



Protecting human rights in Australia

Introduction

In order for any human being to live a life with dignity, certain needs must be met. For example, we need to have the ability to access food, water, shelter and other material conditions to maintain our physical, intellectual, psychological and spiritual wellbeing. Because we are human, we need the capacity to form, articulate and share our ideas and beliefs. Because we live in communities, we need to respect others' needs and ideas, in the same way that we demand respect for ours. While the expression of and significance given to these needs differs between the diverse communities of the world, the basic requirements for human survival, and for each person to live a life with dignity and equality, are common to all peoples, everywhere.

For example, the fundamental rights and freedoms expressed in the 1948 Universal Declaration of Human Rights (UDHR) are:

- *the right to be free and equal in dignity and rights*
- *right to live free from discrimination*
- *right to life, liberty and security of person*
- *no slavery*
- *no torture, cruel, inhuman or degrading treatment or punishment*
- *right to protection from the law*
- *equality before the law*
- *remedy for human rights violation*
- *no arbitrary arrest, detention or exile*
- *fair trials and procedural fairness*
- *presumption of innocence*
- *privacy rights*
- *freedom of movement*
- *right to seek asylum*
- *right to nationality*
- *right to family life*
- *right to own property*
- *right to freedom of thought, conscience and religion*
- *right to freedom of opinion and expression*
- *right to freedom of peaceful assembly and association*
- *right to political participation*
- *right to social security*
- *right to work*
- *right to rest and leisure*
- *right to an adequate standard of living*
- *right to education*
- *right to cultural expression.*

These human rights and fundamental freedoms are not granted by the international community, nor by any state – they exist because we are human. However, they are often written down so that they can be effectively protected and promoted. While documents like the UDHR are an important influence on every member of the United Nations, 'writing in rights' in national bills of rights and in international treaties between states means that these states have not only moral but also clear legal obligations to uphold human rights.

Australia's legacy

Like all colonialist societies, Australia was founded on dispossession and massive violence against Indigenous peoples. The foundational racism of the Australian legal system is evident in the Constitution and was implicitly acknowledged in *Mabo*.¹ From the late 1960s to the early 1990s however, even though many human rights were not realised in Australia, governments did maintain a rhetorical commitment to them.

More recently, successive Australian governments have knowingly violated human rights. Twentieth century practices such as the White Australia policy have been given expression in current times, with the detention without charge of non-citizens in immigration detention centres. The rule of law, and the basic principles of *habeas corpus* and the right to a fair trial, have been ignored with the incarceration of citizens David Hicks and, until recently, Mamdouh Habib, in Guantanamo Bay, without Australian Government protest. Basic civil

¹ For example, Justice Brennan argued that legal recognition of Indigenous sovereignty (and the more radical understanding of land rights that would follow) was impossible because it would fracture the legal skeleton brought to Australia by the colonists (*Mabo v Queensland (No. 2)* (1992) 175 CLR 1, 29-43, 51-52, 69, Brennan J). See also *Kartinyeri v Commonwealth* (the *Hindmarsh Island Case*) (1997) 152 ALR 140, which held that the 'race power' in the Constitution (s 51(xxvi)) need not only be used for the benefit of minority groups.

and political rights were overridden by expanded ASIO powers and the 'war on terror', 'justified' by the post-9/11 climate and associated with Australia's active participation in the Iraq war in the face of UN opposition.

Protestors at the World Economic Forum in Melbourne (September 2000) were denied their rights to peaceful assembly, political expression and freedom of association when police assaulted them, causing over 50 to be hospitalised. Prisoners' rights continue to be ignored via practices like strip searching and the separation of women prisoners from their children. The casualisation of work and other erosion of workers' rights to fair wages and conditions are increasing. Many Australians continue to be denied the right to housing, and the right to social security without harassment and unfair 'breaching' procedures. The Medicare system of health care has become increasingly privatised, jeopardising universal health coverage. All of these situations impact particularly severely on already disadvantaged groups in the community, such as young people. There is still no universal maternity leave, and women and Indigenous people remain grossly under-represented in political decision-making.

