

A Human Rights Act for Australia: The Benefits for Foreign Affairs and Policy

1. Introduction

1. This paper discusses the particular reasons for which the Department of Foreign Affairs and Trade should support the enactment of a comprehensive national Human Rights Act as recommended by the Report of the National Human Rights Consultation Committee.¹
2. The enactment of a Human Rights Act would have a range of benefits for Australian foreign affairs and policy. In summary, a Human Rights Act would:
 - (a) incorporate Australia's international human rights treaty obligations in domestic law;
 - (b) enhance Australia's authority, legitimacy and influence on international and regional human rights issues;
 - (c) give effect to consistent recommendations made by various UN human rights treaty bodies and Special Procedures of the UN Human Rights Council;
 - (d) reduce the need for, and number of, domestic human rights complaints to international bodies;
 - (e) enable Australian courts to better contribute to the development and harmonisation of international laws and jurisprudence; and
 - (f) provide a 'virtuous circle' for international and domestic policy coordination, with benefits for both domestic and foreign policy.
3. Each of these benefits is discussed in greater detail below.
4. The paper supplements the briefing paper entitled, 'A Human Rights Act for Australia', which discusses the key findings and recommendations of that Report and why the enactment of a Human Rights Act is in the national interest.

¹ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009), Recommendation 18.

2. The Value of a Human Rights Act to Australian Foreign Affairs and Policy

2.1 A Human Rights Act would Legally Incorporate Australia's International Human Rights Treaty Obligations

5. Australia has ratified all of the core international human rights treaties and has a legal obligation to respect, protect and fulfil the rights contained therein. While, in theory, states may implement such treaty obligations through a range of measures – including administrative, financial and legislative measures – in practice, the effective implementation of human rights treaty obligations is more comprehensive and effective when human rights are enshrined in legislation or a constitution.²

2.2 A Human Rights Act would Give Australia Greater Authority and Legitimacy on International and Regional Human Rights Issues

6. Australia's status as the only Western democracy without a national human rights law may undermine our authority, legitimacy and influence on international and regional human rights issues.³ If we are to have an authoritative and persuasive voice in international and regional human rights dialogues, Australia must commit to effective domestic human rights implementation, including through the adoption of a comprehensive national Human Rights Act.
7. In its submission to the National Human Rights Consultation Committee, the Victorian Government stated, 'Australia is a human rights leader in the Asia-Pacific region, and having a Federal Charter would help to set the benchmark in the context of conversations between Australia and its neighbours'.⁴ Similarly, the Hon Elizabeth Evatt AC wrote that:
- Australia's ability to influence the protection of human rights in other countries and in international forums should be enhanced when it demonstrates its willingness to ensure the effective implementation and enforcement of rights in Australia, and when it accepts the enforcement of human rights principles, whatever the effect this may have on the policy goals sought by a government.⁵
8. There are clearly a range of benefits that come with enhanced international human rights authority and legitimacy including: the development of a more stable and predictable international and regional policy environment; enhanced international diplomatic capital;

² Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004) [13]. See also, National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 276-7.

³ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 278-9.

⁴ Cited at National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 278.

⁵ Cited at National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 278.

enhanced policy coherence and effectiveness; the development of diverse, cross-cutting international networks with other human rights promoter states; and, the ideation, mobilisation and projection of universal, constructive national values and identities.⁶

2.3 A Human Rights Act has been Strongly Recommended by UN Human Rights Treaty Bodies and Special Procedures

9. The enactment of a Human Rights Act would be consistent with strong and consistent recommendations made to Australia by UN human rights treaty bodies and independent experts.⁷
10. Both the Human Rights Committee⁸ and the Committee on Economic, Social and Cultural Rights⁹ have recently criticised the lack of legal or constitutional protection of human rights in Australia and strongly recommended that Australia enact comprehensive national human rights legislation. Following its April 2009 review of Australia, for example, the Human Rights Committee noted with regret that:

the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000.
11. The Committee recommended that Australia:
 - a) enact comprehensive legislation giving de-facto effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the judiciary on the Covenant and the jurisprudence of the Committee.
12. Similar recommendations have been made over the last three years by the Committee against Torture,¹⁰ the UN Special Rapporteur on Human Rights and Counter-Terrorism¹¹ and the UN Special Rapporteur on the Right to Adequate Housing.

⁶ See generally, Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (2009).

⁷ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 277.

⁸ Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009) [8].

⁹ Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia* UN Doc E/C.12/AUS/CO/4 (2009) [11].

¹⁰ Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, UN Doc CAT/C/AUS/CO/1 (2008) [9]–[10].

¹¹ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Australia: Study on Human Rights Compliance while Countering Terrorism*, UN Doc A/HRC/4/26/Add.3 (2006) [10].

