

Human Rights Bill 2011 –

Final Draft

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Human Rights Act

An Act to respect, protect, promote and fulfil human rights

Preamble

- 1 Human rights are necessary for people to live lives of dignity and value and are essential to a democratic and inclusive society.
- 2 Respecting, protecting and promoting the rights of people improves the welfare of the whole community.
- 3 Human rights are set out in this Act so that individuals and authorities know what their rights and obligations are.
- 4 Setting out these human rights also ensures they are taken into consideration in the development and interpretation of legislation.

- 5 This Act encourages people to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.
- 6 Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One person's rights may also need to be weighed against another person's rights.
- 7 Although human rights belong to all people, they have special significance for Aboriginal people, the ongoing custodians of this land who are members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

Part 1 Preliminary

1 Name and Purpose of Act

- (1) This Act is the *Human Rights Act 2011*.
- (2) The purpose of this Act is to respect, protect, promote and fulfil human rights.

2 Dictionary

The dictionary at the end of this Act is part of this Act.

Part 2 Scope of Act

3 **What are *human rights*?**

In this Act:

human rights means the civil, political, social, economic, cultural and environmental rights in part 3.

4 **Who has human rights?**

All human beings have human rights.

5 Rights apart from Act

This Act is not exhaustive of the human rights a person has under domestic or international law and does not abrogate or limit those rights.

Part 3 Human rights recognised under this Act

6 Recognition and equality before the law

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

- (4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Examples of discrimination

Discrimination because of race, colour, sex, intersex, sex and/or gender diversity, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability, homelessness, social status or other status.

7 Prohibition on Capital Punishment

The State may not take the life of a citizen.

8 Protection from torture and cruel, inhuman or degrading treatment etc

- (1) All people have the right to be free from—
- (a) torture; or
 - (b) treatment or punishment that is cruel, inhuman or degrading.
- (2) All people have the right to be free from being subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.
- (3) Nothing in (2) above limits the capacity of a parent or guardian to consent on a child's behalf to medical treatment.

9 Protection of children

Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

Examples of distinction or discrimination

Distinction or discrimination because of race, colour, sex, intersex, sex and/or gender diversity, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability, homelessness, social status or other status.

10 Privacy and reputation

- (1) Everyone has the right to privacy including the right to freedom from:—
 - (a) unlawful or arbitrary interference with their family, home or correspondence; and
 - (b) malicious attack on his or her reputation.
- (2) No one may be subject to disadvantage or denial of goods or services because they chose to exercise a right to privacy.

11 Freedom of movement

Everyone has the right to move freely within NSW and to enter and leave it, and the freedom to choose his or her residence in NSW.

12 Freedom of thought, conscience, religion and belief

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—

- (a) the freedom to have or to adopt, or not have or adopt, a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
- (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt, or not have or adopt, a religion or belief in worship, observance, practice or teaching.

13 Peaceful assembly and freedom of association

- (1) Everyone has the right to peaceful assembly.

- (2) Everyone has the right to freedom of association.

14 Freedom of expression

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.
- (3) The right in (2) above does not entitle a person to vilify any person or group of people on the basis of their race, colour, sex, intersex, sex and/or gender diversity, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability, homelessness, social status or other status.

15 Taking part in public life

Every citizen has the right, and is to have the opportunity, to—

- (a) take part in the conduct of public affairs, directly or through freely chosen representatives; and
- (b) vote and be elected at periodic elections that guarantee the free expression of the will of the electors; and
- (c) have access, on general terms of equality, for appointment to the public service and public office.

16 Right to liberty and security of person

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
- (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.
- (3) Anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against him or her.
- (4) Anyone who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a judge or magistrate; and

- (b) has the right to be tried within a reasonable time or released; and
 - (c) must be released if (a) and (b) are not complied with.
- (5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.
 - (6) Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.
 - (7) Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.
 - (8) No-one may be imprisoned only because of the inability to carry out a contractual obligation.

17 Humane treatment when deprived of liberty

- (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) Anyone deprived of liberty must not be treated to hardship or constraint other than that which is a necessary result of the deprivation of liberty itself.
- (3) An accused person must be segregated from convicted people, except in exceptional circumstances.

Note An accused child must also be segregated from accused adults (see s 18 (1))

- (4) An accused person must be treated in a way that is appropriate for a person who has not been convicted.
- (5) The correctional system must be primarily directed towards the reformation and rehabilitation of prisoners.

18 Children in the criminal process

- (1) An accused child must be segregated from accused adults.
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted.
- (3) An accused child must be brought to trial as quickly as possible.

- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

19 Fair trial

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, the press and public may be excluded from all or part of a trial—
- (a) to protect morals, public order or national security in a democratic society; or
 - (b) if the interest of the private lives of the parties require the exclusion; or
 - (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

20 Rights in criminal proceedings

- (1) Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.
- (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
-

- (a) to be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge;
- (b) to have adequate time and facilities to prepare his or her defence and to communicate with lawyers or advisors chosen by him or her;
- (c) to be tried without unreasonable delay;
- (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her;
- (e) to be told, if he or she does not have legal assistance, about the right to legal assistance chosen by him or her;

- (f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance;
 - (g) to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;
 - (h) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court;
 - (i) not to be compelled to testify against himself or herself or to confess guilt.
- (3) A child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- (4) Anyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court in accordance with law.

21 Compensation for wrongful conviction

- (1) This section applies if—
- (a) anyone is convicted by a final decision of a criminal offence; and
 - (b) the person suffers punishment because of the conviction; and

- (c) the conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.
- (2) If section 21(1) applies, the person has the right to be compensated according to law.
- (3) However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or primarily of the person's own doing.

22 Right not to be tried or punished more than once

No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with law.

23 Retrospective criminal laws

- (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under State Law when it was engaged in.
- (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

24 Freedom from forced work

- (1) No-one may be held in slavery or servitude.
- (2) No-one may be made to perform forced or compulsory labour.
- (3) In subsection (2):

forced or compulsory labour does not include—

- (a) work or service normally required of an individual who is under detention because of a lawful court order, or who has been conditionally released from detention under a court order; or
- (b) work or service required because of an emergency or calamity threatening the life or wellbeing of the community; or
- (c) work or service that forms part of normal civil obligations.

25 Cultural rights

- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.
- (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

26 Right to work

Everyone has the opportunity to gain a living by work which they freely choose or accept.

27 Right to join Unions

Everyone has the right to form and to join a union.

28 Right to Strike

Everyone has the right to withhold their labour in pursuit of improved working conditions.

29 Right to Food

Everyone has the right to access sufficient food to be free from hunger.

30 Right to Clean Water

Everyone has the right to access sufficient clean water for their personal health and wellbeing.

31 Right to Shelter

Everyone has the right to access shelter that protects their well being.

32 Right to Health

Everyone has the right to access the highest attainable standard of physical and mental health.

33 Right to Education

Everyone has the right to education.

This includes:

- (a) Access to free primary and secondary education;
- (b) Access to higher education.

34 Right to Family

Families are entitled to be protected by society and the State.

Note: The concept of a family is a broad one consistent with clause 23 of the International Covenant on Civil and Political Rights.

35 Environmental Rights

Everyone has the right to a healthy, sustainable and ecologically balanced environment and the duty to protect it and improve it for the benefit of future generations.

36 Human rights may be limited

- (1) Human rights other than those listed in subsection (3) below, may be subject only to reasonable limits set by State Laws that can be demonstrably justified in a free and democratic society.
- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
 - (a) the nature of the right affected;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relationship between the limitation and its purpose;

- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.
- (3) The following rights are absolute and are not subject to the limitations in (1) and (2) above:
- (a) the right to be free from torture and cruel, inhuman and degrading treatment or punishment (section 8(1));
 - (b) the right to be free from slavery and servitude (section 24(1))
 - (c) the prohibition on prolonged arbitrary detention (section 16(1))
 - (d) the prohibition on imprisonment for failure to fulfil a contractual obligation (section 16(8));
 - (e) the prohibition on retrospective operation of criminal laws (section 23)
 - (f) the right of everyone to recognition everywhere as a person before the law (section 6(1));
 - (g) the right of freedom from systemic racial discrimination (protected by section 6(2) and (3)).

Part 4 Application of human rights to State Laws

37 Application of pt 4

This part applies to all State Laws.

38 Interpretation of laws and human rights

- (1) So far as it is possible to do so consistently with its purpose, all State Laws must be interpreted in a way that is compatible with human rights.

- (2) Sub-section (1) applies whether or not a State Law does or might limit a human right.

39 Interpretation of human rights

- (1) International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting a human right.
- (2) Human rights should be interpreted and applied broadly, beneficially, purposively and in a manner that reflects the indivisibility, interdependence and mutuality of rights.

