THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

Australian Bill of Rights Bill 2019

EXPLANATORY MEMORANDUM

and

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Circulated by authority of

Andrew Wilkie MP
Australian Bill of Rights Bill 2019

OUTLINE

This bill seeks to enshrine a Bill of Rights in Australian law. It is modelled very closely on the Australian Bill of Rights Bill 2001 and is intended to give effect to certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. The bill is very similar to the Australian Bill of Rights Bill 2017, introduced by the then Member for Denison. The bill would render invalid any Commonwealth, State or Territory law that is inconsistent with the Bill of Rights to the extent of the inconsistency, and specify that Commonwealth, State and Territory laws should be interpreted so as to be consistent with the Bill of Rights. The bill also allows the Australian Human Rights Commission to inquire into any act or practice that may infringe a right or freedom in the Bill of Rights and allows for complaints to be made to the Commission that allege that an act or practice infringes a right or freedom in the Bill of Rights.

FINANCIAL IMPACT

The bill will have no financial impact.

PART 1 - PRELIMINARY

Clause 1: Short Title

1. This clause is a formal provision and specifies the short title of the Bill as the Australian Bill of Rights Bill 2019.

Clause 2: Commencement

2. This clause provides for the commencement of the Act on the day it receives Royal Assent.

Clause 3: Objects

3. This clause sets out the objects of the act, which are to promote universal respect for and observance of human rights and fundamental freedoms for all persons without discrimination, to give effect to certain provisions of three conventions to which Australia is a signatory, to ensure that a person whose rights or freedoms are infringed has an effective remedy, and to promote freedom and dignity, equality of opportunity and free and full participation in public debate.

Clause 4: Definitions

4. Subclause 4(1) defines several terms used in the Act. Specifically, “act” and “practice” are given broad definitions as being, respectively, any act or practice done by or on behalf of the Commonwealth, a State or a Territory (or an authority thereof) in relation to an Australian citizen within or outside Australia, or in any other case within Australia.
“Authority” is also given a broad definition so as to include, for example, any Commonwealth, State or Territory body, company over which the relevant government is in a position to exercise control, a person holding or performing the duties of an office or appointment established or made under a Commonwealth enactment or by the Governor-General, Governor of a State, or Minister, and local governments.

5. Subclause 4(2) specifies that a reference to the Governor of a state can mean a reference to the Administrator of the Northern Territory.

6. Subclause 4(3) specifies that a reference to the doing of an act also means the refusal or failure to do an act, and that a reference to the doing of an act or practice engaged in by an unincorporated body of persons be read as a reference to that body.

7. Subclause 4(4) states when a law will be taken as being inconsistent with the Bill of Rights.

8. Subclause 4(5) states that when a law both promotes, enhances or secures a right or freedom but also infringes another right or freedom, it will be taken to online be consistent with the Bill of Rights to the extent of its inconsistency.

9. Subclauses 4(6), 4(7) and 4(8) clarify further the operation of the Act.

10. Subclause 4(9) clarifies what will be taken to be a reference in the Act to the security, defence or international relations of Australia.

Clause 5: Interpretation of Bill of Rights

11. Clause 5 specifies how the Bill of Rights is to be interpreted, namely that it may not be interpreted so as to limit or adversely affect the rights of any person or the rights particular to Aboriginal and Torres Strait Islander people.

Clause 6: Extension to external Territories

12. Clause 6 specifies that the Act extends to every external territory.

Clause 7: Extent to which Act binds the Crown

13. Clause 7 specifies that the Act binds the Crown and does not make the Crown liable to be prosecuted for an offence.

Clause 8: Act not to apply so as to exceed Commonwealth power

14. Clause 8 specifies that the Act will only apply to the extent that it does not exceed the Commonwealth’s legislative power set out in section 51 of the Constitution.

Clause 9: Acquisition of property

15. Clause 9 specifies that the Act will only apply to the extent that it would not result in an acquisition of property under the meaning of paragraph 51(xxxi) of the Constitution.

PART 2 – OPERATION OF BILL OF RIGHTS

Clause 10: Application of Bill of Rights

1. Clause 10 states that any law that is inconsistent with the Act does not have effect, to the extent of its inconsistency.
2. Subclause 10(2) allows a Commonwealth, State or Territory law to still operate, however, if that law expressly declares that it operates notwithstanding this Act. Subclauses 10(3), 10(4) and 10(5) state that such a declaration only lasts two years and that the Parliament of the Commonwealth, State or Territory may re-enact such a declaration (although such a re-enactment will again only last two years).

Clause 11: Interpretation of legislation

3. Clause 11 states that a construction of any Commonwealth, State or Territory enactment that is consistent with the Bill of Rights will be preferred to any other construction. This includes an Act or enactment that authorises the making of an instrument.

