give them content and meaning without community consultation or parliamentary scrutiny;
  - There is no consensus as to which rights should be protected, and many human rights are conflicting;
  - The absence of a local charter would not isolate Australian courts from overseas developments, given existing protections found in legislation, the constitution and parliamentary accountability, making a charter unnecessary;
  - A charter would result in many cases of frivolous litigation, delaying courts and leading to increased costs;
  - Rights that may be accepted and relevant at the time the charter is enacted may become entrenched despite no longer reflecting community values. Frequent variations and amendments designed to deal with inflexibility would undermine the strength and authority of the charter;
  - A charter merely panders to minority groups and criminals;
  - The inflexibility of a charter can hinder the enactment of required measures, that by their nature restrict people's rights and freedoms in the interests of national security and safety;
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- A charter of rights could be used to disrupt upon the activities of private businesses and associations by increasing the risk of litigation; and
- A focus on rights can foster a culture of entitlement within the community that overrides the recognition and acceptance of responsibilities and obligations.

## What are Australia's international obligations?

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The key international treaties that Australia has agreed to be bound by are summarised below:

- ***Universal Declaration of Human Rights (UDHR)***

The Universal Declaration covers a wide range of rights including the right to be recognised as a person, freedom from discrimination before the law, freedom from arbitrary detention or exile and the right to seek asylum. This Declaration, teamed with the ICCPR and ICESCR, forms the International Bill of Rights.

- ***International Covenant on Civil and Political Rights (ICCPR)***

The ICCPR covers fundamental rights such as the right to life, liberty and security, freedom of movement, the right to be treated equally before the law, freedom from arbitrary interference with privacy and home life, freedom of thought conscience and religion, freedom of association, right to political participation and the right to dignity and respect when imprisoned.

Prohibited by the covenant is torture, slavery and servitude, criminal charges under retrospective legislation and capital punishment for minors, pregnant women and those charged with less serious offences.

- ***First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR OP)***

The Protocol allows individual citizens to lodge complaints for breaches of the ICCPR to the Human Rights Committee. Since ratification, several complaints have been made in response, to which the Committee found that Australia had violated various obligations

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including the right to trial without undue delay, prohibition of arbitrary detention and the right to free speech under the ICCPR.

- ***International Covenant on Economic, Social and Cultural Rights (ICESCR)***

The ICESCR covers a wide range of rights, including the right to work in just and favourable conditions, to join trade unions, to have an adequate standard of living including a highest attainable standard of physical and mental health. The Covenant recognises the importance of the family unit and creates a right to participate in cultural life and dispose of natural wealth as the individual sees fit.

- ***Convention on the Rights of the Child (CROC)***

The CROC recognises the vulnerability and special needs of children. It sets out children's basic rights, including the right to a name and identity, and to play and engage in recreational activities. It also highlights the importance for a child of being with their parents, if it is in the child's best interests. It requires parties to take action to prevent child neglect, sexual abuse and physical and mental violence.

- ***International Convention on the Elimination of All Forms of Racial Discrimination (CERD)***

CERD opposes policies that create or perpetuate racial discrimination. Specific efforts should be made to prohibit discrimination, particularly in relation to access to education, housing, education, civil rights and citizenship. It calls for equal access to public facilities regardless of race, and for the rejection of policies of racial segregation.

- ***Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)***

This Convention covers discrimination relating to education, employment, financial services and health. It advocates special measures to redress gender discrimination, particularly in relation to rural women. CEDAW also advocates the protection of women from trafficking and prostitution.

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- ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)***

CAT condemns the use of any torture in any circumstances. 'Torture' is defined as any act where pain or suffering - whether mental or physical - is intentionally inflicted upon an individual. It binds parties to ensure that all acts of torture are criminalised, and prevents extradition or expulsion of individuals back to circumstances where they are likely to be tortured. It also provides for effective education systems to be in place for military, medical and law enforcement personnel.

## **Which rights should be protected?**

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The debate regarding the benefits of a charter of rights is often sidelined by debates about which rights should be protected. Deciding which rights should be included should ideally be a process that is conducted with significant community consultation and negotiation.

