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**Inquiry into a Statutory Bill of Rights  
for New South Wales**

**Legislative Council Standing Committee on Law and Justice**

**Submission from  
Public Interest Advocacy Centre**

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## **Introduction**

This submission was prepared by Dr Patricia Ranald, Principal Policy Officer, with assistance from Simon Moran, Solicitor.

## **About PIAC**

The Public Interest Advocacy Centre (PIAC) is an independent and non-profit legal and policy centre located in Sydney. Its charter is:

To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the matters PIAC undertakes are often of national interest or importance or have consequences beyond state boundaries.

PIAC's work goes beyond the interests and rights of individuals. The Centre's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services free or at minimal cost.

In 1992, PIAC established the Public Interest Law Clearing House (PILCH) which facilitates access to legal advice free of charge or at a reduced rate for people and organisations seeking legal assistance in matters of public interest. Members of PILCH who provide this service include private law firms, barristers and accounting firms in NSW.

PIAC's 2000-2003 strategic plan includes as one of its priority areas to ensure access to human rights for citizens in the context of increasing economic inequality, deregulation and the transfer of regulatory powers from the national to the international level. A legislated Bill of Rights for New South Wales is one means of securing access to such rights.

This submission addresses terms of reference a) to e), g) and i).

## **The Need for a Bill of Rights**

Australia is a signatory to the United Nations Declaration of Human Rights (UNHDR) adopted in 1948 as “ a common standard of achievement for all peoples and all nations”. The declaration recognised the “inherent dignity and equal and inalienable rights” of all people, and sought to reaffirm and to protect the human rights which were so dramatically violated by authoritarian regimes before and during World War Two (UNHDR, 1948:1). It contains basic human rights, civil and political rights and economic, social and cultural rights.

The International Covenant on Civil and Political Rights (ICCPR), adopted in 1966, is a more detailed elaboration of the rights of citizens contained in the UNHDR. These relate specifically to the rights and freedoms of citizens in respect to the powers of the state. The International Covenant on Economic, Social and Cultural rights (ICESC), also adopted in 1966, further elaborates the economic, social and cultural rights set out in the UNHDR. These three documents are known collectively as the International Code of Rights. Successive Australian governments have supported them through a ratification process which includes parliamentary debate and consultation with state governments. They have also adopted other Conventions like the Convention on the Rights of the Child, which are relevant to a Bill of Rights. This process indicates broad political support for the rights contained in these instruments. Ratification of the instruments also carries obligations to implement them.

*These rights are not guaranteed in the constitution*

Some have claimed that there are sufficient rights both explicit and implied in the Australian constitution. However the explicit rights contained in the constitution are very few. They include freedom of religion, trial by jury and compensation for government acquisition of property (Victorian Council for Civil Liberties, 1995). The High Court has found that some other rights such as freedom of speech on political matters are implicitly guaranteed (Australian Capital Television v the Commonwealth, 1992). But most of the rights in the UNHDR and ICCPR and the ICESC are not found in the constitution. This is in part because the constitution, written at the end of the nineteenth century, pre-dates these covenants, and the events and analysis of them which generated them .

*The common law does not provide comprehensive or consistent protection*

Australia has inherited the British common law tradition. This tradition has relied in part on the establishment of rights through case law rather than through legislation. However in the absence of the codification of rights, case law does not provide comprehensive or adequate coverage of the rights listed above. Moreover, the application of case law relies on the commitment of individual judges to the rights in question, which can be variable (Gibbs and Eastman, 1995). Protection of rights can also be reduced or qualified over time by developments in case law.

*Constitutional and common law procedures are lengthy expensive and uncertain*

Both constitutional and common law remedies must often be pursued in the High Court, a procedure of such length, expense and uncertainty that it is beyond the reach of most citizens, especially the most vulnerable groups whose rights are often most at risk.

*Protection of the rights of minorities.*

In the context of a democracy, a Bill of Rights provides protection for the rights of minorities which have often been neglected or over-ridden by legislation or administrative action. Thus those who may not have a voice in the major parties or in the political system can have access to justice through a Bill of Rights (Toohey, 1998).

### *Protecting Human Rights in the context of Globalisation*

Global markets for trade and investment have contributed to economic pressures on governments, resulting in political choices which have in practice eroded human rights. For example, there is widespread evidence of the erosion of human rights as governments compete to attract investment to export processing zones by ignoring or abolishing the rights of workers and through neglect of environmental and/or health and safety regulation (Shoemith 1988, Caspersz, 1995, Amnesty International, 1997). In industrialised countries, including Australia, there has been a growth in unregulated forms of labour like home-based work in the clothing industry. Home-based workers have no labour rights or health and safety protection, and receive less than the legal minimum wage (Textile Clothing and Footwear Union, 1995). A number of governments in industrialised countries, including the Australian government, have passed legislation which is in conflict with United Nations and ILO conventions on the rights of workers to organise and to collective bargaining. This has been justified in part by appeal to the need to increase productivity and reduce labour costs in an increasingly competitive global economy.

