

Towards Comprehensive Human Rights Protection:

Submission to *New Matilda* on its draft Human
Rights Bill

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

New Matilda's Campaign for a Human Rights Act

PIAC congratulates *New Matilda* on developing a draft Bill to protect human rights in Australia. As *New Matilda* observes, Australia is the only Western democracy without a Bill of Rights or Human Rights Act. Widespread public consultation has supported the development of charters in the ACT and Victoria, and they are being considered in other states. A Human Rights Act at the Commonwealth level would build upon this success, but would also provide an essential framework for rights protection across Australia.

PIAC supports *New Matilda's* process of public consultation, as such consultation is essential to the development of a Human Rights Act that fully protects the rights of all people in Australia. PIAC pleased to offer this submission in support of the *New Matilda* campaign.

Responses to Questions

Do you support the draft Human Rights Bill that *New Matilda* has prepared?

PIAC broadly supports the proposed Bill. However PIAC submits that its protection of human rights could be strengthened though a number of amendments. The proposed amendments are detailed below.

Does the draft Bill protect the appropriate mix of rights?

PIAC supports the draft Bill's protection of both civil and political rights, and economic, social and cultural rights. For a Human Rights Act to offer meaningful protection to all people in Australia, especially those

who are disadvantaged and marginalised, it must protect the full spectrum of rights and, consistent with international law, recognise the indivisibility of human rights..

Additional rights

PIAC believes that the draft Bill should contain, as an early provision, the right to equality as a stand-alone provision as is found in both the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic Social and Cultural Rights (ICESCR)*. The right to equality is, arguably, a right that underpins the enjoyment of all other rights set out in the International Bill of Rights and is consistently reflected in the preambular provisions of the international instruments that make up the International Bill.

PIAC also submits that the Bill should contain additional economic, social and cultural rights. The Bill as it currently stands includes very few of these rights. At a minimum, PIAC believes that the basic workplace rights enshrined in the *International Covenant on Economic, Social and Cultural Rights* should be expressly included rather than presumed under the right of freedom of association.

Finally, the economic, social and cultural rights contained in the proposed Bill require further elucidation. The framing of these provisions should remain reasonably broad to allow expansive and flexible interpretation by the courts. However, further detail is needed to ensure that the provisions offer a minimum level of protection.

Does the balance struck in the draft Bill between the executive, the parliament and the courts provide adequate and appropriate protection of human rights?

PIAC recognises the need to strike a careful balance between the powers of the executive, the legislature and the judiciary. In PIAC's view, however, a Bill that contained stronger measures to safeguard human rights would not disturb this balance.

The draft Bill proposes three mechanisms to protect human rights:

- Requiring the Federal Attorney-General to present a report to the House of Representatives on each piece of proposed legislation, stating whether the legislation is compatible with human rights.
- Empowering courts to interpret legislation consistently with human rights, and to issue a declaration if consistency cannot reasonably be achieved.
- Requiring 'public authorities' to act in a manner that is consistent with human rights.

While these three mechanisms provide a good starting point for rights protection, they give too much power to Parliament and the Executive to legislate and act inconsistently with human rights. In particular, PIAC does not support the proposed 'declaration of inconsistency' model. PIAC believes that this offers unduly weak protection of the rights recognised in the Bill.

PIAC instead submits that courts should be empowered to strike down as invalid primary or delegated legislation that cannot be interpreted consistently with recognised rights. It has been suggested that a Human Rights Act in this form would infringe parliamentary sovereignty. This is not the case. Parliamentary sovereignty permits Parliament to legislate on any subject within its lawful jurisdiction. Appropriate judicial oversight is entirely compatible with this notion. If the courts strike down legislation, Parliament is free to re-legislate in a lawful manner on the same subject. This is a fundamental principle of Australian democratic institutions, and PIAC asserts that this is especially the case in the context of human rights. As is noted in the preamble to the draft Bill, '[i]n a true democracy, human rights are assured'. This can only be enforced if laws inconsistent with human rights are invalid.

Qualifying provisions

In addition, PIAC does not entirely support the two provisions that allow derogation from recognised rights. The first of these (section 10) provides that rights are subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. PIAC recognises that Parliament may occasionally need to legislate to limit rights in this manner and that this form of words is consistent with other national jurisdictions. As such, the existence of jurisprudence on these equivalent provisions will help guide interpretation in Australia.

However, PIAC believes that, consistent with non-derogation provision of the ICCPR, the Bill should include a list of ‘absolute’ rights, such as the right to life and the right against torture and cruel or inhuman treatment, that are not to be qualified or infringed under any circumstances.