The rights covered in most human rights instruments tend to reflect the basic rights set out in the ICCPR. These include equal protection before the law, the protection of the cultural and linguistic rights of minorities, freedom of expression, thought, movement, association and participation in public life, and protections relating to the justice system by protecting the right to silence, access to a lawyer, the right to a fair trial and to be informed of reasons for arrest or detention, and the ability to test those reasons and prevent double jeopardy and retrospective criminal offences. Commonly protected rights include the rights of the child and of the family unit, and also protections from arbitrary interference with privacy.

The [Human Rights Bill 2006](#) drafted by the group Human Rights Act for Australia, is slightly broader in its scope, as it also incorporates economic and cultural rights as well as addressing fiscal rights relating to social security.

As with the international instruments, allowance is made to limit the rights and freedoms where necessary. Such limitations are generally based on public health, national security or public order grounds. Certain rights, such as the prohibition of torture, cannot be suspended

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even in times of war or emergency. Others can be limited under the charter, but only so far as is as lawfully reasonable in a democratic and just society.

## **Where are each of the jurisdictions up to in terms of implementing human rights legislation?**

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### ***Commonwealth***

There have been numerous, unsuccessful attempts to introduce a bill of rights dating back to the constitutional conventions of the 1890s.

Most recently in 2001 Senator Meg Lees of the Democrats introduced the *Parliamentary Charter of Rights and Freedoms Bill 2001* into the Senate, which reflected the ICCPR and UDHR, and said in the second reading speech:

The bill protects individuals against violations of their rights arising from the actions of governmental institutions or from the impact of State, Federal or Territory laws, the common law or delegated legislation.<sup>1</sup>

The Bill lapsed and was never introduced to the House of Representatives. Natasha Stott Despoja sought to reintroduce the Bill in 2005, with no success.

Also in 2001, the Independent Dr Andrew Theophanous MP, tabled the *Australian Bill of Rights Bill 2001* before the House of Representatives. Encompassing wider rights including the ICCPR, CROC and ICESCR, this Bill never made second reading stage and was also abandoned.

On 5 October 2004, the independent online discussion forum, *New Matilda* (now known as 'A Human Rights Act for Australia'), launched its campaign for a national Human Rights Act

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<sup>1</sup> *Hansard Senate*, 27 September 2001, p28110

complete with a draft Bill, which it sought, unsuccessfully, to have tabled in the Commonwealth Parliament in October 2006. Speaking on its behalf were former Prime Minister, Malcolm Fraser, and Elizabeth Evatt, a former head of the Family Court who sat on the United Nations Human Rights Committee.

The Howard government never supported the introduction of a charter of rights. Former federal Attorney-General, Philip Ruddock, said in an opinion piece: “Bills of rights do not protect essential freedoms - all they do is present the very real risk of having judges imposing personal opinions as law, leaving everyone to guess about what the law might be.”<sup>2</sup>

The Rudd Labor government has confirmed that it is committed to an inquiry on the issue; however is yet to announce any terms of reference or a timeframe for such an inquiry.

### ***New South Wales***

In October 2001 the Legislative Council Standing Committee on Law and Justice published a report entitled *A NSW Bill of Rights*. The report opposed enacting a bill of rights in NSW, even only in statutory form, but did agree that the common law does not offer adequate protection of human rights. The main reason for its opposition was the concern that a bill of rights could undermine parliamentary supremacy and distort the role of the judiciary.

Instead, the Committee recommended that the NSW Parliament establish a Scrutiny of Legislation Committee, similar to the Senate Scrutiny of Bills Committee which would look to see if proposed legislation infringed individuals’ rights and liberties. It further recommended that the Scrutiny of Legislation Committee should be separate from the Regulation Review Committee, to ensure that it could dedicate itself to the task. On 15 August 2003, the Legislation Review Committee commenced its function of reviewing and reporting on all bills introduced into Parliament.

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<sup>2</sup> Ruddock, P “Bills of rights do not protect freedoms” *Sydney Morning Herald* 31 August 2007

In February 2006, the chairperson of the Standing Committee on Law and Justice which recommended against a bill of rights, Ron Dyer, publicly changed his view on the value of a charter of rights.