40 Declaration of incompatibility

- (1) This section applies if—
 - (a) a proceeding is being heard by the Supreme Court; and
 - (b) an issue arises in the proceeding about whether a State Law is consistent with a human right.
- (2) If the Supreme Court is satisfied that the State Law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the ***declaration of incompatibility***).
- (3) The declaration of incompatibility does not affect—
 - (a) the validity, operation or enforcement of the law; or
 - (b) the rights or obligations of anyone.
- (4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

41 Attorney-General's action on receiving declaration of incompatibility

- (1) This section applies if the Attorney-General receives a copy of a declaration of incompatibility.
- (2) The Attorney-General must present a copy of the declaration of incompatibility to the Parliament within 6 sitting days after the day the Attorney-General receives the copy or within 6 weeks of that date, whichever period is the shorter.
- (3) The Attorney-General must prepare a written response to the declaration of incompatibility and present it to the Parliament not later than 3 months after the day the copy of the declaration is presented to the Parliament.

42 Notice to Attorney-General and commission

- (1) This section applies—
 - (a) if—
 - (i) a question arises in a proceeding in the Supreme Court that involves the application of this Act; or
 - (ii) the Supreme Court is considering making a declaration of incompatibility in a proceeding; and
 - (b) the State is not a party to the proceeding.
- (2) The Supreme Court may determine not to allow the proceeding to continue or make the declaration unless the court is satisfied that—
 - (a) notice of the proceeding has been given to the Attorney-General and the commission; and
 - (b) a reasonable time has passed since the giving of the notice for the Attorney-General and the commission to decide whether to intervene in the proceeding.
- (3) For subsection (2), the Supreme Court may—
 - (a) direct a party to give notice of the proceeding to the Attorney-General and the commission; and
 - (b) continue to hear evidence and argument concerning matters severable from any matter involving the application of this Act.
- (4) Subsection (2) does not prevent the Supreme Court from hearing and deciding a proceeding, to the extent that the proceeding relates to the grant of urgent relief of an interlocutory nature, if the court considers it necessary in the interests of justice.
- (5) In exercising its discretion under subsection (2) the Supreme Court must consider matters including:

- (a) whether or not the Court is considering making a declaration of incompatibility in a proceeding; and
- (b) the nature of the human right in issue.

43 Attorney-General's right to intervene on human rights

The Attorney-General may intervene in a proceeding before a court that involves the application of this Act.

44 Human rights commissioner's right to intervene

The human rights commissioner may intervene in a proceeding before a court that involves the application of this Act.

45 Referral to Supreme Court

If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Act or a question arises with respect to the interpretation of a statutory provision in accordance with this Act, that question may be referred to the Supreme Court.

Part 5 Scrutiny of proposed State Laws

46 **Attorney-General's statement on government bills**

- (1) This section applies to each bill presented to the Parliament by or on behalf of a Minister or private member.
- (2) The Attorney-General, in the case of a Minister, or the private member in other cases, must prepare a written statement (the ***compatibility statement***) about the bill for presentation to the Parliament.
- (3) The compatibility statement must state whether, in the Attorney-General's or private member's opinion:
 - (a) the bill is consistent with human rights; and

- (b) if it is not consistent, which human rights it is not consistent with; and
- (c) the basis upon which the Attorney General or private member has formed the opinion referred to in (a) or (b) above; and
- (c) The reasonableness or otherwise of any limitations on human rights by reference to the criteria in section 36(2).

47 Consideration of bills by Human Rights Committee of Parliament

- (1) A joint parliamentary standing committee is to be formed, entitled the Human Rights Joint Standing Committee, that must report to the Parliament about human rights issues raised by bills presented to Parliament, including commenting on any statement provided by the Attorney General as provided in section 46.

48 Noncompliance with section 46 and section 47

A failure to comply with section 46 or section 47 in relation to a bill does not affect the validity, operation or enforcement of any State Law.

Part 5A Obligations of public authorities

49 **Meaning of *public authority***

- (1) Each of the following is a ***public authority***:
- (a) an administrative unit;
 - (b) a State authority;
 - (c) a State instrumentality;
 - (d) a Minister;
 - (e) a police officer, when exercising a function under a State Law;
 - (f) a public employee;

- (g) local councils and councillors;
- (h) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the State or a public authority (whether under contract or otherwise).

Note A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise.

- (2) However, **public authority** does not include—
 - (a) the Parliament, except when acting in an administrative capacity; or
 - (b) a court, except when acting in an administrative capacity.

49A Meaning of *function of a public nature*

- (1) In deciding whether a function of an entity is a ***function of a public nature***, the following matters may be considered:
 - (a) whether the function is conferred on the entity under a State Law;
 - (b) whether the function is connected to or generally identified with functions of government;
 - (c) whether the function is of a regulatory nature;
 - (d) whether the entity is publicly funded to perform the function;
 - (e) whether the entity performing the function is a company (within the meaning of the Corporations Act) the majority of the shares in which are held by or for the State.

