

NATIONAL HUMAN RIGHTS CONSULTATION

BACKGROUND
PAPER

Human
Rights



National Human Rights Consultation

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The National Human Rights Consultation is supported by a Secretariat in the Attorney-General's Department.



Australian Government
Attorney-General's Department

NATIONAL HUMAN RIGHTS CONSULTATION

**BACKGROUND
PAPER**

SHARE YOUR VIEWS

WHY ARE HUMAN RIGHTS IMPORTANT?

Human rights are about equality and fairness for everyone. A society that commits to human rights, commits to ensuring that everyone is treated with dignity and respect. In Australia, values such as freedom, respect, fairness, justice, democracy and equality, stem from a commitment to human rights – or a ‘fair go for all’.

The protection of human rights is everyone’s responsibility. A shared understanding and respect for human rights provides the foundation for peace, harmony, security and freedom in our community.

Human rights are also about more day-to-day matters. For example, a society that protects and promotes human rights makes it unlawful to discriminate against you because of your race, disability, age or sex when you are applying for a job, ensures your rights at work are protected, and ensures that your right to vote and practise your religion are protected.

WHAT IS THE NATIONAL CONSULTATION ABOUT?

The National Consultation is about asking you to share your views on human rights. The Consultation will bring together a range of views from across Australia and encourage discussion about how Australia should protect human rights.

To do this, the Consultation will look at three key questions:

- which human rights (including corresponding responsibilities) should be protected and promoted?
- are these human rights currently sufficiently protected and promoted?
- how could Australia better protect and promote human rights?

It is hoped that people will look broadly at the questions posed by the Consultation. While many people will be satisfied that our current human rights framework is working, others may suggest changes.

The Consultation will be conducted by an independent Consultation Committee and supported by a Secretariat in the Attorney-General’s Department.

The Committee will report to Government on what they hear during the Consultation – to give the Government a better understanding of what the community thinks about human rights.

In its report to Government, the Committee will set out the advantages and disadvantages, and an assessment of the level of support in the community, for the key ideas identified in the Consultation.

The Terms of Reference for the National Human Rights Consultation are at page 16.

HOW YOU CAN SHARE YOUR VIEWS

The Committee's job is to hear the views and ideas of as many people as possible on the key Consultation questions. This Background Paper, which has been prepared by the Consultation Secretariat, may be useful to you in developing your views on the three key Consultation questions. The Consultation questions and this Background Paper are meant to start the discussion. The Background Paper does not necessarily reflect the views of the Consultation Committee or the Australian Government.

There may be issues you think are missed in the Background Paper or other questions that you think are important. You will be able to raise these issues and questions during the course of the Consultation. It is important to the discussion on human rights that you share your views.



NATIONAL HUMAN RIGHTS CONSULTATION WEBSITE

The website address for the National Human Rights Consultation is www.humanrightsconsultation.gov.au. The website will be kept up to date throughout the Consultation.

You will be able to download human rights information from the website. Information will be available in a range of languages and formats, including Braille and large print on request.

There are a number of ways that you can share your views:

Written submissions

You can make a submission to the Consultation individually or on behalf of a group or organisation. The submission can be posted or e-mailed into the Consultation Secretariat.

You can type your submission directly into the Consultation website at www.humanrightsconsultation.gov.au

Every submission is important and will be read.

Submissions can be made at anytime up until the closing date of 29 May 2009.

Submissions may be published on the Consultation website.

All submissions will be treated as public unless the author clearly indicates to the contrary. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

Community roundtables

In the first half of 2009 the Consultation Committee will hold a series of community roundtables. The roundtables will be held throughout regional and remote Australia, as well as in our major cities. The purpose of the roundtables is for you to share your views about human rights in Australia.

