

## Human Rights

There should be no mistake that the state of Indigenous health in this country is an abuse of human rights. A decent standard of health and life expectancy equivalent to other Australians is not a favour asked by our people. It is our right – simply because we too are human. —PROFESSOR MICK DODSON

Human rights are the rights and freedoms that individuals enjoy by virtue of being born human. Human rights are inalienable and universal – they are equal entitlements that we all have, regardless of age, gender, race, sexuality, class, culture or national identity. Two key questions underlie debates about human rights: What is needed to live a life of dignity? And, what rights are fundamental to the development of the human person?

Three widely recognised categories of human rights are:

- 1. Civil and political rights.** These rights are contingent on the basic right to liberty. They include: the right to life; the right to vote in political elections; the right to free speech, movement and political thought; the right to a fair trial; and a range of other security, due process, equality and political rights.
- 2. Economic, social and cultural rights.** These are often described as positive rights because governments must actively provide certain goods and services in order to ensure these rights are respected. This category of rights includes: the right to food, water, healthcare, education and cultural practices.
- 3. Solidarity rights.** These include the right to political, social and cultural self-determination; the right to peace; the right to environmental sustainability, as well as the right to economic, social and environmental development.

Although these categories are useful, they are also problematic. Civil and political rights are often viewed as the most important of all rights and our political and legal

system has constantly reflected this hierarchy. However, this categorisation fails to take into account the inter-relatedness and overlapping of human rights. For example, if people do not enjoy the right to education, housing and food, then how can they realistically enjoy the right to vote or indeed the right to life?

### The Modern Human Rights Movement

The modern human rights movement has matured over recent centuries as a result of historical and political processes, the evolution of philosophical thought and the development of law. In turn, human rights have contributed enormously to international political and legal developments. Human rights have provided a shared set of standards or values to which international organisations, governments, institutions and citizens can look for support in popular struggles over freedom, equality and justice.

Many of the most important international human rights developments were direct responses to the horrors of the Second World War (1939 – 1945), the most murderous war in human history. This was unlike any previous war not only in the number of human casualties, but also because it was the first total war involving armed forces and civilian populations in equal measure. In Europe alone, it is estimated that about thirty-six and a half million people died from war-related causes and that more than half were civilians. In the Asia-Pacific war, weaponry unlike any seen before was deployed on both military and civilian populations. In both war zones there were widespread violations of human rights.

Horror at the atrocities, and a determination that they should never happen, again led to international responses which have taken three significant forms: (1) legal interventions through the development of international law; (2) the development of international humanitarian law and post-conflict legal action such as the Nuremberg and Tokyo trials after World War II, the tribunals for the former Yugoslavia and Rwanda, the International Crimi-

nal Court (ICC) and a range of truth commissions and hybrid courts in places such as South Africa, Chile and East Timor since the early 1990s; and (3) the development of international human rights law, including the “international bill of rights”: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; and the International Covenant on Economic, Social and Cultural Rights.

Of special significance is the Universal Declaration of Human Rights (UDHR). It was adopted without dissent by the newly formed United Nations General Assembly on 10th December 1948 (but with abstention by the former Soviet bloc). The Declaration recognises the “inherent dignity and... the equal and inalienable rights of all members of the human family”. A list of fundamental rights is set out as “common standard of achievement for all peoples and all nations”. For the first time in history, countries across the globe agreed on a comprehensive statement of inalienable human rights. While the Declaration was not without controversy (some arguing that it reflects western values), Mary Robinson (former United Nations High Commissioner for Human Rights and current head of the International Commission of Jurists) argues that the Declaration was the result of “a distillation of many of the values inherent in the world’s major legal systems and religious beliefs, including the Buddhist, Christian, Hindu, Islamic and Jewish traditions.” The Declaration is highly valued across the world, regardless of culture or geographical location.

The International Covenant on Civil and Political Rights (ICCPR) (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) are two separate binding treaties that have been widely ratified by many nations of the world. The ICCPR deals with fundamental civil and political rights. Individuals can make complaints to the UN Human Rights Committee, but recommendations made by the Committee are not enforceable. States that have not ratified the ICCPR include: China, Burma, Pakistan and Singapore.

The ICESCR protects core economic, social and cultural rights. Unlike the ICCPR, it does not have a complaints mechanism. It requires states to take steps (e.g. legislative measures) to achieve “progressive realisation” of the rights contained within. It only requires states to act in good faith over time within their capacity to realise these rights. Among other countries, the United States has refused to

ratify the ICESCR because of the Bush administration’s view that economic, social and cultural rights are not “rights” but socially desirable goals. Whether this stance will be changed by the new Obama administration is yet to be seen.

