



A HUMAN RIGHTS ACT FOR THE NORTHERN TERRITORY

Why do human rights need to be formally enshrined in law in the NT?¹

All Territorians would benefit from having their human rights protected in law. Expressing, promoting and protecting human rights by law helps to ensure that rights are upheld and that we are all treated fairly with dignity, equality and respect. When human rights are not protected in law, they are in danger of being eroded. The ACT and Victoria have both legislated for specific human rights protections, and reviews of those Acts have demonstrated the value add to those jurisdictions.

The ALRC states that ‘respect for human rights is the cornerstone of strong communities in which everyone can make a contribution and feel included.’ Formally enshrining human rights in NT law will demonstrate the government’s commitment to protecting, promoting, respecting and fulfilling the human rights of Territorians and strengthen our democracy in the NT.

What are human rights?

Human rights are the basic freedoms that belong to every one of us regardless of our personal background, circumstances or differences. They are based on principles of dignity, equality and mutual respect. They are the things we all need for our wellbeing and to live a dignified life.

Human rights help to keep our society fair, just and equal.

Human Rights in State and Territory Law

State and Territory government authorities are not required to demonstrate their compliance with International human rights instruments like the ICCPR to the Australian Human Rights Commission. Some state and territories have introduced legislation to ensure that state and local governments are accountable to their human rights obligations. These instruments act as mechanisms to ensure State and Territory public authorities are transparent and accountable in how they take human rights into account in the work they do.

The **Australian Capital Territory** (ACT) was the first Australian jurisdiction to pass a version of a Bill of Rights, the *Human Rights Act 2004* (ACT). In 2006, **Victoria** followed suit and passed the *Charter of Human Rights & Responsibilities Act 2006* (Vic). These two acts cover a selective range of rights. By no means do they provide an exhaustive cover of the human rights standards to which Australia is obliged.

¹ Making Justice Work acknowledges, and expresses thanks for, the expert assistance of the Human Rights Law Centre in the development of this briefing paper

These acts create a dialogue on human rights standards between the Executive, Parliament, the Judiciary and the community. They also aim to put human rights at the forefront of governmental decision-making. The ACT and Victorian human rights legislation include civil and political rights, omitting economic, social and cultural rights. The Victorian Charter does however include some protection for cultural rights and explicitly protects Aboriginal identity, culture and language.

The main features of the two Acts are that they:

- Ensure all new legislation is scrutinized for its human rights implications, and before passed by Parliament it is accompanied by a statement of compatibility with human rights;
- Create a rule of statutory interpretation that courts will interpret legislation in a way that is compatible with human rights;
- Create a duty on ‘public authorities’ to act consistently with human rights and to give proper consideration to relevant human rights when making a decision, unless the law states otherwise;
- Establish periodic reviews to consider expanding the scope of protected human rights; and
- Attempt to create a human rights culture by measures such as appointing human rights commissioners, monitoring compliance, educating the public service and community, and promoting awareness of human rights.

In October 2016, **Queensland** announced a commitment to introduce a Human Rights Act. In **New South Wales**, there is ongoing debate regarding the adoption of a state charter of rights and there is a massive community run campaign to push for a Human Rights Act (see <http://www.humanrights4qld.com.au/> and <https://humanrightsforNSW.org/>).

In 2006, the **Tasmanian** Government initiated a community consultation process, which resulted in a final report recommending the adoption of a statutory charter of rights for Tasmania. The Tasmanian government is currently working on what a Charter of Human Rights and Responsibilities for Tasmania might contain. In 2007, the **Western Australian** Attorney General proposed a state Human Rights Act.

Current Northern Territory Human Rights approach

The NTG recently amended the sessional orders of the Legislative Assembly to require that Members, upon presenting a bill, will table a signed explanatory statement and statement on whether the bill is compatible with Human Rights as defined in s3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).² Whilst a step in the right direction, a sessional order does not have the same weight or public status as legislation, and nor does it govern the conduct of public authorities or guide the interpretation of legislation by Courts.

Aside from this sessional order, the closest instrument the NT has to human rights legislation is the *Anti-discrimination Act*. Complaints of unlawful discrimination under the Act are dealt with by the Northern Territory Anti-discrimination Commission. If the complaint is not resolved, it may be referred to the Northern Territory Civil and Administrative Tribunal (NTCAT) to determine whether or not there has been discrimination or other prohibited conduct and to make a decision. The *Anti-Discrimination*

² See sessional order 12.3 at https://parliament.nt.gov.au/data/assets/pdf_file/0004/384205/Sessional-Orders-13th-Assembly.pdf

Act has been recognised as outdated and in need of reform, and current consultations are being held in the NT in this regard.