Australia is one of the few developed nations in the world without a Bill of Rights. In contrast to countries like Canada and South Africa, the Australian Constitution gives little protection to human rights,² and there is no legislative bill of rights, unlike other nations such as New Zealand and the United Kingdom. The other main way in which a state can use the law to protect human rights is via the United Nations treaty system. Australia has ratified six major human rights treaties, but Australian governments and individuals have often been able to violate these agreements with impunity.

Lack of domestic implementation

Australia is a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and the Convention on the Rights of the Child (CROC).

Our system of government requires international treaties to be incorporated into domestic legislation ('direct implementation') before their contents become part of Australian law, thereby enabling people to enforce these rights through domestic legal processes. ICESCR has not been implemented at all, which means that people living in Australia have no legally enforceable right to housing, social security, health or education.

None of the other major treaties that Australia has signed are fully incorporated in domestic legislation. For example, CEDAW has been partly incorporated via the *Sex Discrimination Act 1984* (Cth), but the Howard Government refused to sign the Optional Protocol, which would have allowed women to make individual human rights complaints ('communications') to the United Nations. The CROC is annexed to the *Human Rights and Equal Opportunity Act 1986* (Cth), which means that the Human Rights and Equal Opportunity Commission can take it into account in its work, but it is not legally binding on the Government.³

Lack of effective enforcement

In order to have any effectiveness, human rights, once recognized, must then be able to be protected by domestic and international mechanisms. Sometimes the processes have worked in tandem for individuals and groups who have been discriminated against. In *Toonen*, a communication to the United Nations led to a change in federal law and consequently the decriminalisation of male homosexual acts in Tasmania.⁴

In relation to the fewer human rights that have been incorporated in domestic law, the powers, functions and resources of domestic bodies such as the Human Rights and Equal Opportunity Commission have been progressively narrowed and diluted.⁵ At the same time, the present High Court is not favorably disposed to law being shaped by human rights norms (*jus cogens*, such as the UDHR), international customary law (common state practice and opinion) and treaties. Justice Kirby is now the only High Court judge who consistently argues that where there is ambiguity in meaning, statutes and the Constitution should be interpreted in a way that is consistent with international human rights. There is also now more judicial division over the extent to which international human rights norms and treaties may influence the common law, as they did in the 1992 *Mabo* decision. The more conservative High Court stance led recently in *Al Kateb* to a majority interpretation of the Constitution in which the indefinite detention of an asylum-seeker was 'justified' despite his preferring deportation and no country being prepared to accept him.⁶

Australia's system of government also means that a judicial decision supporting human rights can be effectively trumped by Parliament passing legislation. This is even more of a concern now that the Liberal Government controls both Houses.

² The express and implied rights in the Constitution include include freedom of religion, a right to vote (though some question whether this is really guaranteed), a right to commerce between the states, and an implied freedom of expression and an implied guarantee restricting Commonwealth powers. Section 109 gives Commonwealth laws primacy over state laws, where the state laws are inconsistent with the former.

³ Other treaties that have been partly incorporated include ICERD (*Racial Discrimination Act 1975* (Cth), *Racial Hatred Act 1995* (Cth)) and ICCPR (*Privacy Act 1988* (Cth), *Evidence Act 1995* (Cth)).

⁴ *Toonen v Australia*, Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992.

⁵ See eg *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

⁶ *Al Kateb v Godwin* [2004] HCA 37 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

At the international level, violations of several treaties by Australia have not generally resulted in any effective sanctions or behavior change. For example, in 1998 Australia became the first western country to be placed under an 'early warning' procedure by the Committee on the Elimination of Racial Discrimination (CERD), due to its lack of compliance with ICERD. Treaty committees assess the track records of signature states by requiring periodic reports, which states must then justify if asked to do so. Australia was questioned particularly about amendments to the native title legislation, policy on Indigenous land rights, and the functions of the Aboriginal and Torres Strait Island Social Justice Commissioner.

