



A Charter

protecting the rights
of all Australians



Law Council
OF AUSTRALIA

Case Studies

Case Studies: Filling the Gaps in Protection



Why does Australia need a Charter of Human Rights?

First, a Bill or Charter of Human Rights is something we need to restore our reputation as a country that values and protects individual rights and freedoms.

Australia is the only western democracy without a national Charter or Bill of Human Rights and many Australians think we already have a Bill or Charter of Rights in Australia.¹

Second, there are gaps in the human rights protection currently available at the federal level.

For example, there is no specific law protecting freedom expression, freedom of movement, freedom from torture, the right to liberty and security of person, or the right to humane conditions of detention.

There is also no requirement that the Government or any other public official take human rights into account when making or applying laws. This means, for example, that the Government can pass laws that discriminate against people on the grounds of race, gender or disability without having to tell the Parliament or the public that these laws breach human rights principles.

The following examples illustrate how a Charter of Human Rights would help fill the gaps in human rights protection at the federal level.

Example 1

Imagine you car pool with a colleague from work. While you share lifts each day you have not become close friends, but you know that your colleague is actively involved in the Islamic community and often helps refugees from the Middle East settle into life in Australia. One day the media reports that there has been a failed terrorist attack on the MCG.

On the way home from work with your colleague, your car is stopped by the police.

¹ Research by Amnesty International in 2006 found that more than 60% of Australians incorrectly thought that Australia *already had* a Charter or Bill of Rights in place.

Both you and your colleague are arrested. You are held in the police lock up overnight without being told of the charges against you. You later learn that your colleague is suspected of being a member of a terrorist organisation. You are held in the police lock up for a further 5 days and questioned by police for long periods.

Meanwhile your home is searched and your lap top seized by police. Your picture is on the front page of the Australian newspapers and your wife and children have been harassed by the media. Finally you are released without being charged with any offence.²

This type of treatment is in breach of your human rights to liberty, to know the charges against you and to humane treatment while in detention, to name a few. Under a Charter of Rights, you may be able to challenge this treatment in court as a breach of your human rights.³ Further, under a Charter, the Government would not be able to pass laws authorising this type of treatment without first making it clear to the public and the Parliament that the law is in breach of human rights.

Example 2

Imagine you are a retired Aussie Rules football player who has been honoured for your contributions to sport in Australia. You have two adult children who now live interstate. You have suffered a permanent spinal injury and as a result you rely on a disability pension to get by. Because you live in the Northern Territory and because you are Aboriginal, half of your pension has been quarantined by Centrelink for food and other

² This example is broadly analogous to the case of Dr Mohamed Haneef. Detention without charge is currently lawful under Part 1C of the *Crimes Act 1914* (Cth). Under Division 102 of the *Commonwealth Criminal Code* it is an offence to associate with a member of a terrorist organisation.

³ For example, human rights considerations relating to conditions of detention were raised during the applications for bail in the Benbrika terrorism trials, wherein 12 accused were charged with a number of terrorist organisation offences. See for example, *R v Benbrika & Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008).

necessities. You have effectively lost control over how your money is spent.⁴

Under a Charter of Rights, before passing this law, the Government would need to have had made it clear to the Parliament and the public that this law is in breach of your right to be free from discrimination.

Example 3

Imagine you live in a Sydney suburb that is directly under the flight path for the Sydney airport. You have a young child who has only recently begun sleeping through the night. Currently the curfew for flights is between 10pm and 6am, however the Minister⁵ has just decided to shorten the curfew to between 12 midnight and 4am.⁶

Under a Charter of Rights, you could seek a declaration or finding from the court that this shorter curfew breaches your right not to have your privacy, family or home arbitrarily interfered with. Under a Charter, the Minister would be required to take these considerations into account when determining whether or not to shorten the curfew.

Example 4

Imagine you are a young woman with a baby. You have recently left a physically and mentally abusive relationship with the father of your child and are now living with your parents. During the past year, you have often spent time at various relatives' and friends' houses to escape the violence of your partner.

The father of your child has gone to the Family Court to seek full-time residence of the child. He claims that you live an 'erratic lifestyle' and would not be able to provide the child with a stable home. You can't afford to pay for a lawyer, so you apply for legal aid. Your application is

⁴ This example is analogous to the NT Emergency Response Legislation, which introduced a system of quarantining welfare payments for Indigenous Australians and suspended the operation of the *Racial Discrimination Act 1975* (Cth).

⁵ Under the *Sydney Airport Curfew Act 1995* (Cth) ss6, 23 the Minister has the power to set and change the Sydney Airport curfew.

⁶ This example is analogous to a case heard in the European Court of Human Rights, *Hatton v United Kingdom* [2003] ECHR 338, wherein the European Court upheld a claim that certain airport noise from Heathrow airport constituted a violation of Article 8 of the *European Convention on Human Rights*, which protects the right to respect for a person's private and family life, his home and his correspondence. This right is also protected under section 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

denied. You represent yourself at the trial, and although you try to tell the court about the domestic violence, you are unable to arrange for any witnesses or experts to give evidence. Full-time residence is awarded to the father.⁷

Under a Charter of Rights, you could have applied for a review of the decision to refuse legal aid on the basis that your right to legal representation⁸ and your right to be treated equally before the law had been breached.⁹ Under a Charter, the Commonwealth program under which legal aid funding is provided would have to consider the human rights implications of the guidelines for funding such cases.

Example 5

Imagine your 17 year old son goes with a group of friends to the Australia Day celebrations held on the lawns of Parliament House in Canberra. The event is marketed as an all-ages, alcohol free event and the Australian Federal Police have promised to take a tough approach to any underage people caught drinking alcohol or consuming illicit drugs. Your son is caught holding a small container of coloured pills for someone else outside the toilets. The pills are later confirmed to be amphetamines. Your son is arrested by the AFP but because the local police cells are full he is transported to the adult remand centre where he is imprisoned over night. In the same remand centre are a number of adult offenders charged with serious violent offences. Your son is highly traumatised after being harassed by other inmates while in custody.

Under a Charter the AFP would have to consider the human rights implications of its detention policy following arrests of juveniles in Commonwealth places and the implications this might have on decisions relating to bail.

⁷ This example is analogous to the case of *T v S* [2001] Fam CA 1147 heard by the Full Court of the Family Court in 2001. In *T v S*, the Mother was denied legal aid and was self represented at the trial. The Judge did not accept her evidence of domestic violence. The Mother later obtained legal representation and appealed the order. The appeal was upheld. During the course of his judgment, Nicholson CJ referred to international human rights principles regarding freedom from discrimination and the right to legal representation.

⁸ The right of a person to legal representation is protected under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s25(2)(f), however it is limited to the right to legal aid in respect to criminal proceedings, if the interests of justice require it, provided the person meets the eligibility criteria set out in the *Legal Aid Act 1978* (Vic).

⁹ The right to equal treatment before the law is protected under Articles 14(1) and 26 of the *International Covenant on Civil and Political Rights*, as well as under section 8 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).



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