2.4 A Human Rights Act would Reduce the Need to Take Human Rights Complaints about Australia to International Bodies

13. The domestic implementation of Australia's international human rights obligations would 'bring rights home' and may reduce the number of complaints in relation to Australia to international treaty bodies.¹²
14. Persons who are within the jurisdiction or subject to the control of Australia may currently raise human rights complaints with five UN human rights bodies in New York or Geneva, provided they have exhausted available domestic remedies.¹³ In the absence of a Human Rights Act which confers domestically enforceable rights, the inability to, at least initially, bring these complaints in Australia raises a number of problems. As Lord Bingham, the former Senior Law Lord of the United Kingdom, has observed:
- (a) Complaints reach UN treaty bodies without the benefit of a domestic judgment addressing the human rights issues.
 - (b) A domestic legal system should 'command the confidence of the public as one which is inclusive, belongs to them and affords a remedy for obvious wrongs. It is destructive of such confidence if there is a justified belief that for a significant category of serious wrongs the domestic court can offer no remedy and the disappointed litigant is obliged to go away and seek this superior justice abroad'.
 - (c) It is very undesirable that members of the public be put to the expense and the considerable delay of seeking redress in New York or Geneva for a human rights complaint which could, had such human rights been part of domestic law, have been granted more inexpensively and much more quickly at home.
 - (d) If the rights and freedoms embodied in the international human rights treaties are, as described, 'fundamental', it is a grave defect that they are not fully protected in domestic law.¹⁴

2.5 A Human Rights Act would Enable Australian Courts to Better Contribute to the Development and Harmonisation of International Laws and Jurisprudence

15. The lack of a Human Rights Act is increasingly isolating Australian law from the development of international and comparative human rights law and jurisprudence. As the Report of the National Human Rights Consultation Committee states:

¹² National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 277.

¹³ These are the UN Human Rights Committee, the Committee on the Elimination of All Forms of Racial Discrimination, the Committee on the Rights of Persons with a Disability, the Committee Against Torture and the Committee on the Elimination of All Forms of Discrimination Against Women.

¹⁴ Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008).

Over time the Australian common law has developed with the assistance of a large body of cases considered by courts in other common law systems, among them the United Kingdom, Canada and New Zealand. Each of those countries has now developed some form of charter of human rights, and there is concern that they will no longer be sources of influence and inspiration for our courts because their common law will increasingly be influenced by their human rights instruments. As a result, the Australian common law could experience a degree of 'intellectual isolation'.¹⁵

16. The Report further notes that:

[I]f Australia does not adopt some form of Human Rights Act its judiciary will be unable to play a part in the important debates and developments associated with human rights that are taking place in other jurisdictions and internationally. Elizabeth Evatt pointed out, 'Legislating for human rights would give the High Court a better opportunity to draw on and to contribute to the development of human rights jurisprudence'.¹⁶

2.6 A Human Rights Act would Provide a 'Virtuous Circle' for International and Domestic Policy Coordination

17. A comprehensive national Human Rights Act could provide a framework for international, regional and domestic policy coordination and cohesion, creating a 'virtuous circle' of human rights promotion and protection.¹⁷
18. According to Canadian political scientist and international relations expert, Professor Alison Brysk, 'Canada's adoption of its Charter of Rights and Freedoms successfully inspired international rule of law promotion efforts, which in turn contributed back to Canadian jurisprudence via developments in international human rights law'. Conversely, as an example of how failure to promote human rights at home can hinder protection abroad, she states that 'Canada's lagging performance on aboriginal rights at home eventually undermined an initially promising record of principled international promotion of indigenous peoples'.¹⁸
19. The value of a human rights framework to the formulation of integrated, whole-of-government policy is reflected in Recommendations 8 and 10 of the Report, which provide, respectively, that:

¹⁵ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 278-9 [citations omitted]. See also Sir Anthony Mason, 'The Death of Human Rights? and Related Issues' (Speech delivered at the Australian National University, 24 August 2007).

¹⁶ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) 278-9 [citations omitted]. See also Geoffrey Robertson, *The Statute of Liberty* (2009) 103.

¹⁷ Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (2009) 225-6. See also Louise Arbour, 'The Responsibility to Protect and the Duty to Punish: Politics and Justice in a Safer World' (2001) 59 *Behind the Headlines* 1.

¹⁸ Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (2009) 225-6.

- (a) 'the Government should develop a whole-of-government framework for ensuring that human rights are better integrated into public sector policy and legislative development, decision making, service delivery and practice more generally; and
- (b) 'the Government require federal departments and agencies to develop human rights action plans and report on human rights compliance in their annual reports'.¹⁹

9 November 2009

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¹⁹ National Human Rights Consultation Committee, *Report of the National Human Rights Consultation* (2009) xxxi, xxxii.