To attend a roundtable between February and May 2009 you will need to check the location of the roundtables and register your details online or by calling 1800 086 134. For registration and information on where your nearest roundtable will be held see www.humanrightsconsultation.gov.au

Contacts

If you would like further information, including more information about human rights, you can visit the website at www.humanrightsconsultation.gov.au

To post a submission, the address is:

**The National Human Rights
Consultation Secretariat
Attorney-General's Department
Robert Garran Offices
BARTON ACT 2600**

You can email the Secretariat humanrightsconsultation@ag.gov.au or call on 1800 086 134.

Information about TTY phone access will be available on the Consultation website.

SHARE YOUR VIEWS

The key questions for the National Consultation are:

- **WHICH HUMAN RIGHTS (INCLUDING CORRESPONDING RESPONSIBILITIES) SHOULD BE PROTECTED AND PROMOTED?**
- **ARE THESE HUMAN RIGHTS CURRENTLY SUFFICIENTLY PROTECTED AND PROMOTED?**
- **HOW COULD AUSTRALIA BETTER PROTECT AND PROMOTE HUMAN RIGHTS?**

Some background information on human rights follows. More information is available from the National Consultation website at www.humanrightsconsultation.gov.au

WHAT ARE HUMAN RIGHTS?

Human rights are about equality and fairness for everyone—no matter where people come from, their racial or cultural background, age, gender, disability or what they earn.

Protecting and promoting human rights is about making sure that basic safeguards for equality and fairness are in place so that we can prevent the violation of rights, and provide remedies when a violation does occur.

Australia's human rights obligations derive, in large part, from the international treaties to which Australia has become a party. For this reason, all Australian Governments (Commonwealth, State, Territory and local governments) have a special role in protecting and promoting human rights. The main kinds of human rights are:

Civil and political rights which protect the individual from the misuse of political power and recognise every individual's right to participate in their country's political process. They include rights such as the right to be free from discrimination and the right to equality before the law.

Economic, social and cultural rights which protect an individual's right to access economic, social and cultural aspects of their country. They include rights such as the right to education and the right to adequate health services.

Australia has ratified the two major international treaties which set out these rights: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. This means that the Government is already responsible for respecting and ensuring rights under these treaties.

Recently, people have started thinking about **emerging human rights principles**. These human rights principles include things like the right to a healthy environment. These rights remain largely unofficial and their status is yet to be settled at international law.

AUSTRALIA'S HUMAN RIGHTS FRAMEWORK

Australia has a strong existing human rights framework. Human rights are currently protected in a range of ways including our democratic institutions, legal safeguards, and a culture that values human rights. Protecting and promoting human rights requires balancing the interests of individuals and groups with the interests of society including security, public health and public order.

HOW ARE HUMAN RIGHTS CURRENTLY PROTECTED IN AUSTRALIA?

This section of the Background Paper provides information about some of the main ways human rights are currently protected. These are the institutions that establish our democratic system of government, the legal framework that protects our human rights, and the promotion of a human rights culture within our society.

(i) Democratic Institutions

The separation of powers

The Australian Constitution establishes three arms of Federal Government – the Parliament, the Executive and the Judiciary. Under the doctrine of the separation of powers, each arm of government has distinct powers and responsibilities:

- the Parliament enacts the laws of the Commonwealth
- the Executive is responsible for formulating and implementing policy, and
- the Judiciary, which is independent from the Parliament and the Executive, interprets and applies the laws.

The separation of powers between the three arms of Government prevents one arm of Government becoming too strong and creates a system of checks and balances in the exercise of political power.

Parliamentary process

When the Government or a Member of Parliament proposes a new law, or Bill, it is the subject of debate within the Parliament. The debate is open to the public and can be reported by the media. A Bill can also be referred to a Parliamentary Committee. The Committee will examine the Bill and test it against certain standards, and report to Parliament to enable a more informed debate in Parliament. Bills will be scrutinised in relation to a range of matters including an assessment of whether the proposed legislation would achieve its stated outcomes, maintains Australia's system of government and representative democracy, and whether it represents a good policy.