I had always held the opinion that parliaments in Australia could be trusted to preserve individual freedoms and not diminish them by enacting draconian legislation. My confidence in this regard has been eroded, if not destroyed, by recent State and Federal legislation in Australia characterised as 'anti-Terrorism laws.' It seems to me that these laws go well beyond the proper limits that should apply in a liberal democracy. They certainly call into question my hitherto long-held belief that Australian parliaments could always be relied upon to be a bulwark against encroachment upon our democratic freedoms.<sup>3</sup>

During his term as Premier, Bob Carr consistently rejected proposals for a statutory bill of rights in NSW, saying: "It's my argument that reaching the right balance is an issue for the realm of parliament, shaped by the give-and-take of elections and freedom of the press, not for a realm of judicial policy-making."<sup>4</sup> Former NSW Attorney-General, Bob Debus, strongly supported the idea of a bill of rights, while Premier Morris Iemma was lukewarm on the issue in 2006, John Hatzistergos, the current Attorney-General, has ruled out NSW adopting a bill of rights saying it would heighten criticism of the judiciary.<sup>5</sup>

At a local government level, the City of Sydney is considering passing a bill of rights through the council, following the lead of Hume City Council in Victoria.

### ***Australian Capital Territory***

The ACT was Australia's first jurisdiction to enshrine human rights, with the *Human Rights Act* passed in 2004. The aim of balancing responsibility for rights between the legislature, the executive and the judiciary was one of the general principles informing the work of the

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<sup>3</sup> Dyer, R "Should Australia have a Bill of Rights?" February 2006, Evatt Foundation Publication (<http://evatt.labor.net.au/publications/papers/159.html>)

<sup>4</sup> Carr, B "Democracy thrives in a free press and politics, not the judiciary" *Sydney Morning Herald* 30 April, 2007

<sup>5</sup> Pearlman, J "Attorney-General rejects charter of rights for NSW" *Sydney Morning Herald* 18 April 2007

ACT Consultative Committee, which was established to inquire into human rights legislation for the Territory.

In its report of May 2003, the Committee commented:

In the context of the ACT, the Consultative Committee considers that a model that preserves a balance between the legislature, the executive and the judiciary in relation to the protection of rights is preferable to one that defers almost completely to the legislature and the executive (as in the current Australian legal system) or one that allows the judiciary effectively to trump the legislature and to invalidate laws (as in the United States Bill of Rights).

The legislation is closely modelled on the UK *Human Rights Act 1998* and is not constitutionally entrenched. It protects most of the rights listed in the ICCPR, but only affects legislation and does not cover the acts of public authorities. It also does not cover social and economic rights, despite recommendations for their inclusion by the Committee.

The rights that are protected in the legislation are granted a special status in the interpretation of statutes, with preference being given to an interpretation that is consistent with the Act. While judges are unable to invalidate Territory laws, they are able to offer an opinion as to incompatibility. Only where such an interpretation is not possible is a declaration of incompatibility to be made, thereby inviting but not mandating parliamentary amendment. What follows is an opportunity for parliamentary review, by which means a dialogue between the legislature and the courts is encouraged. Therefore, individual complainants do not have direct remedies or a direct right of action under the legislation.

Following the mandatory 12 month review of the *Human Rights Act*, which was tabled in parliament in 2006, it was found that there had been no direct litigation under the Act, but that the executive, parliament and the judiciary had been positively influenced by the existence of the legislation.

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## **Victoria**

Victoria's *Charter of Human Rights and Responsibilities Act*, came partly into force on 1 January 2007, with the remaining provisions coming into effect on 1 January 2008.

The Charter is an Act of Parliament that clearly sets out Victorian rights and freedoms, based on the ICCPR, and the responsibilities that go with them, in one document.

It creates new responsibilities for parliament to ensure that any new legislation is compatible with the human rights that it enshrines in the Charter. From 2008 public authorities, including public servants, police and local councils, must give proper consideration to relevant human rights when making decisions. Complaint handling bodies such as the Health Services Commission and the Victorian Equal Opportunity and Human Rights Commission also must give consideration to human rights under the Charter. The Charter grants the Victorian Ombudsman's office the power to investigate whether any administrative action is incompatible with a protected human right.

