

**Submission
No 156**

HUMAN RIGHTS BILL 2025

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LEGISLATIVE ASSEMBLY
COMMITTEE ON COMMUNITY SERVICES
INQUIRY INTO THE HUMAN RIGHTS BILL 2025
SUBMISSION

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Introduction

The International Commission of Jurists [ICJ], founded in 1952, has as its mandate the promotion of the rule of law and the legal protection of human rights throughout the world. As a non-government organisation it has many national sections and affiliates in all regions of the world, each of which adheres to the ICJ mandate. The Australian Section of the ICJ [ICJAS] is one such section and it is supported by branches in States and Territories.

At the international level the ICJ has worked extensively in standard setting of human rights norms and in bringing human rights abuses to the attention of the international community. Its sections and affiliates, at the same time, have worked towards the domestic implementation of human rights norms, which is recognised as the most effective and long-lasting means of protecting human rights. Domestic implementation is not limited to the enactment of laws that give effect to human rights norms. It includes developing within society a culture of fundamental rights and freedoms that 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.*”¹

The New South Wales Branch of the ICJAS, as does the ICJAS itself, seeks the domestic implementation of human rights norms in NSW and congratulates the Government of NSW in its initiative to put before this Committee an inquiry into the *Human Rights Bill* 2025.

Fundamental Rights and Freedoms – Enforcement

Australia, through the Federal Government, has actively participated, since at least 1945, in the formulation and promotion of numerous international human rights treaties setting out what has now been universally accepted as the minimum guarantees of fundamental human rights and freedoms. The Federal Government has willingly signed

¹ Universal Declaration of Human Rights [UDHR], Article 2; International Covenant on Civil and Political Rights [ICCPR], Article 2(1).

and/or ratified many such treaties and has made itself accountable to the international treaty bodies so established to monitor the performance of States parties in meeting their treaty obligations. Australia's commitment is highlighted by its participation in the workings of the various United Nations bodies, including by the nomination of qualified Australians to expert positions within them. Yet the Federal Government has shown reluctance to give full effect to the rights and freedoms identified through their enactment in domestic laws and particularly in the enactment of a *Human Rights Act*. This has forced on Australians a reliance on a patchwork of partial protections and on appeals to international bodies.

Australia has Human Rights Acts (by various titles) in the ACT (2004), Victoria (2006) and Queensland (2019). Recommendations for such legislation have been made in Western Australia (2007), Tasmania (2007 and 2024) and in 2025 a parliamentary committee in South Australia recommended such an Act. A federal Act has been discussed for many years and was recommended in principle in 2024 but is yet to be enacted. Australia remains the only English speaking developed democracy in the world without such national legislation².

While state and territory Acts are important in their own right, they become even more significant in the absence of national legislation. Although a NSW Act will be of limited geographical effect, it will bring to NSW the surety that observance of fundamental rights and freedoms in this jurisdiction requires. This most populous state of Australia, and its most litigious, would put in place a mechanism that recognises and protects the fundamental rights and freedoms that are the foundation of our democracy and provides remedies for breaches.

Human Rights Bill 2025

Overall the *Human Rights Bill 2025* is supported by the ICJ(AS). We merely mention the following aspects.

- 1 One of the objectives of the Bill (clause 4(b)) is "to help build a culture in the public sector of respecting, protecting and promoting human rights". We do not see why that should be confined to the public sector, especially in times when private entities exercise (sometimes delegated public) power over individuals.
- 2 Clause 5(1) provides that the Act binds all individuals. It should also bind all corporate or other non-individual entities.
- 3 Clause 9(3)(a) should include police.
- 4 Clause 9(3)(b) should extend to private providers of such services.
- 5 The human rights included in Part 2, Division 2 should be described in a way that ensures full recognition of economic, social and cultural rights, as well as civil and political rights. Indeed, all rights prescribed by the major UN instruments should be included. This has been largely done, but care needs to be taken to ensure that no inadvertent omissions are made.
- 6 The right of *habeas corpus* should be expressly preserved.
- 7 We strongly support the institution of a Parliamentary Joint Committee on Human Rights. It is unreasonable and unrealistic to expect the Legislative Review Committee to fill that gap that presently exists.
- 8 Clause 50 provides for remedies to be sought for breaches of human rights in the Human Rights Commission, the Civil and Administrative Tribunal or the Supreme Court of NSW. It is important that effective remedies be available, including

² Canada enacted such legislation in 1980, New Zealand in 1990, the United Kingdom in 1998.

damages. As a precaution (and we are in two minds about this) Parliament may consider enacting a graded introduction of remedies so as to learn from experience the extent to which remedies may be sought, the types of remedies that would be appropriate, the potential cost and the best ways of addressing this and progressively to adjust the regime accordingly.

9 We support the costs regime provided by clause 51.

Rebuttal of arguments against a Human Rights Act

General rebuttal

The overwhelming general point is that the reality and weight of the various arguments against a Human Rights Act have been rejected by every independent or parliamentary inquiry undertaken by the Commonwealth and in every other Australian State and Territory since 2009, except the Northern Territory (which has not undertaken any such review).

Arguments against a Human Rights Act

As summarised by the NSW Parliamentary Library, eight main arguments have been put forward against a Human Rights Act.

