

How are rights enforced in Australia?

Federalism has left Australia with a complex legal infrastructure, with the Constitution defining what is in the States' jurisdiction, and what is in the federal government's jurisdiction. The Constitution also gives the Commonwealth some powers to override the States in their own jurisdictions. Some rights are guaranteed by the Constitution¹ and we have inherited others through English Common Law.²

Human rights are also scattered through legislation, but clumps of them are focussed in various discrimination laws, which allows individuals to make a complaint and seek remedy for breaches of some rights.

There's a jigsaw of rights: it's hard to see the overall picture.

The Commonwealth has a range of legislation offering remedies for discrimination on the grounds of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction, and social origin.

Each state and territory has similar but not identical legislation for their jurisdictions: either a Discrimination Act (ACT), an Anti-Discrimination Act (NSW, Northern Territory, Queensland and Tasmania) or an equal opportunity Act (South Australia, Victoria, WA).

In addition, the ACT (2004), Victoria (2006) and Queensland (2020) have Human Rights Acts.

In Victoria, legislation and government decision making must account for human rights, but only discrimination cases can seek remedy through the Victorian Human Rights Commission. Human rights can be used at court, but only as a secondary cause of action.

The ACT legislation is the same in essence as the Victorian legislation, except that human rights complaints can be taken to the ACT Supreme Court, which can make recommendations for remedies but cannot mandate them.

Queensland has built on the Victorian legislation by allowing any human rights complaint to be taken before the Queensland Human Rights Commission but it does not provide access to the Queensland Supreme Court for human rights complainants.

None of the three jurisdictions with a Human Rights Act allows individuals a mandated remedy from a tribunal where the primary cause of action is a human rights breach.³

So, instead of a single statement of principles in a Human Rights Act, we have a mish-mash of legislation with interpretations of rights sprinkled through the various laws that differ from jurisdiction to jurisdiction, and which lack any coherence.



The upshot is an ethical infrastructure that is:

- a vast maze of frustration and helplessness for people with human rights complaints;
- not fit for purpose for efficient and effective decision making; and
- open to the removal of rights by stealth.

¹ From a human rights perspective, the Constitution guarantees: right to vote; acquisition of property on just terms; trial by jury; freedom of interstate trade, commerce and intercourse; freedom of religion; no discrimination between residents of states; and an implied freedom of political communication.

² The common law we inherited from the British gives us: property rights; presumption against retrospectivity; fair trial; burden of proof – presumption of innocence; privilege against self-incrimination; legal professional privilege; appeal rights; procedural fairness – right to a hearing and apprehended bias claim; presumption against delegation; defamation; and executive immunity.

³ The ACT Government in October 2022 announced it would expand the ACT Human Rights Commission brief to respond positively to the “Nor Rights Without Remedy” petition initiated by CLA, Canberra Community Law and ACTCOSS in 2021. The ACT Legislative Assembly will, in the short term, pass new law to enable a complaint about any breach of any clause of the ACT Human Rights Act 2004 to be made to the ACT Human Rights Commission for confidential conciliation. Over a period in 2023, the ACT government will evaluate the possible staffing and financial cost – if conciliation is unsuccessful – of enabling a complaint about a breach of the Human Rights Act 2004 to be made to the ACT Civil and Administrative Tribunal (ACAT) for resolution. When that option is extended into ACAT, the ACT will be the first Australian jurisdiction to open any human rights complaint to confidential conciliation, then mandated remedy through a tribunal if needed (or access to the Supreme Court for major issues and/or legal finality). This final step will let everyone see how the jigsaw fits together so that it can work simply, quickly and cheaply for them and how the complete system will help people in power make better decisions affecting individual citizens in the future.