The second qualifying provision (section 44) allows the Parliament and public authorities to behave in a manner that is inconsistent with recognised rights during times of declared ‘public emergency’. PIAC believes that the provision is currently framed very broadly and is unconvinced that this provision is necessary given the permissive nature of section 10.

In the event that section 44 is retained, PIAC suggests that its potential application be clarified in two respects.

First, we would suggest limiting the permission to derogate to Parliament rather than public authorities. Section 54, which requires public authorities to act consistently with human rights, defines the phrase ‘public authority’ broadly so as to ensure greater rights protection. PIAC strongly supports the broad framing of section 54, however is concerned that such an expansive definition is not appropriate in the context of section 44. Nor should the decision to derogate be within the authority of public authorities. Such derogation is extremely serious and should be an active decision of the Government. This is consistent with the requirement that any derogation from rights under the ICCPR is to notified to the Secretary General of the United Nations.

Secondly, PIAC advocates the inclusion of requirement that the Government declare a public emergency if such derogations are to be implemented and that there be a time limit upon the operation of such declarations of public emergency. For example, the section could include a provision that allows such declarations remain valid for a maximum of 28 days. If Parliament considers that a state of emergency persists after this time, it must vote to extend the declaration for a further more limited. A time limit provision will ensure that Parliament and the public continue to view declarations as exceptional measures that are only justified in rare circumstances. In this way, the provision will guard against the incremental weakening of a human rights culture.

Further, as with section 10, section 44 should clearly state that some human rights are non-derogable.

Entrenchment provisions

Finally, PIAC notes that the Bill appears to lack any entrenchment provisions to protect it against arbitrary repeal. We suggest the inclusion of a provision stating that any proposed amendments require the approval of two thirds of Parliament in a joint sitting.

Does the draft Bill provide appropriate remedies for unlawful infringement of human rights?

PIAC observes that the draft Bill provides both for individuals to pursue a cause of action where public authorities fail to act in accordance with recognised rights, and for courts to award appropriate remedies in response to any demonstrated rights infringement. PIAC believes that the right to seek and achieve a remedy for breaches of human rights is a fundamental aspect of any meaningful Human Rights Act, and commend *New Matilda* for including such provisions.

Proposed amendment

PIAC suggests reframing section 56(1)(d), which currently proposes to allow courts to make an order declaring it would be inappropriate for any further action to be taken in a matter. Where a court finds that an individual’s rights have been breached, the standard response should be the provision of a remedy. If it is

considered necessary for courts to retain the discretion to award no remedy, then the Bill should explicitly state that this response must be limited to exceptional cases.

Is there anything else you would like to tell us?

Please refer to the detailed response below.

Detailed Response

In addition to the responses above, PIAC offers the following comments on specific provisions contained within the draft Bill.

Preamble

Inclusion of provision regarding individual responsibilities

PIAC advocates a modified version of paragraph [6]. It is important for individuals to respect the rights of others in society, and support the inclusion of a statement to this effect. However, a provision regarding individual responsibilities should not imply that entitlement to human rights is contingent upon fulfilling certain responsibilities. As such, PIAC suggests reframing the provision so that it reads as follows:

The exercise of human rights implies corresponding responsibilities to others in society. It is every individual's responsibility to respect the rights of others and observe the law.

This would ensure that paragraph [6] is consistent with other provisions in the Preamble that emphasise universal entitlement to human rights, particularly those in paras [4] and [8].

Universal entitlement to rights

Paragraph [8] is substantive, rather than aspirational, in nature. As such, we support the submission of the University of Melbourne's Centre for Comparative Constitutional Studies to the effect that this provision should be included within the body of the proposed Bill.²

Characteristics of rights

The Preamble should also contain a provision stating that the human rights protected by the Bill are 'interconnected, indivisible and pertain to each person by virtue of their common humanity'.

Recognition of indigenous people

PIAC also proposes that the Preamble includes a provision recognising the traditional owners of Australia, and attesting to the importance of human rights for Indigenous Australians. Such acknowledgment is essential to the legitimacy of any Act that purports to protect and promote human rights in Australia.³

Part 2: Human Rights explained

Definition of human rights

To reflect the fact that the proposed Bill protects cultural rights, the definition of 'human rights' should be amended to read 'the civil, political, economic, social and *cultural* rights set down in Part 3 of this Act'.

Part 3: Human Rights

Section 10: 'Human Rights may be limited'

As noted above, PIAC believes that section 10 as it currently stands provides Parliament with too much latitude to legislate in a rights-infringing manner.

² Centre for Comparative Constitutional Studies, University of Melbourne, *Submission on New Matilda's Draft Human Rights Bill*, 17 February 2006 at 1.

