**Free and equal: An Australian Conversation on Human Rights**

Australian Human Rights Commission

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# **About this Submission**

By way of introduction, Sean Stimson is a human rights lawyer and the head of the International Student Legal Service NSW (ISLS) at the Redfern Legal Centre (RLC). Alexandra Roach is a former journalist who has recently completed her Juris Doctor, and Joshua Poon has recently completed his Bachelor of Laws and Master of Laws; both work with Stimson at ISLS.

In February 2019, Stimson was the recipient of the NSW Human Rights Medal for ISLS’s work, in creating a meaningful and lasting contribution to the advancement of human rights.

It has been our objective in our work to bring human rights concerns to the attention of government, media and public alike, in an attempt to educate and highlight the need to introduce the most effective and long-lasting means of protecting human rights in Australia.

Comments on the contained issues should be regarded as our own personal comments rather than being attributed to RLC.

# **Acknowledgements**

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# **Summary**

We write in response to the invitation of The Australian Human Rights Commission (AHRC) to contribute to the debate surrounding the AHRC’s project, *Free and Equal: An Australian Conversation on Human Rights* (**Free and Equal**). In this submission, we will respond to some of the questions posed in AHRC’s recent Discussion Paper[[1]](#footnote-1) and Issues Paper.[[2]](#footnote-2)

We believe that the most effective method to protect human rights is the creation of legally-binding, comprehensive, and enveloping human rights protections. We believe this would be most effectively and efficiently achieved via a single, all-encompassing document – such as a *Human Rights Act* or *Bill of Rights*.

# **Introduction**

In this submission, we will provide some background, as to understand the current Australian human rights legal landscape, some historical context and understanding of the development of the debate surrounding an Australian Bill of Rights are required. We will also briefly outline the current legal human rights protections in place in Australia, as well as the overall efficacy of those laws.

Australia is the only Western democracy without a statutory or Constitutional Bill of Rights, and as such without certainty in terms of consistent human rights protections.

This is despite the efforts of two of the drafters of the Australian Constitution – Richard O’Connor and the then-Tasmanian Attorney-General, Andrew Inglis Clark – to have the inclusion of a bill of rights similar to that of the United States of America, within the Australian Constitution, it was ultimately decided 19 votes to 23[[3]](#footnote-3) that the ‘British traditions of the common law responsible government and parliamentary sovereignty were sufficient to protect the human rights of the Australian population’.[[4]](#footnote-4)

Until 1986, Australia was tied into the worldwide system supervised by the Judicial Committee of the Privy Council in London, providing Australians with a certain layer of human rights protections. This allowed for Australian lawyers to adopt a comfortable attitude towards the use of inter-jurisdictional comparative law. The advantages of this, as stated by Kirby J, were that it ‘rescued its beneficiaries from narrow parochialism; set high standards of logical judicial reasoning; discouraged and corrected any corrupt or incompetent decisions; and promoted a global view of law and of the relevance of international law’.[[5]](#footnote-5)

However, since 1986 and the introduction of the *Australia Acts* domestically and in the UK, Australians have been prevented from appealing to the Privy Council.

As such we are now lacking the global view of law and of the relevance of international law, and despite the best efforts of the Courts’ judicial reinterpretation of the Australian Constitution as a document for today’s world – which operates in a context shaped by a developing set of international legal obligations, including the protection of human rights – the judiciary’s hands are tied.

This is the result of Australia’s lack of a single enactment of law which protects the human rights of the Australian population. Rather, we currently have a piecemeal enactment approach via state and federal legislation which meets some of Australia’s international human rights obligations. This approach has been referred to as ‘a patchwork’[[6]](#footnote-6) which is ‘somewhat threadbare’.[[7]](#footnote-7)

For Australians’ own human rights to not be legally protected, while Australia holds a seat on the United Nations’ (UN) Human Rights Council, is nothing short of a travesty. This is especially so when one considers that Australia was one of the drafting parties for the 1946 *Universal Declaration of Human Rights* (*UDHR*),[[8]](#footnote-8) yet we remain the sole democratic nation on Earth which does not have a national bill of rights. Indeed, it shows a central ‘tension’[[9]](#footnote-9) to Australia’s approach to human rights, especially regarding international law.

This can be demonstrated in the national inquiries held over recent years (including Royal Commissions) into issues including the treatment of people with disabilities, those in aged care, indigenous Australians, asylum seekers, women experiencing abuse, children, the LGBTI+ community, and even customers of Australia’s banks. Each of these inquiries has demonstrated that Australia’s current human rights protections are deficient and incomplete.

