

A WA Human Rights Act – Position Paper 2024

The Law Society of Western Australia

Level 4, 160 St Georges Terrace, Perth WA 6000 | **Postal:** PO Box Z5345, Perth WA 6831 or DX 173 Perth
Phone: (08) 9324 8600 | **Fax:** (08) 9324 8699 | **Email:** info@lawsocietywa.asn.au | **Website:** lawsocietywa.asn.au

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Executive Summary

A Human Rights Act for WA?

This paper considers whether, compared to the status quo, a state-based Human Rights Act ('HRA') would result in the improved protection of human rights in Australia. In reaching a conclusion, the Law Society considered the following questions:

- Are the current protections for human rights adequate?
- Would a HRA make a practical difference when a person's rights are breached compared to the current framework?
- What roles should Parliaments and Judges have in enforcing human rights?

A conclusion in favour of a WA Human Rights Act

The Law Society supports the establishment of a WA Human Rights Act and supports the promotion and protection of human rights.

Public authorities have a responsibility to safeguard the human rights of all people and ought to consider human rights when making decisions and throughout the political process. A Human Rights Act would create a framework for public authorities to proactively consider the effect of government action on individuals ahead of any dispute. It would create avenues to prevent the escalation of issues and enable individuals to seek remedies when their rights have been violated.

What rights should be included in a WA Human Rights Act?

A WA HRA should include a list of rights based on the texts of the international human rights instruments which Australia is a party to, and particularly the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR').

A HRA should also include protections for the rights of Indigenous peoples.

1. Introduction

1.1 What are ‘human rights’?

The preamble of the 1948 *Universal Declaration of Human Rights* (‘UDHR’) recognises human rights as the ‘equal and inalienable rights of all members of the human family... [that are] the foundation of freedom, justice and peace in the world.’

There is significant agreement among international law scholars that the UDHR has achieved the status of customary law. In other words, communities all around the world recognise and respect the rights listed in the UDHR.

Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with them; regardless of a person’s background, where they live, or their beliefs. Protecting human rights is a way of ensuring that all people are treated with dignity and respect.

All Western Australians have human rights which need protection.

1.2 What is a Human Rights Act?

The purpose of a HRA is to enhance the protection of human rights by ensuring respect for human rights is put into practice. In Australia, the Australian Capital Territory (ACT), Victoria, and Queensland each have a state HRA.¹ These instruments will be referred to as the HRA’s of each jurisdiction.

The common features of state based HRAs in Australia are set out below:

A HRA is an ordinary statute of parliament

A HRA may be repealed or amended. The effect of a HRA on existing laws and upon laws enacted after the HRA is governed by established rules of statutory interpretation.

Human rights are listed

The human rights to which a HRA applies are listed in the Act (‘the listed human rights’). The listed human rights are based upon the civil and political rights and social, economic and cultural rights of international human rights instruments such as the *International Covenant on Civil and Political Rights* (‘ICCPR’) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

¹ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (VIC); *Human Rights Act 2019* (QLD).

Human Rights Education

A significant part of a HRA is to encourage the development of respect for human rights by facilitating human rights education in government agencies and the wider population.

Parliament: a new Human Rights Committee

A Human Rights Parliamentary Committee is created with functions that include examining every Bill presented to Parliament and to report upon whether the Bill is consistent with the listed human rights.

Executive

The Attorney-General must make a statement to parliament on the compatibility of each Government Bill with the listed human rights.

A Human Rights Commission advises the Attorney-General on the listed human rights and has the power to intervene, with leave, in court proceedings concerning the listed human rights.

Courts

In working out the meaning of a written law, an interpretation that is consistent with the listed human rights is to be preferred. A superior court may make a declaration of incompatibility on finding that a written law is incompatible with a listed human right. The declaration does not affect the validity of the written law and is not binding on the parties to the proceedings.

2. Considerations for and against a Human Rights Act

2.1 Are the current protections for human rights in WA adequate?

2.1.1 Current mechanisms for protecting human rights

Representative democracy, constitutionalism and the rule of law in a Federal system.