At the same time many forms of economic regulation are being transferred through negotiation by governments to international bodies like the World Trade Organisation which can enforce them through economic sanctions. This international economic regulation creates uniform conditions for trade and investment for corporations but neglects the protection of human rights.

International human rights covenants through the UN have no comparable enforcement mechanisms to those of the WTO. They rely on implementation through domestic legislation in each member country. A Bill of Rights is a mechanism for such implementation.

In this global context, it is imperative that access to fundamental human rights be strengthened at both the national and the international levels, in order to avoid a race to the bottom on human rights. Governments which have a firm domestic legal basis for human rights can argue with more credibility for their protection in the context of international institutions. This has been recognised by governments in a wide range of countries which have legislated Bills of Rights.

### *Bills of Rights in other Countries*

Australia is one of the few industrialised countries which does not have a Bill of Rights. Some countries like France and the United States have Bill of Rights which pre-dated the UN instruments. There has also been a growing trend for legislated Bills of Rights, even in countries which have inherited the tradition of British common law. The following list, which is not exhaustive, shows that a growing number of countries with and without a British common law tradition have legislated or Constitutional Bills of Rights. The most recent is the United Kingdom itself, which legislated the European Convention and has also ratified the European Social Charter on Economic and Social Rights.

1950 Adoption by the Council of Europe of the European Convention on Human Rights which is legally enforceable through the European Court of Human Rights. The Convention has been subsequently strengthened by amendment, and by a growing number of signatories. By 1998 it had 41 country signatories in Western and Eastern Europe, many of which have enacted equivalent domestic legislation.

1982 Canadian Charter of Human Rights and Fundamental Freedoms (Constitutional)

1984 Tanzanian Bill of Rights

1987 Philippines Bill of Rights (strengthened previous Constitutional Bill suspended under Martial Law)

1990 New Zealand Bill of Rights (Legislated)

1996 South African Bill of Rights (Constitutional)

1992 European Union (15 Western European countries) adopts the Charter on the Fundamental Social Rights of Workers (The Social Charter)

1997 The United Kingdom ratifies the European Social Charter

1998 United Kingdom Human Rights Act (legislation for the European Convention).

*Need for a Statutory Bill of Rights in NSW*

Neither the Constitution nor the common law provides national protection for the range of rights which Australia has supported through international conventions.

There is currently no Federal government support for a referendum for constitutional change for a Bill of Rights.

Legislation at the state level for a Bill of Rights is however possible. Such legislation could address the immediate need of the people of NSW. The existence of a Bill of Rights to which all legislation must conform would educate both legislators and the general community about the need to respect human rights.

The legislation could also provide a model for other states and for future Federal change in the same way as state anti-discrimination legislation paved the way for legislation at the Federal level.

## **International Covenant on Civil and Political Rights**

The Covenant includes clauses on the right to life, liberty and security of person, freedom from slavery and servitude, freedom from torture and cruel inhuman and degrading treatment or punishment, freedom from discrimination, the right to recognition everywhere as a person before the law, the right to an effective judicial remedy, freedom from arbitrary arrest, detention or exile, the right to be presumed innocent until proved guilty, the right to a fair trial and public hearing by an independent and impartial tribunal, freedom from arbitrary interference with privacy, freedom of movement, the right of asylum, the right to nationality, the right to found a family, the right to own property, freedom of thought, conscience and religion, freedom of opinion and expression, right of association and assembly including the right to join trade unions, and the right to take part in government (International Covenant on Civil and Political Rights, 1966).

### *Australian Support for the ICCPR.*

Australia has ratified the ICCPR. In 1991 Australia also ratified the (First) Optional Protocol to this covenant, which enables complaints to the UN Human Rights committee about interference with their rights as elaborated in the covenant.

Many of them are observed already in practice in Australia. They should be included in a legislated Bill of Rights to ensure that legislation and public policy are consistent with them and that all citizens have access to them.

## **The International Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights (ICESC) further elaborates the economic, social and cultural rights set out in the Universal Declaration of Human Rights.