For example, the Senate Standing Committee for the Scrutiny of Bills alerts the Senate to the possibility of the infringement of individual rights, liberties and freedoms. Other committees, such as the Senate Standing Committee for Legal and Constitutional Affairs, also play a role in inquiring and reporting on matters that sometimes include human rights.

(ii) Our Legal Framework

Australian Constitution

The Australian Constitution provides for certain human rights protections. These specific rights include:

- prohibiting the Commonwealth from making any law establishing any religion or imposing any religious observance
- the right to a trial by jury, and
- the right to fair compensation when the Commonwealth acquires the property of a person or a State.

The High Court of Australia has also found that some rights can be implied from the Australian Constitution such as the implied right to freedom of political communication. The extent of the protection offered by these implied rights remains unclear.

Common law

A number of human rights are recognised and protected by the common (or judge-made) law. These include, for example, the right to be presumed innocent until proven guilty, the right to silence and the requirement that evidence of confessions obtained by force be excluded at trials. These rights may be restricted or removed by legislation at any time.

Anti-discrimination legislation

Australia's anti-discrimination laws are integral to the protection of human rights. Under Federal discrimination laws you are not allowed to be treated less favourably in public life because of your sex, marital status, race, age or because you have a disability.

States and Territories also have anti-discrimination laws which, although similar to the Federal laws, vary in the grounds of discrimination they cover, the processes used to make complaints and the remedies available.

Other legislation

Human rights in Australia are protected by a variety of others laws in addition to anti-discrimination legislation. These include Australia's criminal laws which embody human rights principles such as the right to a fair trial.

State and Territory human rights protections

In addition to their anti-discrimination legislation, two jurisdictions in Australia have enacted human rights legislation. In 2004 the ACT Government passed the *Human Rights Act 2004*. Victoria followed with its *Charter of Human Rights and Responsibilities Act 2006*.

The main features of these laws are that:

- they both set out the human rights that are protected in these jurisdictions
- do not enable courts to invalidate legislation, but instead enable them to tell Government if legislation is not able to be interpreted consistently with human rights, and
- in the ACT (although not in Victoria) the legislation, from 1 January 2009, provides for a direct right of action to the courts for individuals who believe their human rights have been breached.

States and Territories also have a range of human rights, anti-discrimination and equal opportunity commissions.

Federal administrative law

The Australian administrative law system provides for a number of rights and protections. For example, in some cases a person affected by a decision made by a government agency may have the merits of that decision reviewed. Other safeguards include: being able to access documents which might be relevant to an administrative decision made about you under the *Freedom of Information Act 1982* (Cth); and privacy protections under the *Privacy Act 1988* (Cth).

International law

Australia has ratified the two major treaties which set out civil and political rights and economic, social and cultural rights (the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) as well as a number of other major international human rights treaties.

When Australia becomes party to an international human rights treaty, it does not automatically become part of Australian law and is therefore not automatically enforceable in Australia. Rather, the rights have to be specifically incorporated into domestic legislation. Australia has a broad range of domestic legislation that recognises the human rights instruments to which Australia is a party.

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) also helps to ensure that the rights contained in the *International Covenant on Civil and Political Rights* and other international declarations such as the *Declaration of the Rights of the Child*, the *Declaration on the Rights of Disabled Persons* and are recognised in Australia.

Under some international treaties that Australia has ratified, individuals can submit a complaint to a United Nations treaty committee concerning alleged human rights violation by an Australian government. For example, the committee can consider the complaint and make a non-binding recommendation.

The Australian Human Rights Commission

The Australian Human Rights Commission, formerly known as the Human Rights and Equal Opportunity Commission, is Australia's independent statutory human rights body at the Federal level. Amongst other functions, the Commission develops human rights education, advises the Australian Government on human rights issues, conducts research into human rights issues, and inquires into and conciliates complaints of unlawful discrimination and, in relation to the Australian Government or an Australian Government authority, breaches of certain human rights.

