

CLA checklist for a future Human Rights Act (HRA)

A HRA identifies the human rights drawn from the seven UN Human Rights Instruments ratified by Australia that the Australian Parliament agrees should be legally protected within its jurisdiction. Does this HRA and its subsidiary instruments:

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Guarantee that all Australians can fully participate in civil and political life without discrimination or repression by including all rights in the International Covenant on Civil And Political Rights?			
Enable the full enjoyment of civil and political rights by including all rights in the International Covenant on Economic, Social and Cultural Rights?			
Cover rights in other Human Rights instruments ratified by Australia, including: • International Convention on the Elimination of All Forms of Racial Discrimination; • Convention on the Elimination of All Forms of Discrimination against Women; • Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; • Convention on the Rights of the Child; and • UN Declaration of the Rights of Indigenous Peoples.			

A HRA codifies how those rights will be upheld, either in the Act or through subsidiary laws and regulations created to implement the Act. Does this HRA and its subsidiary instruments

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Contain mechanisms to ensure that Parliament is obliged to uphold the provisions of the HRA when passing any new legislation or amendments to existing legislation?			
Permit a stand-alone, direct cause of action to the Federal Court and/or a HRA-based cause of action to attach to an independent legal claim?			
Ensure that courts interpret new legislation or amendments consistently with the HRA, and declare legislation to Parliament if it is inconsistent with a HRA?			
Require Parliament to respond to a declaration by the courts?			

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Ensure that an independent tribunal decides and enforces resolutions where rights are in conflict?			
Ensure that an independent tribunal holds government decision makers responsible for acting consistently with the HRA?			
Provide effective, timely and inexpensive access for people to an independent tribunal able to mandate remedies for successful HRA-based complaints raised by individuals about government decisions?			

A HRA specifies the circumstances under which Federal Parliament can override the human rights of individuals in its jurisdiction. Does this HRA and its subsidiary instruments:

	<u>Yes</u>	<u>No</u>	<u>Somewhat</u>
Constrain Parliament's ability to override the HRA to specific and clearly defined circumstances?			
Place a sunset clause on any legislated override?			
Apply to everyone within the Commonwealth's jurisdiction?			

BACKGROUND: *What is the practical effect of a HRA?*

1. Ensures that all new legislation and amendments take into account the Parliament's obligation to uphold human rights included in the HRA.
2. Creates a rule of statutory interpretation that courts will interpret legislation in a way compatible with the rights included in a HRA: and, if they find legislation inconsistent with a HRA, make a declaration to Parliament that further consideration of that law is needed.
3. Creates a duty for government decision makers to properly consider, and act consistently with, human rights in all their decisions and actions.
4. Forms the foundation of an ethical infrastructure to underpin society, based on human rights, ensuring a consistent approach to: compliance monitoring; holding people and organisations to account; conciliation; remedy; damages; and education through mechanisms independent of Government, including Human Rights Commissioners, Integrity Chiefs, Ombudsmen and the Courts.
5. Ensures there are ways that are independent of Government to referee rights in tension with each other.

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BACKGROUND: The best HRA for Australia based on lessons from the ACT, Victoria and Queensland:

CLA maintains that:

- Upholding all human rights through an ethical infrastructure that is applied consistently, drawing on a single codified set of human rights, is the best way to create a society that is sustainable and liveable, enjoying the most possible liberties and freedoms;
- A HRA articulates the government's obligation to be humane to the powerless; and
- A HRA provides common ground for discussing ethics inside government, and outside.
- Once a HRA has been legislated, the role of adjudicating when rights come into tension with each other, with other interests, or where multiple competing rights and interests need to be resolved, is best left to an independent tribunal.

CLA notes that HRA in Australian jurisdictions:

- do not wholly commit their governments to upholding all the human rights covered in UN International Human Rights instruments to the limit of their capacity as jurisdictions;
- do not commit governments to respond to incompatibility declarations by the courts; and
- do not provide a simple, efficient and direct pathway to a binding remedy for individuals with a human rights based complaint about a government decision that is independent of the decision maker.

CLA therefore advocates that:

- The HRA should include all rights Australia is committed to observe, nationally, under the seven UN International Human Rights Instruments.
- The circumstances under which a federal government can override the human rights of individuals are limited to at most: war; a state of emergency; and an exceptional crisis constituting a threat to public safety, health or order; and will be covered by a sunset clause.
- As there are no rights without remedy, a HRA and subsidiary laws and rules should provide a clear pathway to an independent tribunal for people with a human rights complaint about a government decision. *(normally through the decision maker's complaints process, conciliation through the Australian Human Rights Commission and a case before the Administrative Appeals Tribunal; in very rare cases, to higher courts)*