Clause 12: No civil or criminal liability under Bill of Rights

4. Clause 12 specifies that nothing in this Act renders any individual liable to civil proceedings or any person liable to criminal proceedings in respect to an act that is inconsistent with the Bill of Rights.

PART 3 – FUNCTIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION

Clause 13: Additional powers and functions of the Commission

1. Clause 13 gives the Australian Human Rights Commission (the Commission) additional powers, in addition to what it has under the Australian Human Rights Commission Act 1986 (the AHRC Act).

2. These powers include (but are not limited to) the power to inquire into any act or practice that may be inconsistent with the Bill of Rights, to promote an understanding of acceptance of the rights and freedoms set out in the Bill of Rights and to undertake research and educational programs, and to examine enactments and proposed enactments for the purpose of ascertaining whether they are consistent with the Bill of Rights.

Clause 14: Performance of the Commission in relation to Bill of Rights

3. Clause 14 specifies that the powers and duties of the Commission set out in the AHRC Act are extended to apply to rights and freedoms set out in the Bill of Rights.

4. Subclause 14(2) states that the Commission must tell the responsible Minister before inquiring into an act or practice under this Act.

Clause 15: Complaints and redress for infringement of rights or freedoms

5. Clause 15 establishes a mechanism whereby complaints can be made to the Commission if there is an allegation that an act or practice infringes a right or freedom set out in the Bill of Rights.

6. Subclause 15(2) allows an affected person to apply for an interim injunction to the Federal Court or the Federal Circuit Court.

7. Subclause 15(3) allows the Commission to deal with complaints through, as applicable, conciliation and proceedings in the Federal Court and Federal Circuit Court.

8. Subclause 15(4) specifies that the reference to “unlawful discrimination” in the AHRC Act is also read as including an act or practice inconsistent with the Bill of Rights.
Clause 16: Reporting to Parliament

9. Clause 16 requires the Minister to table in Parliament copies of every report made to the Commission within 15 days of the Minister receiving the report. If the report relates to a State enactment, act or practice, the Minister must give a copy to the Attorney-General of that State and then table in Parliament a copy of the report within 15 days of either 30 days after the Attorney-General was given a copy of the report, or the Attorney-General provides the Minister with a statement about the enactment, act or practice.

PART 4 – MISCELLANEOUS

Clause 17: Jurisdiction of the Federal Court and Federal Circuit Court

1. Clause 17 specifies that the Federal Court and Federal Circuit Court have concurrent jurisdiction with respect to civil matters arising under Part 3.

Clause 18: Regulations

2. Clause 18 allows for the Governor-General to make regulations necessary for this Act.

PART 5 – DECLARATION OF RIGHTS

Clause 19: Australian Bill of Rights

1. Clause 19 sets out the Australian Bill of Rights. Details on which rights are engaged with and to which international covenants the Bill of Rights is designed to give effect are outlined in the Statement of Compatibility with Human Rights.

2. The Bill of Rights also engages with other human rights such as the right to equal treatment on the basis of sexual orientation, gender identity and intersex status (article 1(1)) and the right for a person to end their own life (article 12(3)). The bill draws heavily on three international agreements to which Australia is a signatory but also on the rights articulated in the *Australian Bill of Rights Bill 2001*, such as the rights of indigenous peoples (article 10) and the right to live in a safe society (article 24). The explanatory memorandum for the *Australian Bill of Rights Bill 2001* goes into further detail about many of the rights that are to be protected.
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Australian Bill of Rights Bill 2019

This bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the bill

This bill seeks to enshrine a Bill of Rights in Australian law. It is modelled very closely on the Australian Bill of Rights Bill 2001 and is intended to give effect to certain provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment. The bill is very similar to the Australian Bill of Rights Bill 2017, introduced by the then Member for Denison. The bill would render invalid any Commonwealth, State or Territory law that is inconsistent with the Bill of Rights to the extent of the inconsistency, and specify that Commonwealth, State and Territory laws should be interpreted so as to be consistent with the Bill of Rights. The bill also allows the Australian Human Rights Commission to inquire into any act or practice that may infringe a right or freedom in the Bill of Rights and allows for complaints to be made to the Commission that allege that an act or practice infringes a right or freedom in the Bill of Rights.

Human rights implications

The bill is necessary to ensure that Australian law respects human rights and to ensure that people have an effective remedy when their rights are infringed upon. It is also necessary to ensure that Australia is compliant with the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Particularly, the bill engages with articles 2, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 23, 24, 25, 26 and 27 of the International Covenant on Civil and Political Rights, articles 1, 6, 7, 9, 11, 13, 15 of the International Covenant on Economic, Social and Cultural Rights, article 18 of the Convention of the Rights of the Child and articles 3, 10, 11, 12, 13 and 16 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Conclusion

This bill is compatible with human rights because it protects and strengthens human rights and ensures that human rights are respected by the Commonwealth and State and Territory governments.

Andrew Wilkie MP