The preamble to the UDHR links freedom from tyranny and oppression and the enjoyment of human rights to the rule of law. The UDHR itself provides for the right to:

- Equality before the law (Art 7);
- Access to an effective remedy for violation of the law (Art 8);
- An independent judiciary (Art 10); and
- Participate in government through freely chosen representatives (Art 21).

Many of these rights are already secured at the Commonwealth and State level for example:

Participation in government

The *Australian Constitution* guarantees that members of the Federal Parliament will be ‘directly chosen by the people’ (ss 7, 24, 41). The *Electoral Act 1907* (WA) regulates the election of members of the WA Parliament. A freedom of political communication has been implied from the system of representative government evident from the ‘text and structure’ of the Constitution.²

Independence of the judiciary

Chapter III of the *Australian Constitution* provides for security of tenure etc. for the High Court and other courts created by the Federal Parliament (s 72). WA statutes providing for similar, though not identical conditions, for judicial officers in WA courts.³ A common law rule provides that judge is disqualified from participating in a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.⁴

Separation of powers

A separation of powers principle has been implied from the structure of Constitution and the text of Chapter III with the result that the judicial power of the Commonwealth may only be exercised by courts established under Chapter III.⁵ The principle has been extended so that State courts invested with federal jurisdiction may not exercise powers that ‘might undermine public confidence in the impartial administration of the judicial functions of State courts.’⁶

Legality

The availability of judicial review of the constitutionality of laws is assumed in our system of government. Section 75(v) of the *Australian Constitution* contains a guarantee of judicial review of Commonwealth executive action. Subject to statutory exceptions, the WA Supreme Court has jurisdiction over the issue of common law prerogative writs and, to that extent, reviews the WA executive.

Federalism

² *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

³ For example the *Supreme Court Act 1935* (WA).

⁴ *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63).

⁵ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁶ *Kable v DPP (NSW)* (1996) 189 CLR 5.

Whatever else might be said about a federal system, a division of power necessarily involves a limitation of power and, to this extent, limit the chances of the infringement of human rights that are a characteristic of the concentration of unbridled political power. On the other hand, with each lawyer of government comes a fresh opportunity for regulation that may infringe human rights.

Civil and political rights in the Australian Constitution

Besides the implied freedom of political communication and the separation of powers doctrine, the *Australian Constitution* contains very few other guarantees of human rights.

Commonwealth laws providing for acquisition of property must also make provision for just terms.⁷ The Commonwealth may not establish any religion or prohibit the free exercise of any religion.⁸

Civil and political rights in legislation

Commonwealth and WA legislation provide a guarantee of non-discrimination on the grounds of race, sex, disability and analogous grounds. The treatment of other human rights is best described as “piecemeal” with statutes regulating (or preventing) the enjoyment of the subject matter of the right. Examples may be found in:

Commonwealth statutes

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*
- *Racial Discrimination Act 1975*
- *Sex Discrimination Act 1984*

WA statutes

- *Equal Opportunity Act 1984*;
- *Aboriginal Communities Act 1979*;
- *Aboriginal Heritage Act 1972*;
- *The Criminal Code*;
- *School Education Act 1999*;
- *Police Act 1892*;
- *Young Offenders Act 1994*.

⁷ *Australian Constitution* s 51(xxxi); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Cf Art 17(2) UDHR.

⁸ *Australian Constitution* s116; *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Cf Art 18.

Human rights and the Australian Human Rights Commission

The *Human Rights Commission Act 1986* (Cth) established the Australian Human Rights Commission ('AHRC'). The functions of AHRC include reporting to Federal parliament on laws, policies and practices of the Commonwealth that infringe human rights including those rights listed in the ICCPR. The AHRC can make reports in response to complaints or of its own initiative.

Common Law

Relevant common law rules include:

Statutory interpretation and fundamental rights and freedoms

A court will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms in the absence of clear unambiguous language.⁹

Teoh's Case

The ratification of a treaty – including a human rights treaty - may give rise to a legitimate expectation (subject to a legislative or executive indication to the contrary) that the executive will consider relevant treaty obligations when making administrative decisions.

In *Teoh's Case*, the High Court found that the ratification of an international convention can be a basis for a reasonable expectation that the principles of the convention will be complied with.¹⁰ Therefore, if a decision-maker proposes to ignore a relevant treaty, the person affected must be informed otherwise the person has been denied procedural fairness.