These include the right to self-determination of peoples, the right to work with fair wages, equal pay for equal work, safe and healthy working conditions and reasonable working hours, non-discrimination in employment, the right of women to maternity leave, the right to organise unions and bargain collectively, a legislated minimum working age and the right of children to be protected from economic and social exploitation. Also included are the right to social security including social insurance, the right to a minimum standard of food, clothing and housing, the right to services to ensure a reasonable standard of physical and mental health, the right of access to education and the right to take part in cultural life (ICESC, 1966).

Like civil and political rights these rights reflect the human values of dignity and equality and are no less important. Lack of access to fair conditions of employment, housing and health services can also prevent the exercise of other rights.

The Covenant recognises that some of these rights are dependent on the ability of governments to develop policies and to finance programs to provide access to particular services. It therefore obligates governments to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present covenant by all appropriate means ” (ICESC, 1966:2).

Australia has ratified this Covenant. Many of these rights are reflected in law and policy in Australia, but not all have access to them.

Evidence from a wide range of sources indicates the growth of inequality and the persistence of poverty in Australia. The numbers of people living in poverty have increased over the last decade (Saunders, 1996, Harding and Szukalska, 1999). One million Australians live on unemployment benefits which are 20% below the official poverty line (ACOSS, 2000). Homelessness has also increased , as has the number of people approaching homeless services for assistance (Australian Institute for Health and Welfare, 1999).

Australia has moved from 7th to 15th place on the United Nations index of human development, making it one of the most unequal of all industrialised countries (ACOSS, 2000).

In this context, both Federal and State governments have been reducing expenditure on employment programs and on public housing. There have also been increased restrictions on eligibility for unemployment benefits and other government payments (Community Organisations, 1998).

These restrictions and reductions in services have the greatest impacts on the most vulnerable.

For example, newly arrived migrants are not eligible for unemployment benefits for two years after arrival. A study of the living conditions of newly-arrived unemployed migrants found that those with relatives in Australia often became unpaid servants in return for board and keep. Others with children attempted to live on family payments and food parcels from charities. This resulted in illness and malnutrition of children (Welfare Rights Centre, 1998).

Many newly arrived migrant women work as home workers in the clothing industry. They work in completely unregulated conditions with no health and safety protections or labour rights at rates as low as two dollars per hour (Textile, Clothing and Footwear Union, 1995).

Indigenous people suffer systemic discrimination. They have a life expectancy 20 years below that of other Australians, with higher rates of infectious diseases linked to sub-standard housing. They have lower school retention rates, lower labour force participation rates and higher rates of imprisonment than other Australians (ABS 1999 and Australian Institute for



Health and Welfare, 1999). Indigenous unemployment rates are twice as high as those of other Australians (Taylor and Hunter, 1998).

Up until the 1960s, many indigenous children were forcibly removed from their parents. Many suffered long term detrimental effects and, in some cases, physical or sexual abuse after being removed (National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997).

The inclusion of economic and social rights in a Bill of Rights would provide a clear framework for state legislation to address those issues. It would also provide redress for the most vulnerable who are without access to adequate conditions of work, housing and health services in areas which are the responsibility of the State government. Such rights are contained in the European Social Charter, which is legally binding on 15 Western European countries, including the United Kingdom, and in the Canadian and South African Bills of Rights.

### **Rights of Indigenous Peoples**

The United Nations is still debating the Draft Declaration on the Rights of Indigenous Peoples. This seeks to protect the collective rights of indigenous peoples as distinct from individual rights. The general principles include the right to life and existence as a people with distinct culture and traditions, the issues of education and language, rights to lands and resources and access to political institutions and legal systems (Berger and Hunt, 1994).

Indigenous people in New South Wales should be specifically consulted as to their views on the inclusion of these issues in a legislated Bill of Rights.

New South Wales and Federal governments have recognised some cultural and land rights in specific legislation, although the adequacy of that recognition is still the subject of debate. Indigenous rights have been recognised in South Africa, Canada, New Zealand and the Scandinavian countries. Inclusion of such rights in a Bill of Rights would give some security of basic standards in future legislation.

### **Whether individual responsibilities should be included in a Bill of Rights**

The legitimacy of government in a democracy is founded on the democratic will of the people which establishes the constitution and elects the parliament. The general obligations of citizens are to abide by laws which derive their legitimacy from democratic structures.

The purpose of a Bill of Rights is to enshrine universally recognised human rights and to protect people from abuse of power by government or other public bodies. Its purpose is not to list the duties of individuals towards government. Government is established to serve the people, not vice versa. Bills of Rights in other countries do not contain such duties.

## **In what circumstances Parliament might override basic rights**

The circumstances in which Parliament might override a Bill of Rights containing basic human rights should be very narrow. Following the ICCPR, there should be no overriding of the right to life, freedom from slavery, freedom from discrimination, freedom of religion and belief, freedom from torture or freedom from arbitrary arrest. The South African Bill of Rights also forbids the overriding of the rights of detained and accused persons to a fair trial and of the rights of children.