In the Northern Territory, there has been consultation and many examinations regarding a Human Rights Bill. None have resulted in legislative reform. The discussion in the NT has largely related to the broader political question of Statehood. In 1995 the Legislative assembly published a discussion paper titled 'A Northern Territory Bill of Rights'. In 2005 the Statehood Steering Committee touched on the issue. In 2007, the Steering Committee's discussion paper, contained a section about a Northern Territory Bill of Rights.

Options for ratification of human rights obligations in the NT

There are different options available as to how human rights obligations can be ratified. At a national level, a constitutional bill of rights could be established. This means the rights would be enshrined in the constitution and can only be changed through a complex and challenging amendment process. It also means that parliaments cannot introduce laws that conflict with the rights protected in the constitution of their country. Such constitutional models exist in the US, Canada and South Africa.

In NT law, the preferred option is to introduce a Bill of Rights through legislation. This piece of legislation would be an ordinary piece of legislation that would require the government to respect, protect and fulfil the rights listed in the Act. There are two models that the Act could take, these are:

1. An Act which directly creates legally enforceable rights;
2. An Act which professes not to do that, but which requires courts (a) to interpret all other legislation "in a way which is compatible with human rights"; and (b) where that isn't possible to issue a Declaration of Incompatibility stating that the legislation is contrary to one or more of the enshrined human rights (but without overriding the challenged legislation). This is said to establish a constructive human rights "dialogue" between judiciary and politicians.

The ACT and VIC have versions of the latter. Under the legislative model, Territory Parliament would be required to consider the human rights compatibility of laws being proposed and the Territory courts would be obliged to interpret legislation in a way that is compatible with the human rights listed in the Act. This model would also require government departments and other organisations carrying out public functions to act consistently with human rights and give proper consideration to relevant human rights when making a decision.

Benefits of a Human Rights Act

As well as enshrining human rights in law, a Human Rights Act would provide important social, economic and cultural benefits. Key benefits include:

- a) improving law making and government policy;
- b) improving public service delivery;
- c) protecting marginalised Territorians by addressing disadvantage;
- d) contributing to the development of a human rights culture;
- e) creating and adding economic value;
- f) assisting to fulfil Australia's human rights obligations;
- g) 'bringing rights home' by enabling human rights complaints to be heard;
- h) Providing appropriate avenues to remedy breaches of human rights;

- i) Promoting greater awareness of human rights within government and throughout the community; and
- j) Fostering a strong human rights culture in the NT which will have the potential to lessen the occurrence of human rights breaches.

A Human Rights Act in the NT would better safeguard the rights of Aboriginal and Torres Strait Islander people, who comprise approximately 30% of the population in the NT but disproportionately experience unacceptable levels of disempowerment, disadvantage and discrimination. A Human Rights Act that includes protections of cultural rights would be in step with the NTG's commitment to establishing an Aboriginal Justice Agreement in the NT. Further, a Human Rights Act for the NT is timely to consider given Australia's recent appointment to the UN Human Rights Council.

Examples of who has been helped by Human Rights Acts in other jurisdictions

In Victoria, the Human Rights Charter was used to protect vulnerable children in detention. After riot damage to a youth justice centre, the Victorian Government set up a new youth justice centre in a unit in the maximum security adult Barwon Prison and started transferring children as young as 15 there. The conditions in the unit were very harsh, including the use of extended arbitrary confinement, regular handcuffing and the denial of proper education.

The Victorian Aboriginal Legal Service (VALS) took legal action using the Charter and other laws to get all the Aboriginal children back into normal age-appropriate youth justice centres. VALS argued that locking up children at Barwon Prison breached their human rights, including their rights to humane treatment, protection of children and Aboriginal cultural rights. The Victorian Government settled the legal action by agreeing to remove all Aboriginal children from Barwon Prison and to not transfer any Aboriginal children other than in very limited circumstances. The Charter was later used to bring successful legal action to remove all remaining children from Barwon Prison.³

Here in the NT, the disturbing revelations as to conditions and practices in youth detention that emerged during the Royal Commission into the Protection and Detention of Children make discussions about a Human Rights Act particularly imperative. A Human Rights Act could provide vulnerable children with additional protection from such treatment in future.

³ See *Certain Children v Minister for Families and Children* (Victorian Supreme Court, 2017)