³ For an example of such a provision, see the Preamble to the Charter of Human Rights and Responsibilities Bill 2006 (Vic).

PIAC proposes the following two amendments:

- The provision should contain a list of rights from which no derogation is permissible in any circumstances. These should include:
 - the right to protection from torture and cruel, inhuman or degrading treatment or punishment;
 - freedom from discrimination;
 - the right to life from the time of birth;
 - the prohibition against slavery and enforced labour;
 - the right to be recognised as a person before the law;
 - the right to freedom of thought, conscience and religion; and
 - protection from retrospective criminal penalties.

The Bill may permit Parliament to derogate from other rights, such as the right to respect for privacy and the right to freedom of association. However, as explained in the following paragraph, derogation should only be permitted to occur in limited and clearly defined circumstances.

- The provision could usefully include a note providing a guide to interpretation that includes a set of criteria to be considered in determining whether Parliament has limited human rights in a permissible manner. PIAC suggests that the criteria could be framed as follows:

Proposed legislation must:

- pursue an objective that is important to the achievement of a free and democratic society and be rationally connected to that objective;
- not impair any right more than is necessary to achieve the objective; and
- not have a disproportionate (or discriminatory) impact on the people to whom the law will apply.⁴

Under section 45 of the draft Bill, the Federal Attorney-General is required to accompany any proposed legislation with a human rights compatibility statement. PIAC suggests that if the Federal Attorney-General believes that a law is inconsistent with human rights, that he or she should be required provide a justification for the law. Such a justification should follow the criteria outlined above.⁵

Section 25: Right to marry

PIAC appreciates the intention behind the provisions contained within section 25. However, PIAC is concerned that without further clarification, they could be interpreted in restrictive ways and act to the detriment of certain groups within the community.

Section 25(1)

The draft Bill should make it clear that section 25(1) is not limited to the right of individuals to marry members of the opposite sex. Although the provision currently contains nothing that requires it to be read as referring only to heterosexual marriage, its ambiguity leaves it open to restrictive interpretation.⁶

Section 25(3)

PIAC shares the concerns of a number of others who have provided submissions on the Bill⁷ regarding the statement that each spouse possesses 'equal rights and *responsibilities* upon marriage, during the marriage and at its dissolution'.⁸ Women have historically experienced disadvantage (financial and otherwise) due to

⁴ The Bill should clarify that this criterion does not prohibit the implementation of special measures that may appear discriminatory, but which operate to benefit particular equality-seeking groups.

⁵ For further discussion of this point, see below.

⁶ See the comments made by the New South Wales Council for Civil Liberties: NSWCCCL *Submission to New Matilda's Public Consultation on the Human Rights Bill 2006* (2006) 2.

⁷ National Association of Community Legal Centres, *Submission to New Matilda on the Human Rights Bill 2006*, 31 March 2006 at 3; Combined Community Legal Centres Group, *Submission to New Matilda on the Human Rights Bill 2006*, 31 March 2006 at 3.

⁸ Emphasis added.

the gendered norms that have governed parties' roles within marriage. To a large extent, such disadvantage persists today. PIAC acknowledges that section 25(3) is perhaps formulated with these problems in mind. However, the reference to responsibilities could allow the provision to be used to reinforce, rather than redress, existing inequalities.

Section 26: Protection of the family

Section 26(1)

In principle, PIAC does not view the inclusion of a provision that aims to protect the family as problematic. However, the current framing of section 26(1) invites a narrow interpretation of the term 'family'. In practice, the provision could therefore operate to disadvantage people who exist outside the 'traditional' archetype of the nuclear family. These people include Indigenous Australians, who may recognise alternative forms of family structure, and marginalised or disadvantaged individuals (such as homeless people) who may lack any 'family' as the term is commonly understood.

PIAC recommends that the provision be amended to explicitly recognise that families may take many different forms.

Section 26(2)

PIAC applauds the inclusion of a provision supporting the needs of women during, and surrounding the period of, childbirth. This provision appears to have been sourced from Article 10 of the *International Covenant on Economic, Social and Cultural Rights*. In light of this, PIAC recommends that the proposed Bill adopt the substance of Article 10 in its entirety. The remainder of Article 10 states that 'during such period working mothers should be accorded paid leave or leave with adequate social security benefits'. In order to give full force to section 26(2), this statement should be included within the provision.

Economic, Social and Cultural Rights

Given the inclusion of a progressive realisation provision in the Bill (section 43), PIAC supports the inclusion of a provision that makes it clear that once rights have been realised they should not be lost. That is, progressive realisation should mean just that and any measure that reduces the protection afforded to a right should be subject to the section 10 analysis.

