



Constitutional validity of an Australian Human Rights Act

On 22 April 2009 the Australian Human Rights Commission convened a meeting of Australian constitutional and human rights lawyers to discuss the constitutional implications of an Australian Human Rights Act. This statement records the consensus reached by those at the meeting. Their names are listed below.

Agreement on constitutional validity

The unanimous view of the meeting was that a Human Rights Act for Australia can be drafted that would be constitutionally valid.

In particular, it was agreed that there is no constitutional impediment to an Act that has the following elements:

1. Human rights defined

The Act would identify the human rights to be protected, being rights contained in the International Covenant on Civil and Political Rights.

2. Limitation of rights

It would allow the rights identified in the Act to be limited in defined circumstances, taking into account factors such as the nature of the right and considerations of necessity and proportionality.

3. Bills tabled in federal Parliament to be accompanied by a human rights ‘statement of compatibility’

The Act would require the Attorney-General, or the member introducing legislation, to prepare and table in federal Parliament a human rights ‘statement of compatibility’. The statement of compatibility would, at a minimum, give reasoned consideration to whether the Bill was compatible with the human rights identified in the Act.

4. Federal public authorities would be bound by a Human Rights Act

It would require federal public authorities to act in a way that is compatible with the rights identified in the Act unless required by law to do otherwise. This obligation could extend to organisations acting on behalf of the Commonwealth in carrying out public functions.

5. Courts to interpret legislation consistently with human rights

It would require courts to interpret all legislation of the Commonwealth in a way that is consistent with the rights identified in the Act, so far as it is possible to do so consistently with the purpose of that legislation.

6. The Government to respond publicly if a court finds that a law is inconsistent with human rights

If a court found that it could not interpret a law of the Commonwealth in a way that is consistent with the rights identified in the Act, a statutory process could apply to bring this finding to the attention of federal Parliament and require a government response.

An example of a possible process is as follows:

The Australian Human Rights Commission would be empowered, at the request of a party to the proceeding or of its own motion, to notify the Attorney-General of a finding of inconsistency. The Attorney-General would be required to table this notification in federal Parliament. The Government would be required to respond to the notification within a defined period (for example, 6 months).

Following the Government's response, Parliament might decide to amend the law in question to ensure its consistency with the Act. It would not, however, be required to do so.

There may be other models for a Human Rights Act that would also be constitutionally sound. Those participating in the meeting hold differing views on the best model for an Australian Human Rights Act, including which rights should be included and the details of how best to implement some of the elements set out above.

However, all agreed that the Australian Constitution is no barrier to an effective Australian Human Rights Act.

Participants

The Hon Sir Anthony Mason AC, KBE

The Hon Michael McHugh AC, QC

The Hon Catherine Branson QC, President, Australian Human Rights Commission

Ms Pamela Tate SC, Solicitor-General of Victoria

Mr Simeon Beckett, New South Wales Bar Association

Ms Sarah Moulds, Law Council of Australia

Mr Edward Santow, Gilbert + Tobin Centre of Public Law

Associate Professor James Stellios, Australian National University

Associate Professor Anne Twomey, University of Sydney

Mr Bret Walker SC, New South Wales Bar Association

Associate Professor Kristen Walker, University of Melbourne

Professor George Williams, University of New South Wales

Professor Spencer Zifcak, Australian Catholic University