In this submission, we will discuss as to why we believe a federal Human Rights Act (‘*HRA*’) is, in the first instance, in the best interests of Australia's populace. We will also discuss why we believe this federal *HRA* will lay the essential groundwork required for the introduction of a Constitutionally-entrenched *Bill of Rights*. In terms of comparative law, we will look to Canada, where this approach was successfully implemented.

# **Discussion Questions: Discussion Paper**

## *Do you consider the options proposed are the most important reforms that could be undertaken to better protect human rights?*

### *Constitutional Protection for Human Rights, via Statutory Enactment First*

We agree with the AHRC’s recommendation[[10]](#footnote-10) that a federal, statutory *Human Rights Act* ('*HRA*') should be introduced in Australia.

However, drawing from Canada’s experience – specifically, with the *Canadian Charter of Rights and Freedom* (1982)[[11]](#footnote-11) and its statutory precursor *Canadian Bill of Rights* (1960)[[12]](#footnote-12) – we believe the Australian population would be best served in the long-term by a constitutional entrenchment of human rights. We are therefore of the opinion that at enacting an *HRA* at the federal level is only the first necessary step towards the eventual creation of a Constitutionally-enshrined *Bill of Rights*.

A constitutionally-enshrined *Bill of Rights* would address the most fundamental problems faced by the current Australian human rights protection system, that is, the limited enforceability of Australia’s international obligations, and the lack of individual access to redress for breach of these rights. These problems will be discussed below.

* + - 1. *Lack of Enforceability and Access to Remedies*

While Australia has worked some of its international obligations into domestic law, of significant concern is that these enactments only protect certain human rights to a limited extent, providing varying degrees of protection in different areas. This is seen within anti-discrimination legislation, which has been worked into domestic law but does not prohibit all forms of discrimination. For example, it does not deal with systemic discrimination and there are exceptions concerning the grounds upon which race or sex discrimination can be based.[[13]](#footnote-13) Indeed the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), which incorporates the *International Covenant on Civil and Political Rights* (ICCPR)[[14]](#footnote-14) into Australian domestic law, limits complaints about breaches of ICCPR rights to acts and practices of Commonwealth agencies. It further limits the remedies available if there is a breach of ICCPR rights: the ‘remedy’ is a report prepared by the Human Rights Commissioner and tabled in Parliament'.[[15]](#footnote-15)

As a result, the *full effect* of the rights, freedoms and protections contained in these treaties are not available to Australians via our current domestic laws. This leaves the Australian population without adequate protection and effective redress or remedy to human rights breaches or abuses.

Contributing further to the lack of certainty surrounding human rights in Australia is the fact that some Constitutionally enshrined rights do not cover those living in the Territories, including guarantees of trial by jury and, possibly, religious freedom, nor do non-citizens enjoy strong protections of any kind (which has been of particular relevance regarding High Court decisions where legislation has been upheld which permits the ongoing detention of those seeking asylum in Australia.)

Further, it must be noted that the Constitution does not protect people against actions of other individuals, or corporations, which violates their human rights.

* + - 1. *The Common Law Does Not Provide Adequate Protection*

The Parliament has the power to amend, or repeal, ordinary legislation at any time. This includes legislation which enshrines Australia’s international human rights obligations into domestic law. A very recent example of this was the repeal of the *Medevac*[[16]](#footnote-16) despite strong opposition. This demonstrates that, ‘although it may at times be politically difficult for governments to amend or repeal these provisions, day-to-day political constraints alone are not sufficient to ensure individual rights in Australia’.[[17]](#footnote-17)

In the absence of written guarantees within comprehensive human rights legislation, the common law we feel also fails to provide adequate human rights protections.[[18]](#footnote-18) Arguably, common law rights cannot securely protect rights as all common law principles and presumptions are susceptible to change as the composition of the government or judiciary shifts.

### ***Do you have comments about how these reforms might work in practice?***

#### *Lessons from Australia’s current human rights framework*

To discuss how any reforms to human rights law in Australia may work in practice, it is perhaps advisable to briefly overview the current legal framework in place.

Following the 2009 National Human Rights Consultation, in 2010 the Rudd Government announced the National Human Rights Framework. Its centrepiece – the *Human Rights (Parliamentary Scrutiny) Act 2011* – was designed to ensure that Parliament did not introduce any laws which breached the human rights of the populace.