Circumstances in which other rights might be suspended could include genuine emergencies such as war or major natural disaster. They should not include legitimate civil protest or industrial disputes.

Such a state of emergency should be announced prospectively and should be for a limited period of a few days, until parliament is convened. Extensions should be specifically time-limited and only approved by a parliamentary majority.

## **Extent and Manner of Enforcement**

### *Extent of Enforcement*

The Bill of Rights must be enforceable if it is to be effective and relevant to the community. Enforceability focuses on two issues; providing remedies for individuals for the breach of their rights and enforcing the requirement that legislation be consistent with the Bill of Rights.

### *Cause of action to individuals*

The rights contained in the Bill of Rights relate to individuals and to the community in general. Where an individual's rights are breached by government actions then individuals must have standing to enforce their rights. Individuals would have a right of action in the Courts where they could seek an appropriate remedy. Remedies could include damages and injunctions.

### *Declaration of invalidation of legislation*

All legislation in NSW should be consistent with the Bill of Rights, as it is would be fundamental statement of rights in NSW. Where a breach of the Bill of Rights occurs through the provisions or operation of legislation then Courts must have the power to address this breach on the application of an individual or interested party. The Court should have the power to make a declaration of inconsistency and then be able to disallow or read down part or all of the legislation.

This review process can be facilitated either by entrenching the Bill of Rights through constitutional change or by inserting a clause in each piece of legislation that states that the legislation is subject to the Bill of Rights, which would be a separate enactment.

*Manner of Enforcement: through the Supreme Court*

The Supreme Court should have original jurisdiction in proceedings based upon the Bill of Rights. The Court has the required standing in the community to make decisions on the important issue of citizens' basic rights. The court also has wide powers, contained in *Supreme Court Act NSW 1970*, to make orders it thinks are appropriate.

*No costs jurisdiction*

Litigation is, in PIAC's experience, complicated, expensive and risk laden. Even for litigants with strong cases there is always the possibility that the Court could find against them. This is particularly important for impecunious litigants who are most likely to need to seek redress for breach of their rights and least able to bear the costs of litigation.

The general rule for the use of the Court's discretion in awarding costs at the conclusion of litigation is that 'costs follow the event'. Essentially this means that the winning party has their costs paid by the other party.

The risk of adverse cost orders disproportionately affects those seeking to enforce their rights under the Bill of Rights compared with the potential respondents in such proceedings. It is common that there is significant disparity between the financial resources of an individual complainant on the one hand, and those of the respondent, government bodies, on the other. The risk of an adverse costs order will mean that many disadvantaged people will not proceed to the hearing stage of an application for breach of their rights.

It is therefore essential to the goal of an accessible and effective Bill of Rights that applications brought under it should be covered by a 'no costs' rule. This can be achieved by including in the Bill of Rights a provision which states that in any action taken under the enforcement procedures of the Bill of Rights the parties will bear their own costs.

*Standing*

A central role of the Bill of Rights is to ensure that all legislation is compatible with the rights contained in it. Challenging the validity of a piece of legislation will invariably involve complex litigation, again involving substantial risks, and with largely community, rather than individual, benefits. While individuals may seek to challenge legislation, as well as seeking redress for individual breaches, there is no reason why standing should be limited to these individuals. There should therefore be wide standing provisions for organisations with a sufficient interest in the operation or provisions of the legislation, in addition to individuals directly affected, to challenge legislation that is perceived to be incompatible with the Bill of Rights.

## **Whether legislation should be construed in a manner compatible with international human rights instruments**

Legislation should be construed in a manner which is compatible with UN Human Rights Instruments. Ratification of these instruments is a public commitment to the principles contained in them. They should then be implemented through domestic legislation, and other legislation should be compatible with them.

Even if this does not occur, the High Court has ruled that the ratification of a convention is a commitment that the executive and its agencies should conform with that convention (*Minister of State for Immigration and Ethnic Affairs vs Teoh*, 1995). Several prominent judges have argued that mandatory sentencing for juveniles in the Northern Territory violates the UN Convention on the Rights of the Child which Australia has ratified (*Santow*, 2000).

### **Conclusion**

The context of global economic pressure and growing inequality means that the need for protection of basic human rights is acute. This has been recognised by increasing numbers of governments around the world. Australia remains one of the few industrialised countries without a Bill of Rights. The NSW Parliament has the opportunity to exercise leadership and pave the way for the protection of human rights. PIAC urges it to do so.

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