(iii) Promoting a Human Rights Culture

A human rights culture in Australia is encouraged in a number of ways including:

- through the Australian Human Rights Commission (formerly known as the Human Rights and Equal Opportunity Commission) which plays a key role in providing human rights education in Australia and promoting awareness of, and respect for, human rights in the community. This includes an emphasis on human rights education programs in our schools
- a strong human rights non-government organisation sector which has a role in advocating for human rights and educating the community about human rights programs and protections available to them
- a 'Civics and Citizenship' education program which promotes school students' participation in Australia's democracy by equipping them with the knowledge, skills and values of active and informed citizenship. The program develops knowledge and understanding of Australia's democratic heritage and traditions, its political and legal institutions and the shared values of freedom, tolerance, respect, responsibility and inclusion, and
- internationally, by engaging in bilateral human rights dialogue, and through our Australian aid program which contributes to the advancement of human rights through its focus on poverty reduction and sustainable development.

HOW COULD AUSTRALIA FURTHER PROTECT AND PROMOTE HUMAN RIGHTS?

Many people will consider that human rights are already sufficiently protected and promoted. Others may consider that human rights could be further protected in this country. It is therefore hoped that a diverse range of views will be shared with the Committee during the Consultation process.

To assist you to consider how human rights and responsibilities could be protected and promoted in Australia, this section of the Background Paper outlines some ideas that have been raised in the past. It also poses some questions that you might like to think about. The Background Paper does not advocate one option over any other, nor does it provide an exhaustive list of the ways human rights could be protected and promoted. What follows is a series of ways that Australia could protect and promote human rights in the future.

(i) Democratic Institutions and Human Rights

One view is that the Australian Parliament could play a greater role in respecting, protecting and promoting human rights. Some questions you might wish to consider include:

- should the parliamentary scrutiny process be expanded to enable committees to provide guidance to Government departments, legislative drafters, and policy advisers on human rights issues?
- should Government Ministers make a statement to the Parliament on how a Bill is, or is not, compatible with Australia's human rights obligations when it is introduced into Parliament?
- would the parliamentary scrutiny process be enhanced if bills were assessed against an agreed set of human rights set out in legislation?
- should an Australian Government Parliamentary Secretary for human rights be appointed to ensure that human rights are given more prominence?

One view is that human rights could be further integrated into Australian Government policy development and administrative decision-making processes. Some questions you might like to think about include:

- would policy development by Government departments be improved if there was a formal process to assess the human rights implications of new policy proposals?
- should Government departments, through their Ministers, report to Parliament on their procedures and safeguards for protecting human rights in their decision-making processes?
- how could human rights principles be further incorporated into how Government departments interpret laws and make decisions?

(ii) The Legal Framework and Human Rights

This section of the Background Paper provides some examples of how our current legal framework might be changed to further protect and promote human rights.

Commonwealth anti-discrimination laws could be strengthened

Currently Commonwealth anti-discrimination legislation covers unlawful discrimination in four specific areas - race, sex, disability and age.

Some questions that you might wish to think about are:

- have you ever felt that you were discriminated against and found there was no course of action or remedy available to assist you?
- are there inconsistencies between existing anti-discrimination laws that should be addressed?
- would it be simpler to make a complaint if there was one, streamlined Commonwealth anti-discrimination law to cover the four existing areas of unlawful discrimination, as well as any new areas of unlawful discrimination?

A human rights Act

Legislation (that is, an Act or Acts of Parliament) could be enacted to set out which human rights (such as civil, political, economic, social and cultural rights) are protected and promoted in Australia.

There are two main ways that a national human rights Act could be enacted:

- the first is as an ordinary piece of legislation that can be repealed or amended, like all other legislation, by the Parliament

- the second is by amending the Australian Constitution to include a bill of rights. Amending the Constitution to include a bill of rights would require a referendum (which is a special voting procedure that requires a majority of people in a majority of States to vote supporting the proposed change to the Constitution). Any changes to a bill of rights set out in the Constitution would also require a referendum.