Some other important international human rights instruments include (but are not limited to):

- The Convention on the Prevention and Punishment of the Crime of Genocide (1948);
- The United Nations Convention Relating to the Status of Refugees (1951);
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1981);
- The Convention on the Rights of the Child (1989); and
- The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1989)

## Human Rights in Australia

There are four sources of human rights law in Australia:

1. **The Australian Constitution:** Unlike founding documents in other countries, the Australian Constitution says very little about rights and does not provide protection for the most basic of rights, such as the right to life and freedom from torture (although these are recognised as “implied rights”). It does include explicitly: the right to vote; the right to trial by jury in some matters; the right to freedom of religion; the right to freedom from discrimination when a resident of another state; the right to review governmental action; and freedom of interstate trade.
2. **Federal and state legislation:** The Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) was created by the *Human Rights and Equal Opportunity Act 1986*. The Commission is a national independent statutory government body with responsibilities for inquiring into alleged infringements under five anti-discrimination laws – the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; the *Disability Discrimination Act 1992*; and the *Age Discrimination Act 2004*. Matters that can be investigated by the Commission include: discrimination on the grounds of race, colour or ethnic origin, racial vilification, sex, sexual harassment,

marital status, pregnancy or disability. Public inquiries carried out by the Commission have also been very influential. For example, the *Bringing them Home Report* on the Stolen Generations was effective in bringing Indigenous human rights issues to public attention.

3. **Common law:** Australia's legal system is based on common law, namely, the progressive refinement of the law by legal judgements. The common law can provide some protection of human rights (e.g. the *Mabo* case). Common law has, however, had little impact on the development of greater human rights protection in Australia.
4. **International law:** Australia has ratified a range of international treaties. These treaties do not, however, have force in law unless given effect by domestic legislation.

Australia does not have a national charter or bill of human rights, that is a formal legislated or constitutional summary of human rights.

For the majority of Australians, human rights are very well protected. Australia enjoys a strong democratic tradition of government premised on human rights and protection against inequality, discrimination, violence and vilification. Australia has an independent judicial system and freedom of press and religion. Australia has also been a strong advocate of international human rights and is party to most landmark human rights treaties.

On the other hand, Australia has attracted widespread criticism for parts of its human rights record. The treatment of Indigenous people has received condemnation over the high rate of imprisonment, the appalling state of Indigenous health, education, employment, as well as other violations of fundamental rights such as the Stolen Generation policies, dispossession and racism. In 2007, the Federal Government introduced the Northern Territory Intervention, which has been criticised on a number of grounds, including that it suspends the *Racial Discrimination Act*. In 2007, Australia was one of four countries to vote against the United Nations Declaration of Indigenous Peoples, which was adopted by the UN.

There has also been international condemnation of the treatment of asylum seekers and refugees in Australia. Particular issues include: the mandatory detention of asylum seekers without a valid visa (including children) in

prison-like settings for indefinite periods and the denial of certain rights to refugees on temporary protection visas. Although the Rudd Government has made some changes in 2008 (e.g. to end the Pacific Solution, make mandatory detention a last resort, and overhaul temporary protection visas), much more needs to be done to remedy Australia's immigration policy.

On about 50 occasions, individuals have taken their complaints to the UN Human Rights Committee. In about 17 of these cases, the Committee has found Australia in violation of the ICCPR. For example, the Toonan case which went before the Committee in 1994, involved a complaint about the discriminatory Tasmanian laws criminalising consensual sex between adult males in private. The Committee found that the laws amounted to an arbitrary interference with the right to privacy under the ICCPR and recommended that the laws be repealed. Subsequently, the Federal Government passed legislation prohibiting the making of such laws, and in 1997, the High Court of Australia struck down the Tasmanian laws.

## Should Australia have a National Charter of Human Rights?

On 10 December 2008, the 60th anniversary of the adoption of the Universal Declaration of Human Rights, the federal Attorney-General Robert McClelland announced the National Human Rights Consultation. The Consultation provides an opportunity for widespread discussion about human rights in Australia. The Australian Human Rights Commission will assist community organisations and individuals to take part in the Consultation, including holding seminars and debates.

Whether Australia should have a national charter or bill of rights and responsibilities is a hotly debated issue in Australia today. Those who oppose the introduction of a charter argue that human rights are adequately protected under Australian law, including common law. They also argue that a charter would shift responsibility from the Parliament to the courts and that a charter would lead to a lawyer's picnic, arguing that much (or at least some) of the strong support for a charter among legal bodies and the legal profession is a manifestation of self interest.