This was to be achieved via a two-part process. Firstly, any proposed legislation requiring a ‘Statement of Compatibility’ to be drafted regarding any human rights implications that legislation may have, and if there *are* implications, what the justification for those implications are. This Statement of Compatibility is then added to the legislation’s explanatory memorandum. Secondly, a Parliamentary Joint Committee on Human Rights was created, a bipartisan review board which reviews all proposed laws for compliance, or lack thereof, with human rights, and compiles reports. The Joint Committee’s reports are meant to keep all parliamentarians informed as to the impact of all proposed legislation on human rights prior to needing to vote as to whether these proposals become the law of the land.[[19]](#footnote-19)

However, the overall success and effectiveness of the *Parliamentary Scrutiny Act* has been heavily debated: indeed, in the years since this law first came into force on 4 January 2012, some commentators have proclaimed it an outright failure.[[20]](#footnote-20) Two criticisms of the *Parliamentary Scrutiny Act* which have been noted are the *Act*’s “goal…[of] ensuring that new human rights cases do not emerge in the courts”,[[21]](#footnote-21) and that fact that the *Act*, by its design, “entrusts Parliament with the task of ensuring that our laws do not infringe human rights. This is a major problem because Parliament is the very body often accused of infringing these rights in the first place…This approach of entrusting this role only to Parliament has not been adopted in any other democracy”.[[22]](#footnote-22)

It could also be said that this style of approach is perhaps unlikely to work in a Government where there is little separation between the Executive and the Parliament, as there is in Australia, no matter which political party has formed government.[[23]](#footnote-23)

As has been noted by George Williams: “It is very rare to see parliamentarians break rank and disagree with their own party’s policies (indeed, doing so can thwart a person’s aspirations to become a minister). Some parliamentarians have noted that, even in the privacy of the party room, dissent on issues of human rights is increasingly being branded as disloyal and can have personal consequences for those who speak out. This is especially true for some of the most contentious political issues, such as the rights of asylum seekers or people accused of terrorism offences.”[[24]](#footnote-24)

Further, it must be noted that the National Human Rights Consultation itself (chaired by Father Frank Brennan) had recommended, among other outcomes, the introduction not of a *Parliamentary Scrutiny Act*, but of a federal Charter of Rights.[[25]](#footnote-25)

#### *Lessons from Canada*

Akin to the Canadian experience, the introduction of a federal Australian *HRA* would allow Australians “to become accustomed to the idea [of human rights]. It also allowed the original provisions to be interpreted and tested in the courts and elsewhere as a sort of trial run for the later rewrite”[[26]](#footnote-26) for the Constitutionally-entrenched *Bill of Rights*.

This approach would also permit the Australian populace to become accustomed to, and comfortable, with legally-protected human rights of both themselves and others, including the concept of enforceable remedies for breaches by government, corporations, groups, and individuals.

Under a federal *HRA*, it could be ensured that the Parliament deliberates how proposed legislation impacts upon human rights of Australia’s people, and Executive Government keeps human rights issues at front-of-mind when developing policy. Additionally, it could be ensured that the Courts consider human rights when interpreting legislation, and the public service deliver services and make decisions with human rights contemplated.

Under a federal *HRA*, the remedies available to someone whose human rights have been breached may include a cause of action in the Courts, the right to seek damages or other remedies such as an injunction, or the ability to access official complaint-handling mechanisms and conciliation services.

We feel that the first step in achieving a legislative *Human Rights Act* or a Constitutionally-enshrined *Bill of Rights* is to have a robust culture of human rights, where all the people of Australia are ‘able to name the human rights that the Australian Government has pledged to protect; and have an understanding of their human rights and their responsibility to respect the rights of others and importantly they are aware of what actions are available to them if their rights are breached’.[[27]](#footnote-27)

This education program should not be limited to just the general public, but more broadly, it should include parliamentarians, court officials, public servants, private sector workers, and students in both schools and universities.

As has been noted in the United Kingdom:

“learning about these principles would become part of the school curriculum and adult education, encouraging people and the students to debate the importance of protecting human rights and the difficulties which arise when they conflict. Such a development would lead to a more informed public, more sensitive to the implications of restricting civil liberties and of extending them”.[[28]](#footnote-28)

Such an understanding, we feel, would deliver a permanent, effectual safeguard against repressive government action in both the present and future.