Some questions that you might like to think about include:

- which human rights should be recognised in any national human rights Act?
- who should be obliged to respect human rights set out in any national human rights Act – the Australian Government, businesses, individuals, or all three?
- how should any national human rights Act deal with breaches of human rights?
- should a national human rights Act recognise an individual's responsibility to respect the human rights of others?
- what should the role of courts be in protecting the human rights set out in any human rights Act?

A strengthened role for the Australian Human Rights Commission

The Australian Human Rights Commission plays an important role in protecting and promoting human rights in Australia. Consideration could be given to strengthening the Commission's ability to resolve human rights disputes.

Questions you might like to think about include:

- should the jurisdiction of the Commission be expanded to enable it to inquire into and conciliate a broader range of human rights complaints?
- should the Commission have a greater role in scrutinising legislation for human rights compatibility?
- how should the Australian Government respond to the Commission's recommendations, such as those contained in Commission reports that are tabled in Parliament?

(iii) Human Rights Awareness

This section provides some examples of how human rights could be further promoted in Australia.

The National Human Rights Action Plan

Australia could develop a new National Human Rights Action Plan to reflect Australia's international and domestic human rights priorities and strategies for achieving positive human rights outcomes. A new Action Plan could focus on integrating human rights protections and promotion as a central public policy objective, with appropriate review mechanisms to assess implementation of the Action Plan against its objectives.



A community charter

An alternative to an Act of Parliament is a community charter of people's rights and responsibilities. A community charter could help foster a culture of respect for human rights and articulate the rights that we value as a community. A community charter would not be a legal instrument and would not give rise to binding obligations on the Government or individuals. It could be used by the Government, individuals and businesses as a guide to help protect and promote human rights as part of the Australian culture.

Greater community participation in policy and legislative development

A number of mechanisms for increasing community participation in Government policy making could be considered. Examples include using the internet to centralise access to Government information on human rights, or building on existing ways of allowing people to speak directly to Government about particular issues such as through Community Cabinet meetings.

Increasing human rights education

There could be an increased emphasis on human rights training and education, both in formal settings such as schools, government departments and specific professions, and in less formal settings such as human rights community awareness campaigns.



CONCLUSION

The National Human Rights Consultation will give the Australian community the opportunity to discuss this issue of national importance.

Everyone who wants take part in this national discussion is encouraged to take this opportunity to share their views. You are able to share your views by making a submission to the Consultation or attending a community roundtable discussion.

All contributions that are received will be considered.

Contacts

If you would like further information, including more information about human rights, you can visit the website at www.humanrightsconsultation.gov.au

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NATIONAL HUMAN RIGHTS CONSULTATION TERMS OF REFERENCE

The Australian Government is committed to the protection and promotion of human rights—a commitment that is based on the belief in the fundamental equality of all persons.

The Government believes that the protection and promotion of human rights is a question of national importance for all Australians. The National Human Rights Consultation Committee will undertake an Australia-wide community consultation for protecting and promoting human rights and corresponding responsibilities in Australia.

The Government has given the Consultation Committee the following terms of reference:

1. The Committee will ask the Australian community:
 - Which human rights (including corresponding responsibilities) should be protected and promoted?
 - Are these human rights currently sufficiently protected and promoted?
 - How could Australia better protect and promote human rights?
2. In conducting the consultation the Committee will:
 - consult broadly with the community, particularly those who live in rural and regional areas
 - undertake a range of awareness raising activities to enhance participation in the consultation by a wide cross section of Australia's diverse community
 - seek out the diverse range of views held by the community about the protection and promotion of human rights
 - identify key issues raised by the community in relation to the protection and promotion of human rights, and
3. The Committee will report to the Australian Government by 31 July 2009 on the issues raised and the options identified for the Government to consider to enhance the protection and promotion of human rights. The Committee is to set out the advantages and disadvantages (including social and economic costs and benefits) and an assessment of the level of community support for each option it identifies.

The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.



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