Common law rules of evidence and rules guaranteeing a fair trial

These rules are increasingly being overtaken by statute.

Right to bodily inviolability

The High Court has affirmed the right not to undergo invasive medical treatment without consent.¹¹

Native title

The common law recognition of the right of Indigenous people to their traditional lands (subject to the extinguishment of the right) is consistent with human rights

⁹ *Coco v The Queen* [1994] HCA 15; (1994) 179 CLR 427 (a statute authorising the grant of a warrant to use a listening device by a member of the police force in the execution of his/her duty was held not to authorise the grant of a warrant that permitted entry to private property).

¹⁰ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

¹¹ *Re Marion* (1991) 175 CLR 218 (1991).

guarantee of the non-discriminatory enjoyment of property rights and the right of Indigenous minorities not to be denied the enjoyment of their culture.

Barriers to human right protections

Because human rights are often expressed in general terms, the protection afforded by a guarantee of a particular human right will depend upon the interpretation of the scope of the right.

Many human rights are not absolute

The interdependency of human rights means that the limitation of one right may be necessary to secure the enjoyment of another right. It may be necessary to limit or regulate the enjoyment of the freedom of peaceful assembly on a public road so that others may enjoy the freedom of movement.

It is also well accepted there may be some limitations on the enjoyment of certain human rights on the grounds of national security, public order or public health. Again, the protection afforded by a guarantee of a particular human right will depend upon the interpretation of the extent to which government ought to be permitted to limit the enjoyment of the right.

The approach of the High Court to a law that burdens the implied freedom of political communication is to ask whether the law is reasonably appropriate and adapted to achieving an end the fulfilment of which is compatible with the system of representative and responsible government prescribed by the Constitution.

The Victorian HRA includes a clause that offers guidance on the proper approach to limitations on the enjoyment of a human right.

7. Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including— (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

Clause 7 reflects the approach of other jurisdictions to the interpretation of domestic human rights instruments including Section 36 of the South African *Bill of Rights* and the approach of the Supreme Court of Canada to the *Canadian Charter of Rights and Freedoms* (1982).

The effective protection of human rights requires government to assume positive and negative obligations

An instrument that guarantees the human rights of individuals will require the state to refrain from passing laws that infringe those rights and to refrain from engaging in executive conduct.

The negative obligation of the state not to infringe human rights is the one most commonly associated with a guarantee of civil and political rights. However, a moment's reflection reveals that the effective protection of civil and political rights will also require the State to assume some positive obligations. This point is well illustrated by *Dietrich v The Queen* (1992).¹² The enjoyment of the right not to be tried unfairly requires a State to allocate sufficient resources to the legal aid system so that each defendant to a serious criminal charge has access to counsel. The discharge of a positive obligation may require the resolution of complex policy questions. What proportion of the finite resources of the State should be devoted to the protection of the human right? There may be a variety of positive steps that could be taken to protect the human right: which is the most (cost?) effective?

2.1.2 Australia's international obligations

Australia has ratified seven core international human rights treaties:

- *the International Covenant on Civil and Political Rights (ICCPR)*
- *the International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)*
- *the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*
- *the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*
- *the Convention on the Rights of the Child (CRC)*

¹² 177 CLR 292.

- *the Convention on the Rights of Persons with Disabilities (CRPD)*

This means Australia has voluntarily accepted an obligation to comply with these conventions.

Two of the thirty articles of the UDHR are only relevant at the Federal level, namely the right to seek and enjoy asylum and the right to nationality. Of the remaining articles, those relating to civil and political rights have been elaborated on in the ICCPR, and those relating to economic, social and cultural rights have been elaborated on in the ICESCR.

2.1.3 Gaps in human rights protections in WA

The Framework for human rights protections in Western Australia is a patchwork of State and Federal legislation, Common law and convention. There is currently no mechanism to formally monitor the total effect of this framework for consistency or compliance with the principles of human rights.¹³ Similarly, there is no single body that people can turn to for a remedy if their rights have been breached. Therefore, the effectiveness and accessibility of protections for certain rights can vary greatly in different spheres of public life.