The Committee urged the Howard/Coalition Government, as a matter of utmost urgency, to suspend implementation of the 1998 amendments and reopen discussions with the representatives of Aboriginal and Torres Strait Islander peoples, with a view to finding acceptable solutions which would comply with Australia's obligations under the Convention. The Australian Government disagreed with the Committee's findings, with the Attorney-General, Daryl Williams, describing the CERD's findings as 'an insult to all Australians as they are unbalanced' and as failing to understand Australia's system of democracy.⁷

On invitation from Opposition senators and ATSIC, the CERD proposed to visit Australia, but the Government objected and it did not take place. This example demonstrates that while a treaty committee can express grave concern, its views are not legally binding on the offending state.

The other main international method of accountability, individual communications, which in theory at least gives individuals another avenue of redress when their country has abused their freedoms or has failed to assist them against abuse, is scarcely used. This is due partly to the lack of publicity given to this route by Governments, which they are required to do as part of their treaty obligations. However, it is also because the UN process is time-consuming, and submitting an individual communication first requires exhausting domestic remedies - and as Moira Rayner put it, the word 'exhausting' is best seen as an adjective.⁸

Human rights convention committees are the pre-eminent interpreters of their relevant treaties - themselves legally binding - and so committee decisions are strong indicators of legal obligations.⁹ Remedies can include compensation or other reparation, prosecution of violators, prevention of further violations, and amendment of laws.¹⁰ Special Rapporteurs can also ask states for follow-up information where violations have been found but the complainants have not been given an appropriate remedy. The offending States are publicised and reported to the General Assembly via the Economic and Social Council.¹¹ However, treaty committees have no legal powers of enforcement and can only rely on the fact that state rejections of their findings are good evidence of bad faith towards treaty obligations.¹²

The Liberal 'dummy spit'

If treaty committees' greatest weapon is international embarrassment, it is a tactic that has had little effect on the current Australian Government. Australia has not only shrugged off UN censure but has attacked the UN human rights treaty monitoring process in response to criticisms of Australia's human rights record. In 2000, the CERD expressed various concerns, including over the Australian Government's refusal to apologise for the Stolen Generations, its continuing discriminatory practices in relation to native title, and its unsatisfactory response to the early warning procedure. The Government responded with a volley of denigratory comments,¹³ and announced that it would conduct a closed review of its participation in the UN treaty system.¹⁴ No public submissions were called for, and the review document has never been made public.¹⁵

⁷ Media Release, the Hon Daryl Williams, Attorney-General, 19 March 1999, quoted in S Hoffman, 'United Nations Committee on the Elimination of Racial Discrimination: Consideration of Australia under its early warning measures and urgent action procedures' (2000) 6(1) *Australian Journal of Human Rights* 13, 30.

⁸ Moira Rayner, 'Exhausting Domestic Remedies', in Centre for Comparative Constitutional Studies, University of Melbourne, *Internationalising Human Rights: Australia's Accession to the First Optional Protocol* (1992), 62.

⁹ Sarah Joseph, J Schultz and Melissa Castan, 'Introduction to the ICCPR' in Sarah Joseph, J Schultz and Melissa Castan, *The ICCPR: Cases, Materials and Commentary* (2000), 14.

¹⁰ Elizabeth Evatt, 'Individual Communications Under the Optional Protocol to the International Covenant on Civil and Political Rights' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1988), 105.

¹¹ A Robertson and J Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (1996), 70-71.

¹² Sarah Joseph, J Schultz and Melissa Castan, 'Introduction to the ICCPR' in Sarah Joseph, J Schultz and Melissa Castan, *The ICCPR: Cases, Materials and Commentary* (2000), 14.

¹³ Eg Minister for Foreign Affairs, Alexander Downer, said the Government was 'appalled at the blatantly political and partisan approach taken by the Committee', which was 'little more than a polemical attack on the Government's indigenous policies' ('Government to review participation in UN treaty committee system', transcript of interview with Kerry O'Brien, *7.30 Report*, ABC, 30 March 2000). Attorney-General Daryl Williams called the CERD's comments 'an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs'. He said the Committee's international credibility was 'in question unless it takes a more balanced perspective in the future' (Media release, Attorney-General, 'CERD report unbalanced', March 26 2000).

¹⁴ Minister for Foreign Affairs and Trade, Government to Review UN Treaty Committees' (2000), <http://www.dfat.gov.au/media/releases/foreign/2000/fa024_2000.html>, 28 August 2002.