Those who support the adoption of a charter point out that Australia is the only western democracy without a national charter or bill of rights. For example, Professor

George Williams (leading expert in human rights law), writes that the protection of human rights in Australia “is ad hoc and the rights themselves are scattered and often hard to find.” Advocates also point out that there are already successful models of charters operating in Australia today. In 2004, the ACT enacted the *Human Rights Act 2004* and in 2006, the *Victorian Charter of Human Rights and Responsibilities Act 2006* was passed. Other states and territories are considering adopting their own charters. The primary aim of the ACT and Victorian legislation is to ensure that human rights are taken into consideration in law and policy making by governments and legal and public authorities. For example, all bills passed by the Victorian Parliament must be scrutinised for compatibility with the human rights standards set out by the Charter. If the courts find that legislation is inconsistent with the Charter, the Victorian Supreme Court may require Parliament to review the law. The Charter does not apply to corporations or individuals, only public authorities. Some argue that the Victorian Charter provides only weak protection of human rights. For example, the government may issue an override declaration even when laws breach fundamental human rights. It is then left to the Parliament to have the final say. In addition, individuals do not have the right to take action when their human rights are breached.

Both the ACT and Victorian examples provide little evidence to support the fears of those who oppose a national charter because both are relatively conservative and to date have not led to any surge in legal action, nor a shift in power from parliament to the courts.

There are two options for introducing a national charter of human rights in Australia should a decision be taken to move in this way. The first is a constitutional or entrenched charter of rights. The second is a statutory charter of rights as an ordinary act of parliament. The first option is difficult as it requires an absolute majority in both houses in federal parliament and it must also be passed at a referendum by the majority of the Australian people. Such an action would introduce a statement of human rights similar to that in the US Constitution. This is, however, a very inflexible system as US problems with gun laws have shown. A statutory charter, a charter established by an ordinary piece of legislation, is thus a preferable option. It could be modeled on the Victorian Charter to ensure that all new federal laws are scrutinised

and accompanied by a human rights compatibility statement. A national charter could also go further and provide individuals with a range of remedies, including internal complaint handling mechanisms, conciliation, legal remedies and the right to seek reparations.

Human rights constitute an important set of standards or a benchmark for political legitimacy. The case for a national human rights act is that it would help ensure Australia meets its international obligations; it would enhance democracy by protecting the rights of minorities and it would keep governments in check. A charter would enhance policy and law making by ensuring that legislation passes the human rights test, and it would serve as an important education tool for promoting cohesion and understanding in an increasingly diverse society.

## Human Rights: The Challenges

There is disagreement about what constitutes a “human right”; whether human rights are western in both origin and development; and whether they pay sufficient attention to other cultural, religious and political traditions. Although these debates are important, the ideals of equality, freedom and justice are themselves outstanding aspirations that we should continually strive to achieve.

There are many other great human rights challenges and controversies. Nelson Mandela once said, “... after climbing a great hill, one only finds that there are many more hills to climb.” Terrorism, climate change, migration, discrimination based on sexuality, gender, race and disability, and a range of other issues, such as prisoner rights and homelessness, represent some of the major “mountains” that we are currently climbing or are yet to climb.

How should different types of human rights be weighed against each other? For example, is hate speech freedom of expression or defamation? Does abortion and euthanasia violate the right to life? Does the right to national security trump the right to a fair trial and the right not to be arbitrarily detained? Does the right to privacy mean that women can be violated by their partners in their own home? Does the right to consume pornography violate the rights of women? Do the rights of the child override the rights of Indigenous people to be protected against racial discrimination? Does the environment have rights? Does the right to development override the right to a clean environment?

# T H E A U S T R A L I A N C O L L A B O R A T I O N

The idea of conflicting human rights continues to predominate public discourse and debate, sometimes with seemingly irreconcilable differences. However, because there are controversies and disagreements about some aspects of human rights it should not be thought that they are unimportant or unnecessary. Quite to the contrary. Human rights are the most fundamental standards from which to live a life of dignity and because of competing demands for scarce resources, it is inevitable that there should be debate surrounding not only the origins of human rights, but also their scope and their enforcement. The most important outcome of these controversies, debates and challenges must be *dialogue*. This fundamentally requires respect, understanding and compromise. It is about listening and not judging in an increasingly interdependent, diverse and multicultural global community. While we may not always find resolution to some of the issues, there can be no doubt that human rights provide an essential platform for democracy, peace and justice.

## Useful sources

The Australian Human Rights Commission,  
<http://www.hreoc.gov.au/index.htm>

The Australian Human Rights Commission is an independent statutory organisation established in 1986 by a federal act of parliament.

The National Human Rights Consultation,  
<http://www.humanrightsconsultation.gov.au/>

This is the official website for the National Human Rights Consultation, set up in December 2008 for the public consultation on human rights in Australia.

Steiner, H.J., Alston, P., & Goodman, R. (2008). *International Human Rights in Context: Law, Politics, Morals: Texts and Materials* (3rd edition). Oxford; New York: Oxford University Press.

The third edition of *International Human Rights in Context* is extremely comprehensive in scope, with new chapters on terrorism, nonstate actors, climate change and other important human rights concerns.

## Author

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