Furthermore, legislation passed by WA Parliament is not formally reviewed for compliance with Australia's international obligations. This means Parliament does not need to justify passing legislation which has the effect, or potential effect, of infringing on individuals' human rights. Every person in WA has an interest in ensuring that their rights are protected. However, the people who are most at risk are often the people who have the least access to support. This includes children and young people, First Nations Australians and people from culturally and linguistically diverse backgrounds, people who identify as LGBTIQ+, people who have a disability, adults and children in incarceration, and the elderly.

2.2 Would a Human Rights Act make a practical difference?

2.2.1 A Human Rights Act would consolidate the current framework

Currently, a person needs to refer to State legislation, Federal legislation and the Common law to locate the source of their rights, which may change depending on the context in which the right has been breached.

A WA HRA would consolidate the current piecemeal framework and provide clarity on what rights and protections people are entitled to.

¹³ That human rights are universal, inalienable and indivisible.

2.2.2 A Human Rights Act would increase access to remedies

A HRA would create a positive obligation for legislation to act consistently with the human rights listed in the Act. This means that conduct by public authorities and legislation inconsistent with these rights and Australia’s human rights obligations could be challenged in court.

2.2.3 A Human Rights Act would increase awareness of human rights

Under the current framework for human rights protections in WA, rights are often articulated in a way that’s not accessible to most people and are difficult to apply. In contrast, the ACT, Queensland and Victorian HRAs expressly list the rights that are protected under the Act and the scope of the protection.

Listing human rights in a WA HRA would increase accessibility and public awareness of human rights and support a culture of respect for human rights. This is consistent with the principles of the UDHR which calls on members to strive ‘by teaching and education to promote respect’ the rights contained in the UDHR ‘to secure their universal and effective recognition and observance...’¹⁴

2.2.4 Making a real difference in ACT, Queensland and Victoria

A review of 101 case studies on the ACT, Queensland and Victorian HRAs completed by the Human Rights Law Centre in 2022 found that HRAs make positive differences to people’s lives in big and small ways. Consistently, HRAs:

- Helped governments to identify and address human rights issues affecting people at an early stage of policy development
- Ensured transparency around how governments and parliaments have considered people’s human rights
- Promoted better understanding of human rights
- Prevented human rights issues from escalating
- Provided a way for people to resolve human rights issues raising them with government and other agencies
- Given people the power to take action and address human rights issues by raising them with government and other agencies.¹⁵

According to the Human Rights Law Centre:

“These Charters have been quietly improving people’s lives, in small and big ways. They have helped to ensure that people are treated with greater fairness,

¹⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Preamble para 7.

¹⁵ Human Rights Law Centre Charters of Human Rights Make Our Lives Better (Report) 8 <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/62e9d75b7c16926c8cadbdc4/1659492229319/Charter_101+Cases_08_22.pdf>.

dignity and respect, stopping families from being evicted into homelessness, ensuring people with a disability receive appropriate support and so much more.”¹⁶

2.3 What roles should Parliaments, Courts and the Executive have in enforcing human rights?

2.3.1 A WA Human Rights Act and Parliament

A WA HRA should make provision for:

- Parliament to receive a statement on whether, in the opinion of the Attorney-General, each government bill is compatible with the listed human rights;
- A parliamentary committee to consider any bill introduced into Parliament and report on whether the bill is incompatible with the listed human rights; and
- Any judicial declaration of incompatibility to be presented to Parliament by the Government.

2.3.2 A WA Human Rights Act and the Executive

A WA HRA should provide:

- It is unlawful for a public authority to act incompatibly with the listed human rights.
The definition of ‘public authority’ should include government departments; statutory authorities; the police and local government. It should also include some private and community bodies when they are doing certain things for the government.
- A person aggrieved by the unlawful conduct of a public authority may obtain a remedy in the form of any orders that a court or SAT considers ‘just and appropriate’ including damages.
- For the creation of a Parliamentary Human Rights Commission with powers and functions including intervention in relevant cases and advising the Attorney-General. Consideration should be given to the Parliamentary Human Rights Commission assuming the powers and functions similar to those currently performed by the Australian Human Rights Commission.