All new laws require a Statement of Compatibility to tell parliament whether they meet the requisite human rights standards as set by the Charter. In the rare circumstance that a law does not meet human rights standards, the government is expected to formally explain the discrepancy. In exceptional circumstances parliament may strike down laws that do not uphold protected human rights.

Like the ACT, the Supreme Court can issue a Declaration of Incompatibility requiring the government to reconsider offending legislation; however courts do not have the power to strike down laws that breach the charter. Nor does the Charter provide a legal right of action to the individual, as the focus of the Charter is to ensure human rights protections are not violated at a planning and policy stage rather than providing an avenue for aggrieved parties to seek compensation. However, litigants are able to raise human rights arguments or refer to the charter in a court or tribunal in an existing case.

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At a local government level, Hume City Council passed the 'Inaugural Citizens' Bill of Rights' as part of the council policy encompassing both civil and political rights and also social and economic rights.

### ***Tasmania***

The Tasmanian Law Reform Institute is the final stages in its review as to whether Tasmania should have a Charter of Human Rights. The inquiry received a record 407 submissions, of which 94.1 per cent were in favour of the adoption of a Charter of Rights.

The final report was handed down in 2007, with 23 recommendations. The recommendations concluded that Charter cover both civil, political and also economic, social and cultural rights, that it should only bind public authorities and that it have enforcement provisions.

The final report recognises that while a Charter of Rights would not solve all human rights breaches in Tasmania, it is hoped that it would raise awareness of the issue and lead to a human rights culture in the state.

### ***Queensland***

In 1997, the Legal, Constitutional and Administrative Review Committee released an issues paper which investigated whether Queensland should adopt a Bill of Rights.

In its final report in 1998, the Committee found that a Bill of Rights was not the preferred option for greater recognition of rights, as it was unlikely to offer greater protection to Queensland citizens.

While recognising the value of fundamental rights to dignity, life, democratic participation, security of person and equality – the report cited the transfer of parliamentary sovereignty

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to the judiciary, increased litigation and the problems with applying such a bill to the private sector in the face of the diminishing public sector to be significant concerns.

The Queensland Law Society has indicated its support for formal recognition of human rights as a mode of safeguarding fundamental rights of an individual. Politicians such as former Queensland Attorney-General, Dean Wells, have also publicly voiced their support for a new community consultation process.

### ***Western Australia***

Western Australia embarked on a significant review of human rights protections and in a report handed down in November 2007, concluded that such legislation was beneficial and necessary for the state.

A majority of the submissions were in support of a Human Rights Act, with opposing submissions citing politicisation of the judiciary as a major objection. Many of the submissions voiced concerns that rights were not being adequately protected within Western Australia and felt human rights legislation would lead to greater awareness of human rights abuses.

The consultation committee recommended a statutory bill of rights which, unlike many other jurisdictions, would also incorporate economic and cultural rights on top of civil and political rights and government duties.

The report also annexed a draft bill for the government's consideration.

### ***South Australia***

South Australia has not begun a formal review process into the introduction of human rights legislation.

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A private members bill from Sandra Kanck of the Democrats entitled *Human Rights Bill 2004* which sought to implement the ICCPR was introduced into parliament, but has not progressed beyond first reading stage in the Legislative Council.

### ***Northern Territory***

The Northern Territory is also yet to begin a formal review process into human rights protections. The Australian territories are in a more vulnerable position than the states, as the few direct and implied rights in the federal Constitution are not applicable in the territories.

At the 2007 Charles Darwin Symposia entitled: 'Securing Territorian Rights: Statehood and a Bill of Rights?' academic and human rights advocate Professor George Williams debated Professor James Allan from Queensland on whether the Northern Territory should adopt human rights legislation.

Professor Williams cited mandatory sentencing as a key issue as to whether human rights legislation could have protected individuals and moulded government policy positively. Conversely Professor Allan said that while some politicians had made grave mistakes in the past, the public can ensure greater accountability with elected parliamentarians than unelected judges.