As noted above, PIAC believes that additional economic, social and cultural rights should be included in the proposed Bill. While the proposed Bill broadly covers the rights protected by the *International Covenant on Economic, Social and Cultural Rights*, it lacks much of the detail that gives these rights their substance.

In particular, PIAC believes that the following provisions require amendment.

Section 38: Right to education

At the very minimum, this provision should provide that primary and secondary education must be available free to all.

Section 39: Right to work

PIAC supports substantial expansion of this provision, to include more detailed requirements concerning working conditions and the right of workers to belong to trade unions.

'Just and favourable working conditions', protected by section 39(2), should explicitly include the factors set out in Article 7 of the ICESCR, namely:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;

- (c) Equal opportunity for everyone to be promoted in his or her employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; and
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

In addition, the right to join a trade union should be enshrined within the Bill.

Section 41: Right to physical well-being and health

PIAC considers that protection of the right to health could be improved by including a provision that requires government to take steps to achieve:

- (a) the improvement of all aspects of environmental and industrial hygiene.
- (b) the prevention, treatment and control of epidemic, endemic, occupational and other diseases; and
- (c) the creation of conditions that would assure to all medical service and medical attention in the event of sickness.⁹

Part 4: Scrutiny of proposed Commonwealth laws

Section 45: Attorney-General's statement on proposed laws

PIAC supports a process that requires Parliament to consider the human rights implications of any proposed legislation. In the short term, such a process would ensure that Parliament achieves a better standard of rights protection and that the public is made aware of any laws that have the potential to infringe human rights. In the long term, the scrutiny process would encourage a culture whereby consideration of human rights is viewed as an essential and inherent part of Parliament's law-making function.

However, the strength of such a process is seriously undermined by the inclusion of a 'notwithstanding' provision in section 45(4). This provision allows the Federal Attorney-General to state that a law is intended to operate notwithstanding its inconsistency with certain human rights. PIAC suggests instead that where the Federal Attorney-General believes that proposed legislation will infringe or limit a right protected under the Act, that he or she be required to provide a justification for this in the compatibility statement. Such a justification should be framed according to the criteria that PIAC proposes for guidance under section 10 of the Bill (see above).

In the event that a 'notwithstanding' clause is included in the Bill, PIAC suggests that it should be accompanied by the following measures:

- A sunset provision that limits the life of such legislation to a maximum of three years.
- A requirement that a comprehensive process of review, including community consultation, occur before the legislation passes.
- Provision for ongoing Parliamentary oversight by the Joint Standing Committee on Human Rights.¹⁰

These measures are necessary to guard against 'legislation creep', whereby extraordinary legislation begins to be seen as 'normal', and to prevent against the incremental weakening of a human rights culture.

Section 46: Joint Standing Committee on Human Rights

PIAC welcomes the inclusion of a provision providing for the establishment of a Joint Standing Committee on Human Rights. In addition to the functions conferred on this Committee by section 46(3), the Committee be responsible for:

⁹ These goals are articulated in Article 12 of the ICESCR.

¹⁰ Established under section 46 of *New Matilda's Bill*.

- inquiring into the practices of public authorities, either on its own information, or on a reference that discloses a significant and systemic human rights issue from the Federal Attorney-General, the Ombudsman or the Auditor-General; and
- overseeing any new piece of legislation that is declared by the Federal Attorney-General to justifiably derogate from rights protected by the Bill.¹¹

Part 5: Application to Commonwealth laws

Section 49: Interpretation of rights by courts

PIAC supports the inclusion of section 49(1), and does not believe it is necessary to include section 49(2) as a qualifying provision.

Section 49(2)(a)

The requirement that legislation be interpreted consistently with human rights ‘so far as it is possible to do so’¹² acts as a sufficient safeguard to ensure that legislation is given its ‘ordinary meaning’. In approaching the task of interpreting legislation in line with human rights, courts will be governed by general principles of statutory interpretation. As such, they are unlikely to apply international law or foreign judgments to subvert the ‘ordinary meaning’ of a law.

Section 49(2)(b)

The court’s inherent ability to govern its own processes will ensure that extraneous material is not introduced where this would prolong proceedings ‘without compensating advantage.’¹³

Section 52: Declarations of incompatibility

As was noted in above, PIAC does not agree with *New Matilda*’s proposed ‘declaration of inconsistency’ model. PIAC advocates instead for a model whereby the courts are empowered to strike down as inconsistent any legislation that cannot reasonably be interpreted in line with human rights.