As has been argued by George Williams:

“My view is that a Bill of Rights is primarily important because it offers a means of improving scrutiny and debate on such issues at the political and community levels. Rather than merely creating a legal text, the aim would be to foster a culture of liberty, including a tolerance and respect of difference. Legal texts are meaningless unless they exist within a supportive cultural and political framework. After all, the 1936 USSR Constitution contained a Bill of Rights at the height of the great purges initiated by Joseph Stalin.”[[29]](#footnote-29)

## **Discussion & Consultation Questions: Issues Paper**

### ***What human rights matter to you?***

We are of the belief that human rights are universal, inalienable, indivisible, interdependent and interrelated, as is stated within international law and practice. However, we believe that an emphasis should be placed upon the populace’s ability to access information. It is of fundamental importance that this access is protected, as knowledge is essential in enabling the population to both assert and exercise their human rights.

For this reason, in the below section, we will focus on freedom of speech, association and press, and the freedom to protest, as they are essential to the functioning of a democratic society.

#### *Freedom of speech, association and press; freedom to protest*

Freedom of speech, press, and association, and the right to protest, are closely interlinked, and are all vital in keeping a democratic government accountable to the people who elected them. Curtailing these interconnected rights is often an attempt at silencing dissent.

It is of fundamental importance that the public is well informed as to their rights and the rights of others, without the interference of government. This is because an informed public is able to look to the possible failings of their elected government, and hold them accountable for their failings at all times.

As former Australian Prime Minister Robert Menzies once explained:

Should a Minister do something which is thought to violate fundamental human freedoms he can promptly be brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary, defeated. And if that… leads to a new General Election, the people will express their judgment at the polling booths. In short, responsible government in a democracy is regarded by us all as the ultimate guarantee of justice and individual rights.[[30]](#footnote-30)

The media, as the ‘fourth estate’ is the cornerstone of democracy, being ‘an essential part of the weave of democracy and freedom of expression’.[[31]](#footnote-31)

In Australia, the High Court has found freedom of speech to be both a common law right[[32]](#footnote-32) and an implied Constitutional right when it relates to ‘political communication’ (that is, the ‘expression of concerns about government and political matters’).[[33]](#footnote-33)

However, even this Constitutional guarantee has not halted the slow creep of the erosion of the fundamental principles of government which Menzies espoused, and the politicisation – and eventual weaponisation – of those seeking refuge, of the right to protest, of free speech and press and association.

Successive Australian Governments have created an information void around certain issues; two notable examples being refugees and ‘national security’.

This can be seen in the continued lack of information flow from government to the media, and by extension, from the media to the public. This has been the result of the criminalisation of any ‘unauthorised disclosure’ of information by a Commonwealth officer, or others that are performing services on behalf of the government,[[34]](#footnote-34) and ‘whistle-blowing’ by those working within the immigration detention system from speaking out as to conditions and or treatment.[[35]](#footnote-35) Any such person who does speak out could face a custodial sentence. Additionally, under secrecy laws, five years’ imprisonment could await any party – including journalists – who publishes classified information garnered via a federal public servant.

There has been a pattern of legislation at federal and state level that, when seen as a whole, reduces hard-won human rights to ‘paper promises’, with civil liberties abandoned and dissent criminalised, and holding concerns regarding the nation and its climate have been weaponised by those in power in favour of corporate interests and ‘national security’. As a result, we see that a protester could, under the Espionage *and Foreign Interference Bill* (EFI), see 25 years in jail for participating in a peaceful protest.

Other examples of this can be found at state level. Since 2016, penalties for attending certain protests can result in a seven-year jail term. The recent *Crown Land Management Regulation 2018* (NSW) includes newly-created powers to break up protests, including the ability for public officials to “direct a person [to stop] taking part in any gathering, meeting or assembly”.[[36]](#footnote-36)

Indeed, ‘national security’ has become the government’s lever to change the fundamental political and legislative landscape post-9/11, with the extent of what ‘national security’ actually involves remaining ill-defined.

Successive Australian Governments have used threats of emerging foreign interference in justifying repressive legislation, and to win elections. This tactic has been referred to by Amnesty International as ‘a Trojan Horse of breaches of civil liberties and human rights’.

Further, the right-wing think tank the Institute for Public Affairs (IPA), has stated: ‘The IPA is inherently concerned about any proposal that seeks to “manage” political debate by limiting freedom of speech’.[[37]](#footnote-37)

With the introduction of increasingly restrictive legislation, that effectively creates media blackouts, the government has effectively ‘blinkered’ the populace to their actions, with the voting public seeing only what the government is allowing them to see. The need for defined human rights in Australia is well illustrated by the dramatic effect these measures have on free speech, and the burden imposed upon those wanting or needing to engage in public policy debate.

There are also concerns as to what appears to be the current Australian Government’s approach when it comes to the right to protest; the large climate change-related protests of 2019, in particular, seem to demonstrate this.