2.3.3 A WA Human Rights Act and the Courts

A WA HRA should provide:

¹⁶ Human Rights Law Centre *Charters of Human Rights Make Our Lives Better* (Report) 2
<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/62e9d75b7c16926c8cadbdc4/1659492229319/Charter_101+Cases_08_22.pdf>.

- For a rule of statutory interpretation to the effect that courts must interpret written law ‘in a way that is compatible with human rights’ and ‘so far as it is possible to do so consistently with the purpose of the HRA.’
- The Parliamentary Human Rights Commission has the power to make a non-binding declaration that a state law is incompatible with human rights.

2.3.4 A WA Human Rights Act and Civil Society

Consideration should be given to mechanisms for the involvement of non-state entities in identifying and preventing infringement of human rights in WA. For example, the work of the Parliamentary Human Rights Commission should facilitate the involvement of professional organisations, business and employer organisations and trade unions. Consideration should be given to allowing such groups to contribute to the development of the law by appearing (with leave) as consultants in any case concerning the listed human rights.

3. Community Support for a WA Human Rights Act

In 2007, the WA Government initiated a community consultation on the introduction of a HRA in WA.¹⁷

The consultation was open to submissions from the community. Of the submissions received which expressed a view as to whether a WA HRA should be introduced, 59% were in favour, and 41% were opposed.¹⁸

The Law Society provided a submission to the consultation in favour of a WA HRA.

The WA Government also engaged a market research consultant to complete a public flash poll to assess public opinions about human rights protections in WA. An overwhelming majority (89%) of respondents believed that WA should have a law that aims to protect the human rights of people.¹⁹

Following the consultation, the recommendation was made that WA introduce a Human Rights Act. The WA Government stated at that time that:

‘The Western Australian Government believes that human rights will only be adequately protected if a human rights culture prevails in our community, in which there is greater awareness of, respect for, and observance of, human rights at all levels of government and throughout the community...The Western

¹⁷ Consultation Committee for a Proposed Human Rights Act, Parliament of Western Australia, *Report of the Consultation Committee for a Proposed WA Human Rights Act* (Report, November 2007) <<https://alhr.org.au/wp/wp-content/uploads/2017/03/Annexure-1-WA-Government-Consultation-Committee-for-a-Proposed-WA-Human-Rights-Act-Final-Report-November-2007.pdf>>.

¹⁸ Ibid 20.

¹⁹ Ibid Appendix E, 1.

Australian Government believes that introducing a WA Human Rights Act would help to establish a human rights culture in this State because it would create a political and administrative culture in which the need to respect human rights is understood and acted upon.²⁰

3. A Federal Human Rights Act

In March 2023, pursuant to section 7(c) of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Attorney-General asked the Parliamentary Joint Committee on Human Rights to review the scope and effectiveness of Australia's 2010 [Human Rights Framework](#) and the [National Human Rights Action Plan](#).

The Australian Human Rights Commission delivered a comprehensive report entitled *Free and Equal* in December 2023 calling for a national Human Rights Act after several years of consultation and Research.

In May 2024 the Parliamentary Joint Committee reported back to the Attorney General with the strong recommendation that Australia Federal Parliament enact comprehensive human rights legislation.

Both the *Free and Equal* Report and the Parliamentary Joint Committee Report acknowledged that a federal human rights act would not replace the need for state acts, given that a federal act would not apply to state based government agencies.

4. The Law Society's Policy Position

The human rights of people in Western Australia are not being adequately protected by existing federal and state legislation. Instead, protections for human rights are drawn from a range of sources including the Constitution, common law, international treaties and Commonwealth statutes. The result is a patchwork of laws that can be difficult for a person to navigate when trying to understand their rights and seeking remedies when their rights are breached.

Public authorities in WA have a responsibility to safeguard the human rights of all people and ought to consider human rights when making decisions and throughout the political process. A Human Rights Act would create a framework for public authorities to proactively consider the effect of government action on individuals ahead of any dispute. It would create avenues to prevent the escalation of issues and enable individuals to seek remedies when their rights have been violated.

²⁰ Ibid 19 [3.1].

The Law Society supports the establishment of a WA Human Rights Act and supports the promotion and protection of human rights.