¹⁵ The closed review also undermined a pre-existing publicly accessible review by the Joint Standing Committee on Treaties into Australia's post-Cold War relationship with the UN, which included consideration of the UN human rights treaty system (Joint Standing Committee on Foreign Affairs Defence and Trade (June 2001) *Australia's Role in United Nations Reform*, AGPS, Canberra).

In the last few years, Australia has consistently refused to cooperate with or insulted UN rapporteurs and other experts who have visited (or attempted to visit) Australia to investigate conditions in detention centres and to investigate racism. The frequent interrelationship of the different factors undermining human rights is shown by Australia's 2002 refusal to ratify the Optional Protocol to the CAT, which would have enabled the UN to make unannounced visits to detention centres.

Perhaps one of the most insidious ways in which the Liberal Government has eroded human rights in Australia is via its highjacking of oppositional discourse. As just one example, the proposed industrial relations 'reforms', as with voluntary student unionism, are being promoted in the media as an expansion of workers' 'free choice'. Like the abolition of ATSIC, both the medium of dissent and the vehicles for protest have come under attack.

Where to from here?

Of course the UN system is far from perfect. Economic, social and cultural rights, and other 'less obvious' areas such as the environment, have always been given less attention and protection than other human rights. The Draft Declaration on the Rights of Indigenous People is yet to be approved after years of debate,¹⁶ a particular sticking point being the right to self-determination - broadly speaking, the right of peoples to 'freely determine their political status and freely pursue their economic, social and cultural development'.¹⁷ People with disabilities still have not even a formal UN acknowledgment of their human rights.

International human rights law often does not apply when a 'non-state actor' is the offender, a state being defined as including a state organ which encompasses entities at any level or arm of government (including where they are in some way authorised to act by or in the absence of a state), but not if they act in a private capacity.¹⁸ This gap links to inadequate redress for violation of the rights of women, including within minorities otherwise protected.

For example, as the Special Rapporteur on Violence Against Women has discussed, treaties other than CEDAW exhibit a gender bias which works against victims of domestic violence.¹⁹ Since the *Velasquez* case, states are in violation of their obligations if they do not demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses.²⁰ But violation can only be established if it can be shown that there is a *pattern* of the state condoning abuse, which sets the bar higher than for other, arguably comparable human rights violations.²¹

In other words, the legacy of liberal, masculinist European-derived individualism and the ongoing political battles in the UN are clear signs that the system needs improvement. Nevertheless, withdrawing support is not the answer. Australia's revised National Action Plan on Human Rights refers to 'Australia's leading role in developing the international human rights system, and its commitment to the principle of fair treatment for all' as being 'enforced by our nation's robust system of human rights protection'.²² What strategies would it take to genuinely achieve this picture of Australian society?

This briefing paper was written by Chris Atmore, Federation of Community Legal Centres. Much of this paper is drawn from *Right Off: The Attack on Human Rights in Australia*, Human Rights Working Group, Federation of Community Legal Centres (Vic), (2002), available at <http://www.communitylaw.org.au/fedclc/pages/LawReform/>

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For more information about the conference, how to register, this particular workshop and the Now We The People network, please visit www.nowwethepeople.org. Email info@nowwethepeople.org

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¹⁶ Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN4/1995/2, E/CN4/Sub.2/1994/56 (1994).

¹⁷ Ryszard Piotrowicz, 'The Structure of the International Legal System' in Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2005) 20, 23-4, 37-8.

¹⁸ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) <www.un.org/law/ilc> at 1 May 2005.

¹⁹ See eg 'Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms', Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85 (E/CN4/1996/53, 6 February 1996, Commission on Human Rights, Fifty-second session).

²⁰ E/CN4/1996/53, para 33.

²¹ *Velasquez* concerned political disappearances and arbitrary executions, acts typically associated in visible international law with male victims.

²² Commonwealth of Australia, *Australia's National Framework for Human Rights: National Action Plan* (2004), 5.

<http://www.ag.gov.au/agd/WWW/civiljusticeHome.nsf/AllDocs/0F9F219C19427392CA256F6C00150967?OpenDocument>