

AN AUSTRALIAN CHARTER OF RIGHTS AND FREEDOMS

A PROPOSAL FOR THE INTRODUCTION OF A COMMONWEALTH
STATUTE FOR THE PROTECTION OF HUMAN RIGHTS AND
FUNDAMENTAL FREEDOMS



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A. Executive summary

1. Liberty urges each political party in Australia to commit itself to the introduction of a Commonwealth statute for the protection of human rights and fundamental freedoms in Australia during the next term of the Federal Parliament.
2. Human rights receive only piecemeal protection under Australian law at present. The introduction of a comprehensive federal human rights statute would go a long way to improving this position.
3. Human rights statutes have now been enacted in most other western liberal democracies, including the United States, Canada, New Zealand and the United Kingdom. We have drawn on each of these models to develop a structure which is, we believe, appropriate for Australia at this time.
4. In summary, we propose that:
 - 4.1 A Charter of Rights and Freedoms should be introduced as an Act of the Federal Parliament.
 - 4.2 The rights and freedoms protected by the Charter would be based on the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention on Human Rights.
 - 4.3 The Charter would have precedence over all other Federal Acts unless the Parliament expressly declared that an Act or a provision thereof was intended to prevail over the Charter.
 - 4.4 The Charter would have precedence over all State and Territory Acts unless the State or Territory legislature expressly declared that an Act or a provision thereof was intended to apply notwithstanding the Charter.
 - 4.5 Any derogation from the Charter under 4.3 or 4.4 would cease to have effect after five years, unless re-enacted.
 - 4.6 In addition to the Commonwealth, State and Territory Parliaments, the Charter would apply to the executives of the Commonwealth, the States and the

Territories and to any person or body performing a public function, power or duty imposed by law.

- 4.7 The relief available for breach of the Charter would include damages if the Court is satisfied the award is necessary to do justice.
5. Although Liberty's ultimate goal is the entrenchment of a Charter of Rights and Freedoms by constitutional amendment, we consider the enactment of a Charter of Rights and Freedoms as an Act of Parliament to be an important step towards the protection of human rights and the development of a human rights culture in this country.

B. Reasons why Liberty supports a Charter of Rights and Freedoms

6. Although some human rights are currently protected under Australian law, for example under certain provisions of the Australian Constitution and under the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992, many fundamental rights and freedoms are not currently protected under Australian law.
7. For example, Australian law does not currently provide any explicit general guarantee of freedom from discrimination on the ground of race, freedom of expression, or freedom of movement. The Charter would give such freedoms legal recognition and protection.
8. In these circumstances, we consider it both important and appropriate that Australian law give recognition to certain fundamental rights and freedoms derived from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the European Convention on Human Rights.
9. Other reasons for the introduction of a Charter of Rights and Freedoms include:¹
- 9.1 It would enhance Australian democracy by protecting the rights of minorities.
- 9.2 It would improve government policy-making and administrative decision-making.

¹ See George Williams, *A Bill of Rights for Australia* (UNSW Press, 2000) ("Williams") at 25.

9.3 It would serve an important educative function.

9.4 It would promote tolerance and understanding in the community.

C. What rights should be protected?

10. The following are examples of the sorts of rights and freedoms which should be protected:

- Right to liberty and security.
- Right to a fair trial.
- Freedom of thought, conscience and religion.
- Freedom of expression.
- Freedom of assembly and association.
- Prohibition of discrimination
- Right to education.

D. A statute of the Commonwealth Parliament

11. Although Liberty considers a constitutional Charter of Rights and Freedoms (ie, one incorporated in the Constitution by amendment at referendum) to be its ultimate goal, we consider there to be good reasons for a Charter to be first introduced as an Act of the Commonwealth Parliament.²

12. A statutory Charter of Rights and Freedoms will significantly enhance the protection of human rights in this country, and will also perform a useful educative function. Schools will study it. Students will learn it. Citizens will take pride from it. This has been the experience in Canada and (more recently) the United Kingdom.

13. We believe that a statutory Charter would perform a useful role in enabling the Charter to be tested and debated before consideration is given to the introduction of a constitutional Charter of Rights and Freedoms.

² See generally Williams, ch 5 (“A Gradual Path Forward”).

14. Given the history of failed referendums, we consider it unlikely that a referendum to introduce a Charter of Rights and Freedoms in the Constitution would succeed at this time. We do, however, consider a statutory Charter to be a significant and worthwhile improvement in the protection of human rights, and therefore recommend the introduction of such a statute.
15. Not all bills of rights are constitutionally entrenched. The Human Rights Act 1998 of the United Kingdom and New Zealand's Bill of Rights Act 1990 provide models for the introduction of a Charter by Act of Parliament.

E. Charter to prevail over other Commonwealth legislation

16. We recommend that the Charter of Rights and Freedoms prevail over other statutes of the Federal Parliament unless it is expressly provided that another Act or statutory provision is intended to prevail over the Charter.
17. The purpose of such a provision is to give the Charter precedence over future Commonwealth legislation (to the extent that this is constitutionally possible) unless the Parliament specifically considers it appropriate to derogate from the Charter.
18. We consider that such a provision balances the need for flexibility — there may be special and unforeseen circumstances which justify Parliament derogating from the Charter — with the need to ensure that any derogation is fully considered and that there is political accountability for the decision. The experience of Acts requiring exemption will also be helpful in considering reform to the Charter, both generally and in the context of possible entrenchment.

F. Charter to prevail over State and Territory legislation

19. We recommend that the Charter of Rights and Freedoms be expressed to prevail over State and Territory Acts, unless the State or Territory Parliament expressly declares that the State Act or a provision thereof is intended to operate notwithstanding the Charter.
20. The reasons for allowing the State and Territory Parliaments to declare that an Act or provision is to operate notwithstanding the Charter are broadly the same as for the Federal Parliament. We do not consider that it would be politically feasible to deny

the State and Territory Parliaments the ability to derogate from the Charter in cases they consider appropriate (although it would be constitutionally possible to do so).

21. The requirement that a State or Territory Parliament expressly declare that an Act or provision is to operate notwithstanding the Charter should bring political accountability to any decision to derogate from the Charter.

G. Derogation to lapse after 5 years

22. Although we accept that Commonwealth, State and Territory Parliaments should have the power to derogate from the Charter in cases they consider appropriate, that does not need to be open-ended in time. In our view, the derogation should operate for only five years and then lapse.³ Should the legislature consider it necessary to continue the derogation, it could re-enact the provision at the end of the five years.
23. A precedent for a five-year limit on opting-out is found in the Canadian Charter of Rights and Freedoms.⁴

H. Charter to bind executive and others performing public functions

24. The Charter will operate as a check not only on the Federal, State and Territory Parliaments but also on Federal, State and Territory executives (ie, government) action.
25. Furthermore, in view of the increasing trend to contract out services traditionally performed by government, we consider that the Charter should apply to any person or body performing a public function, power or duty imposed by law.

I. Relief to include damages

26. In many cases, the relief for breach of the Charter will be a declaration that an Act or statutory provision or executive act is invalid. However, in appropriate circumstances we consider that the relief available should also include damages.⁵

³ Subject to constitutional limitations.

⁴ Section 33(1).

⁵ Section 8 of the UK Human Rights Act contains such a provision.

J. Conclusion

27. We believe that the time is right for the introduction of a Charter of Rights and Freedoms by the Federal Parliament. There is an increasing awareness and appreciation in the Australian community of the importance of the protection of human rights. The present protection of human rights in Australia is piecemeal and inadequate. We call on all political parties to support the introduction of an Australian Charter of Rights and Freedoms during the term of the next Parliament.