Speaking at the Queensland Resources Council on 1 November 2019, Prime Minister Scott Morrison said that ‘radical activism [and] absolutist environmentalism’ were ‘testing the limits of the right to protest’, and stated that his government sought to ‘identify mechanisms that can successfully outlaw’[[38]](#footnote-38) consumer boycotts against coal companies and other companies which provides the sector with services including insurance and banking.[[39]](#footnote-39)

As stated by Claire O’Rourke, the director for external affairs at Amnesty International Australia:

By joining regimes around the world in passing new, restrictive laws attempting to suffocate civil society under pretexts of “treason” and “security”, the opposition and government are lurching towards authoritarianism.[[40]](#footnote-40)

# **Conclusion**

In conclusion, we are of the opinion that the inadequacies of the current human rights protection system in Australia could be addressed through the implementation of a formal legal instrument. We have suggested that a federal *Human Rights Act* should be introduced in the first instance, which would then pave the way to the Constitutional entrenchment of human rights in the future, which would provide the best possible protection of these rights.

Any such proposed instrument’s introduction should not be limited solely to the implementation of the enactment of laws which give effect to human rights norms, but also the development within our diverse society of a culture of knowledge and respect of all people’s fundamental rights and freedoms which are ‘*without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’,*[[41]](#footnote-41) including disabilities.

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3. Justice Michael Kirby AC CMG, 'A Bill of Rights for Australia’ (Speech, the Young Presidents' Association Queensland Chapter, 4 October 1994). [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)
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6. George Williams. *A Charter of Rights for Australia.* (4th ed, UNSW Press, 2017). 44. [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, SC Res 1734, UN SCOR, UN Doc S/RES/1734 (22 December 2006) (‘*UDHR*’). [↑](#footnote-ref-8)
9. George Williams, 2017, 43. [↑](#footnote-ref-9)
10. AHRC. August 2019. 6. [↑](#footnote-ref-10)
11. *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’). [↑](#footnote-ref-11)
12. SC 1960, c 44. [↑](#footnote-ref-12)
13. Bernice Carrick, ‘Australian Federalism And The Debate Over A Bill Of Rights’ 2010. [↑](#footnote-ref-13)
14. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’). [↑](#footnote-ref-14)
15. Above n 13. [↑](#footnote-ref-15)
16. *Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018* (‘Medevac Bill’). [↑](#footnote-ref-16)
17. ‘Submission of the Human Rights Committee to the Inquiry into a Bill of Rights for NSW’ (Legislative Council Standing Committee on Law and Justice) *The Law Society of NSW*. [↑](#footnote-ref-17)
18. Eg, defamation laws and the common law right to privacy, see Barbara McDonald, ‘A statutory action for breach of privacy: Would it make a (beneficial) difference?’ (2013) 36 *Australian Bar Review* 241. [↑](#footnote-ref-18)
19. George Williams. *A Charter of Rights for Australia.* (4th ed, UNSW Press, 2017). 57-59. [↑](#footnote-ref-19)
20. Ibid, 62. [↑](#footnote-ref-20)
21. Ibid. [↑](#footnote-ref-21)
22. Ibid, 64. [↑](#footnote-ref-22)
23. Ibid, 64. [↑](#footnote-ref-23)
24. Ibid. [↑](#footnote-ref-24)
25. Ibid, 57. [↑](#footnote-ref-25)
26. Garrett, 2000. [↑](#footnote-ref-26)
27. Ibid. [↑](#footnote-ref-27)
28. A British Bill of Rights IPPR (2nd ed, 1996) 15. [↑](#footnote-ref-28)
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30. Robert Menzies, *Central Power in the Australian Commonwealth* (1967) 54. [↑](#footnote-ref-30)
31. Ejvind Hansen.'The Fourth Estate: The construction and place of silence in the public sphere.’ 44 *Philosophy and Social Criticism* 10 (2018), 1073. [↑](#footnote-ref-31)
32. *Monis v The Queen* (2013) 249 CLR 92 [60] (French CJ). [↑](#footnote-ref-32)
33. *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177

    CLR 1; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570. [↑](#footnote-ref-33)
34. *Crimes Act 1914* (Cth) s 70. [↑](#footnote-ref-34)
35. *Australian Border Force Act 2015* (Cth) s 42. [↑](#footnote-ref-35)
36. *Crown Land Management Regulation 2018*, r 13. [↑](#footnote-ref-36)
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41. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, SC Res 1734, UN SCOR, UN Doc S/RES/1734 (22 December 2006) (‘*UDHR*’) art 2. [↑](#footnote-ref-41)