1. Adequacy of current human rights protections:

A Human Rights Act is unnecessary because Australia provides adequate protection of human rights through democratic institutions, constitutional protections, legislation and the common law. Australia enjoys greater social equity than other countries that do have a Human Rights Act.

Rebuttal: NSW in general presently provides no greater or less protection of human rights than Victoria, Queensland and the ACT and countries like the UK did before they enacted their Human Rights Acts. Evidently that status quo was and is not adequate, as the near universal recommendations of inquiries favouring a HR Act and acceptance of those recommendations demonstrates. Marginalised and disadvantaged people in NSW are much in need of recognition and vindication of their human rights notwithstanding that in some other countries things may be worse.

2. Undermining our tradition of parliamentary sovereignty:

There would be an unacceptable shift of power from the legislature to the judiciary if a Human Rights Act was introduced. Such an Act would require judges to make policy decisions, could result in courts ‘rewriting’ legislation, and would ultimately lead to the politicisation of the judiciary, undermining public confidence in the independence of the courts.

Rebuttal: NSW, like the rest of Australia and unlike the USA, has no problem or culture of politically committed or “activist” judges despite occasional assertions to the contrary. The legal profession from whom our judges are drawn eschews the politicisation of the judiciary and all political parties have observed that convention. Politicisation of the judiciary is very unlikely. Judges already make many “policy” decisions under the common law and in seeking to ascertain Parliament’s intention when interpreting legislation. The making of law by judges is commonplace as they develop the law case by case.

All Australian Human Rights Acts or proposals for them embody a **dialogue** mode, as does the subject NSW Bill. The proposed model for a NSW Human Rights Act does

not allow courts to strike down legislation, only to interpret it consistently with the Act and, where that is impossible, to draw Parliament's attention to the incompatibility. Statutorily entrenched rights may be amended. Parliament will continue to reign supreme. The ACT, Victoria and Queensland have all operated successfully under this model without judicial overreach or diminution of parliamentary sovereignty.

3. No better human rights protections:

A Human Rights Act would not result in better human rights protections. Nor would it result in better laws, since parliament would either focus on pre-empting negative judicial consequences or abdicate its duty in relation to difficult policy questions, leaving them to the courts. It would not result in better government policies and services, and it would impose further costs on government agencies.

Rebuttal: The experience of other jurisdictions is that human rights are in fact better protected when legislated. No comparable jurisdiction has ever found it necessary to repeal a statutory guarantee of human rights. Parliament may be assumed to behave sensibly and neither to waste time second-guessing courts nor to abdicate its duty to make sometimes difficult policy decisions.

4. Potentially negative outcomes for human rights:

A Human Rights Act might actually limit human rights or lead to other negative consequences for human rights protection. The very process of identifying and defining rights can limit them, and unintended or adverse consequences could flow from the protection of certain rights.

Rebuttal: There have been older historical instances of these fears being realised but no modern example that we are aware of. In any case, an advantage of a non-constitutional human rights guarantee as proposed is that parliament can repair any unforeseen problem of the kinds referred to.

5. Excessive and costly litigation:

If a Human Rights Act was introduced it would generate excessive and costly litigation, and the legal profession would be the main beneficiary. Such an Act could have adverse effects on the court system.

Rebuttal: Whether such downsides would occur depends on the design of the legislation and the statutory remedies provided. If other legislation has been vetted for compliance with a Human Rights Act, it is likely that litigation will be avoided rather than provoked. In relation to already existing legislation and steps taken under it, in many cases a claimed denial or breach of human rights will be non-contentious and remedied without need for litigation. Our suggestion of a graded introduction of remedies (see above) and a mandatory review of the Human Rights Act's operation after a few years will enable the feared flood of litigation to be stemmed if it occurs (cf. Part 7). Across the entire breadth of statutory innovations history shows that floodgate fears are rarely realised.

6. Democratic processes and institutions offer better protection of rights:

Rights are best protected through a healthy democracy, a strong civil society and strong democratic institutions. It is the customs, attitudes and culture of a people, as expressed through their institutions, that determine the strength of a commitment to democratic values.

Rebuttal: Democratic processes, a healthy democracy, civil society and democratic institutions will all be augmented and strengthened by statutory recognition and promotion of human rights. There is no dichotomy between democracy and legislated human rights. The dialogue model assures this.

7. A major economic cost:

The economic costs of introducing a Human Rights Act would outweigh any particular benefits the Act might have to offer.

Rebuttal: Our understanding is that the economic costs of implementing human rights legislation in other comparable jurisdiction have not been great. The promulgation of statutory human rights standards is likely to reduce the direct and indirect costs of attending to dissatisfaction with legislation or public administration caused by the lack of such standards.

8. Unnecessarily legalised human rights:

A Human Rights Act would transform social and political questions into legal ones, and this would turn moral debates about rights into technical debates about statutory interpretation, undermining the potential for cultural change

Rebuttal: The dialogue model ensures that Parliament would maintain the power of ultimate mediation of social and political questions that may arise. Cultural change is highly likely to be stimulated over time by the promulgation and operation of statutory protections of human rights.

Conclusion

The ICJAS strongly supports the enactment of a Human Rights Act for New South Wales. It is submitted that the *Human Rights Bill 2025* makes a very good start and deserves to be supported, perhaps with the minor amendments we have submitted should be considered.

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