However, in the event that the process represented in Part 5 is retained in the proposed Bill, PIAC recommends that legislation subject to a declaration of inconsistency be required to undergo a mandatory process of review after three years. This process of review would be conducted by the Joint Standing Committee on Human Rights, and would include a public consultation phase. If the Federal Attorney-General supported the continued operation of the legislation, he or she would be required to submit a justification to this effect to the Joint Committee. The justification should be framed in terms of the criteria that PIAC has submitted for guidance on section 10.¹⁴ At the conclusion of the review process, the Joint Standing Committee would be required to present recommendations to Parliament as to whether the legislation should continue to exist in its current form.

Section 54: Acts of public authorities

PIAC supports the requirement in the Bill that public authorities act in a manner consistent with human rights. However, PIAC does not support the exclusion of Parliament or persons exercising parliamentary functions from such a provision. PIAC advocates that the Bill follows the example set by the New Zealand *Bill of Rights Act* (1990),¹⁵ and guarantee equal protection for human rights across all three branches of government.

PIAC also supports the functional approach to identifying ‘public authorities’ that is contained within section 54(3)(b) of the draft Bill.

¹¹ See PIAC’s proposal regarding section 45 of the Bill.

¹² Section 50(1) of the Bill.

¹³ Section 49(2)(b) of the Bill.

¹⁴ See above.

¹⁵ Section 3.

Sections 55 and 56: Judicial proceedings and remedies

PIAC commends the inclusion of provisions that empower individuals to both bring proceedings, and receive remedies, if their rights set out in the legislation are infringed. The right to redress for wrongs goes to the heart of what it means to hold individual human rights. Without acknowledging this, a human rights instrument is relatively meaningless.

However, PIAC believes that the Bill requires further clarification with respect to the class of individuals who would possess standing to bring an action and receive remedies. As the Bill currently stands, three classes of individuals are referred to in sections 55 and 56. These are individuals generally, 'aggrieved persons', and those who are 'victims' of unlawful acts committed by public authorities. The use of these three terms creates confusion regarding the operation and effect of sections 55 and 56.

Section 55(1) currently provides:

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 54(1) may:

- (a) bring proceedings against the authority under this Act in an appropriate court; or
- (b) rely on the right or rights concerned in any legal proceedings, but only if he or she is (or would be) a victim of the unlawful act.

This appears to mean that any person possesses standing to commence a cause of action for an alleged breach of rights, but only those affected by the actions of the public authority may 'rely' on those rights.

Section 56 appears to render declaratory relief available in all cases where a public authority is found to have acted unlawfully, and specific remedies available to persons who have been directly affected by unlawful acts.

The operation of sections 55 and 56 together therefore seems to create a two-pronged system of actions and remedies, whereby all individuals can bring an action for, and obtain, declaratory relief, but only affected individuals can rely on rights and obtain individual remedies.

If *New Matilda* intends the Bill to be read in this way, PIAC suggests that this should be stated more clearly. In particular, the following discrepancies should be addressed:

- It is currently unclear whether the reference to 'aggrieved persons' in paragraphs 56(1)(b) and (c) implies that the specific remedies contained within these paragraphs are only available to persons aggrieved, or that *all* claims under section 55 are limited to persons aggrieved. If the former meaning is intended, then this should be made clear in paragraphs 56(1)(b) and (c). If the latter meaning is intended, then sub-section 55(1) should be amended to read 'an **aggrieved** person who claims that a public authority has acted [unlawfully] ... may bring proceedings'. PIAC urges the former interpretation as more consistent with seeking broad understanding of and compliance with the law.
- It is also unclear whether the phrase 'victims of unlawful acts' in paragraph 55(1)(b) is intended to bear the same meaning as 'aggrieved persons' (as referred to in section 56 and defined in the dictionary to the Bill). If this is the case, then PIAC suggests amending paragraph 55(1)(b) to refer to 'aggrieved persons'. If this is not the case, we believe that section 55 should further elucidate the class of persons who may be considered 'victims of unlawful acts'.
- The definition of 'aggrieved person' could usefully be amended to make express reference to an act or conduct that is inconsistent with the Part 3 rights.
- It is important to ensure that if a challenge is brought by an organisation asserting that it is acting to protect the human rights of individuals, consideration be given to what, if any, commercial benefit such an organisation may gain from the right being upheld in the way argued for by that organisation. The use of 'human rights' by corporations to argue for advertising freedom as an aspect of freedom of communication has caused many to express concerns about the use of human rights by corporations.

The framing of these clauses should be amended so as to clarify who may bring an action under the Act, and what remedies they would be entitled to receive.

Section 59 & 60: Human Rights and Equal Opportunity Commission may intervene and other parties may intervene

PIAC strongly supports the inclusion of these two provisions.