- (2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.
- (3) Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:
 - (a) the operation of detention places and correctional centres;
 - (b) the provision of any of the following services:
 - (i) gas, electricity and water supply;
 - (ii) emergency services;
 - (iii) public health services;
 - (iv) public education;

- (v) public transport;
- (vi) public housing;
- (vii) disability services;
- (viii) child welfare and adoption service;
- (ix) psychiatric services and facilities; and
- (x) homelessness services.

49B Public authorities must act consistently with human rights

- (1) It is unlawful for a public authority—
 - (a) to act in a way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.
- (2) Subsection (1) does not apply if the act is done or decision made under a law in force in the State and—
 - (a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or
 - (b) the law cannot be interpreted in a way that is consistent with a human right.

Note A law in force in the State includes a State Law and a Commonwealth law.

- (3) In this section:
public authority includes an entity for whom a declaration is in force under section 49D.
- (4) Section 36 does not apply to this section.

49C Legal proceedings in relation to public authority actions

- (1) This section applies if a person—
 - (a) claims that a public authority has acted in contravention of section 49B; and
 - (b) alleges that the person is or would be a victim of the contravention.
- (2) The person may—
 - (a) start a proceeding in the Supreme Court against the public authority; or
 - (b) rely on the person's rights under this Act in other legal proceedings.

- (3) A proceeding under subsection (2) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.
- (4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate.
- (5) This section does not affect—
 - (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
 - (b) a right a person has to damages (apart from this section).

Note See also s 16 (7) and s 21.

- (6) In this section:

public authority includes an entity for whom a declaration is in force under section 49D.

49D Other entities may choose to be subject to obligations of public authorities

- (1) An entity that is not a public authority under section 49 may ask the Minister, in writing, to declare that the entity is subject to the obligations of a public authority under this part.
- (2) On request under subsection (1), the Minister must make the declaration.
- (3) The Minister may revoke the declaration only if the entity asks the Minister, in writing, to revoke it.

Part 6 **Miscellaneous**

50 **Review of effect of State Laws on human rights**

- (1) The commission has the following functions:
 - (a) review the effect of State Laws, including the common law, on human rights;
 - (b) report in writing to the Attorney-General on the results of the review.
- (2) The Attorney-General must present a copy of a report mentioned in subsection (1) to the Parliament within 6 sitting days after the day the Attorney-General receives the report.

- (3) However, the Attorney-General may amend the report (including by omitting part of the report) before presenting it to the Parliament to prevent the report—
- (a) disclosing the identity of—
 - (i) a person whose human rights have, or may have been, contravened; or
 - (ii) someone who may have contravened someone else's rights; or
 - (b) allowing the identity of someone mentioned in paragraph (a) to be worked out; or
 - (c) disclosing information if the disclosure of the information could, in the Attorney-General's opinion, harm the public interest.
- (4) If the Attorney-General amends the report, the Attorney-General must present a statement to the Parliament with the report that tells the Assembly that the report has been amended.

51 Regulation-making power

The Executive may make regulations for and consistent with this Act.

Schedule 1 ICCPR source of human rights

(see pt 3)

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Schedule 1

ICCPR source of human rights

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8	10	privacy and reputation	17 (1)
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Schedule 1 ICCPR source of human rights

column 1 item	column 2 section	column 3 description	column 4 ICCPR article
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29	24	freedom from forced work	8 (1), (2), (3) (a), (3) (c)
30	25	cultural rights	27

Dictionary

(see s 3)

act, for part 5A (Obligations of public authorities), includes fail to act and propose to act.

commission means the human rights commission.

conduct includes omission.

court includes the following:

- (a) the Coroner's Court and the Administrative Decisions Tribunal;
- (b) an entity prescribed by regulation.

declaration of incompatibility—see section 40.

engage in conduct means—

- (a) do an act; or
- (b) omit to do an act.

function of a public nature—see section 49A.

him and/or her includes a reference to a male, female, transgendered, non-gendered, intersex and transsexual person.

human rights—see section 3.

ICCPR means the International Covenant on Civil and Political Rights.

international law includes—

- (a) the International Covenant on Civil and Political Rights and other human rights treaties to which Australia is a party; and

- (b) general comments and views of the United Nations human rights treaty monitoring bodies; and
- (c) declarations and standards adopted by the United Nations General Assembly that are relevant to human rights.

public authority—see section 49.

State Law means an Act or statutory instrument.