Formal human rights protections in Australia [1]

There is no legislative or constitutional bill of rights federally in Australia: see Human rights in state and territory law [2].

In 2008, the Rudd Labor Government announced that it would support a national community consultation on the most appropriate methods of protecting human rights. The 2008-09 Federal Budget provided $2.099 million for that process. The National Human Rights Consultation Committee issued its report in 2009, which made recommendations including that:

- the Federal Government enact a Human Rights Act in the model of the existing Victorian and ACT legislation (sometimes called the ‘dialogue model’)
- the right to the highest possible standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; and the right to education be recognised as a priority, although the Committee said any complaints for breach of those rights should not be heard in Court, but by the Commission
- education about human rights be a top priority for the Federal Government
- public servants be required to consider policy recommendations and programs through a human rights lens
- new Bills brought before the Federal Parliament be assessed for their compatibility with human rights standards.

In 2011, the Human Rights (Parliamentary Scrutiny) Act 2011(Cth) was passed. It commenced in January 2012. It gives effect to one of the recommendations of the National Human Rights Consultation Committee by requiring all Bills and disallowable legislative instruments introduced to the Federal Parliament to be accompanied by a statement of compatibility with human rights standards. The Act also created the Parliamentary Joint Committee on Human Rights to review Bills for human rights compatibility and to advise the Parliament. The Federal Attorney-General’s Department has created tools to assist with the preparation of statements of compatibility based on human rights jurisprudence and in particular, the principle of proportionality.

Discrimination law reform

The Commonwealth Parliament has passed legislation that prohibits discrimination and harassment on a number of grounds, including:

- race, including a person’s colour, descent, national or ethnic origin, immigrant status and racial hatred (Racial Discrimination Act 1975(Cth))
- sex, including a person’s marital status, whether they are pregnant, family responsibilities and sexual harassment (Sex Discrimination Act 1984(Cth))
- disability, including temporary and permanent disabilities, physical, intellectual, sensory, psychiatric disabilities, diseases and future disabilities, and association with a person with a disability (Disability Discrimination Act 1993(Cth)); and
- age, including both young and older people (Age Discrimination Act 2004(Cth)).

Additionally, the Australian Human Rights Commission (the Commission) can investigate claims of discrimination and harassment in employment, on the basis of a person’s sexual preference, criminal record, trade union activity, political opinion, or religion or social origin (Australian Human Rights Commission Act 1986(Cth) (the AHRC Act)).

A consolidated form of anti-discrimination legislation has been developed by the Federal Government as a draft exposure bill (Human Rights and Anti-Discrimination Bill 2012(Cth)). It would consolidate all federal anti-discrimination legislation into a single Act with the purpose of providing a simpler, more consistent system that provides greater certainty; creating clearer complaint resolution processes and shifting the burden of proof to a respondent once a prima facie case of discrimination is made out; and addressing gaps and inconsistencies. The Government proposes that the Act would create a single, simplified test for discrimination on any ground; introduce
new protected attributes of sexual orientation and gender identity, and recognise the possibility of discrimination on
the basis of a combination of attributes. It would preserve the exemptions in current discrimination legislation
(religious exemptions and justifiable conduct). Finally, the Bill would give greater certainty to respondents by
promoting voluntary compliance that once certified by the Commission and adhered to by an employer, could act
as a shield against claims of discrimination.

The Bill was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee (Report, February
2013).

The Human Rights and Anti-Discrimination Bill has not yet been passed and has attracted significant public
comment. In the meantime, some of the reforms proposed by Government have been introduced to the Parliament.
In 2013, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013
(Cth) was passed. It expanded the protected grounds in the Sex Discrimination Act 1984(Cth) to include sexual
orientation, gender identity and intersex status.

The Commission is empowered under the Acts listed above (together with the AHRC Act) to investigate and to
conciliate complaints involving discrimination and harassment on the grounds listed above: see website [3]. It is
against the law to be discriminated against in many areas of public life, including employment, education, the
provision of goods, services and facilities, accommodation, sport and the administration of Commonwealth laws. If
the Commission cannot conciliate the complaint so that the parties reach a settlement (a private agreement to
resolve the complaint, and might involve an apology, a change in future conduct, and/or a financial payment), a
complainant can choose to continue their complaint in the Federal Court or the Federal Circuit Court (formerly the
Federal Magistrates Court). The Commission can also intervene in litigation, or seek the leave of the court to
provide assistance as amicus curiae (‘friend of the court’). The Commission’s role as an intervener or as amicus
curiae is to provide specialist submissions on human rights and discrimination issues, independent from the parties.

However, prohibiting discrimination (and proscribing racial vilification) falls short of implementing the range of
standards guaranteed in the international conventions on human rights. Also, the existing prohibitions in Australian
law against discrimination on enumerated grounds are not ‘entrenched’. That means that they can be overridden
by subsequent laws if the Parliament wished, rather than setting a standard that subsequent laws must satisfy to
be valid laws. For an example, legislation authorising the Northern Territory Intervention sought to limit or to
exclude the operation of the Race Discrimination Act.

Under the AHRC Act, the Commission can also investigate alleged breaches of ‘human rights’ as narrowly
defined in that Act. The rights that the Commission is empowered to deal with are:

- International Covenant on Civil and Political Rights
- International Labour Organisation Discrimination (Employment) Convention ILO 111
- Convention on the Rights of the Child
- Declaration of the Rights of the Child
- Declaration on the Rights of Disabled Persons
- Declaration on the Rights of Mentally Retarded Persons; and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

**Note:** this is not an exhaustive list.

It does not include the International Covenant on Economic, Social and Cultural Rights; International Convention
on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of
Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or
Punishment; and the Convention on the Rights of Persons with Disabilities, and other key human rights
declarations.

In Australia, although the Commission is empowered to investigate breaches of the rights scheduled to the AHRC
Act, it is not unlawful to breach those rights.

The Commission has the power to investigate and to make recommendations. For example, everyone has the right
not to be required to perform ‘forced or compulsory labour’ and the right to have a criminal trial ‘within a
reasonable time’. If a right like this is breached, the Commission can investigate a complaint, try to resolve it and
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make recommendations, but no further action can be taken by a complainant in the courts. Reports of the Commission’s investigations into human rights breaches under the AHRC Act are tabled in Federal Parliament.