

Democracy in Australia – The Protection of Human Rights in Australia

During the Second World War (1939 – 1945), it is estimated that about thirty six and a half million Europeans died, a number vastly exceeding the death toll in the First World War. These staggering figures do not furthermore include those killed in the war with Japan in the Asia Pacific nor the death toll experienced by the US in Europe. *In Postwar: A History of Europe since 1945* Tony Judt has observed that “no other conflict in recorded history killed so many people in so short a time”. Buried within these statistics is another terrible figure; the percentage of civilian deaths. Judt estimates civilian deaths to have been more than nineteen million people, that is more than half of all those killed. The deaths alone do not tell of other shocking abuses, the Holocaust, the treatment by the German army of Russian peasants and prisoners of war on the Russian front and the terrible vengeance, death, rape and pillage, wreaked by Russian soldiers as they advanced across Europe. Many more such abuses occurred in the Asia-Pacific war.

It was revulsion about these atrocities that led a group of countries in 1945 to bring the United Nations into being with the aim of protecting human rights, alongside peace and security. One of the early actions of the United Nations was to draft the Universal Declaration of Human Rights in 1948. The Declaration is now the most translated document in the world.

International Human Rights Declarations and Conventions

The Universal Declaration of Human Rights recognises that ‘the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world’. It declares that human rights are universal – to be enjoyed by all people, no matter who they are or where they live. The Universal Declaration includes civil and political rights, such as the right to life, liberty, free speech and privacy. It also includes economic, social and cultural rights, such as the right to social security, health and education.

The Declaration is an expression of values that are shared by member countries of the United Nations. It is not a treaty, and so it does not create obligations for Australia or other countries. The Declaration is, however, the foundation for a series of agreements which, if ratified by individual countries, do become binding in international law.

The Declaration, along with the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are known as the International Bill of Rights. Australia has ratified these covenants, along with a group of more specific conventions. These conventions are;

- the Convention on the Rights of the Child (CRC)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention on the Elimination of All Forms of Racial Discrimination (CERD), and,
- the Convention on the Rights of Persons with Disabilities (ICESCR).

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The Conventions generally reflect rights which are part of the covenants with respect to the specific groups they address.

Ratification of the covenants by the Australian Federal government encourages Australian Courts to take their provisions into account in their interpretations and judgements but this cannot be guaranteed unless the covenants have been expressly incorporated into Australian legislation. Individuals who find their rights under these laws have been violated can make a complaint to the Office of the United Nations High Commission for Human Rights. The Commission maintains eight treaty bodies, which monitor implementation of the covenants and conventions. These Committees can only hear complaints when individuals have exhausted their rights to complain to all Australian courts and if they find that a breach has occurred they have no ability to remedy that breach.

Human Rights Implementation in Australia

Human rights are a significant feature of the constitutions of some countries (notably the United States of America) but feature only in a limited way in the Australian Constitution. The main function of the Constitution is to define the rights of the States and the rights and role of the Commonwealth. Zifcak and King point out that it does provide a limited right to a trial by jury (in section 80) and prohibits the Commonwealth from passing laws which limit freedom of religion (section 116), and from discriminating against residents according to the state or territory they live in (section 117). They also point out that the High Court of Australia has also found that there are certain implied political rights in the provisions in the Constitution.

The Australian Federal Government has passed specific legislation which gives effect to some of the rights set down in international instruments that it has ratified.

- Australian Human Rights Commission Act 1986
- Age Discrimination Act 2004
- Disability Discrimination Act 1992
- Race Discrimination Act 1975
- Sex Discrimination Act 1984

The Australian Human Rights and Equal Opportunities Commission (HREOC) administers these Acts and is empowered to hear and conciliate complaints from individuals who believe their rights have been breached. HREOC may investigate complaints and make recommendations to remedy any breaches it finds have occurred but has no powers of enforcement. Australian Governments can pass laws and effect policies that contravene conventions and covenants they have agreed to and ratified, unless those conventions and covenants are incorporated into legislation.

State and Territory Initiatives

The ACT enacted a Human Rights Act in 2004. The Act is an ordinary act of Parliament, which allows the legislature to amend the legislation to refine it if necessary. The Act obliges the Legislative Assembly to consider human rights provisions of new bills before they are enacted. The Act obliges the courts to interpret enacted bills in a way consistent with human rights where possible. If a court finds legislation incompatible with the Human Rights Act, it can declare the two incompatible. The Attorney-General must then recommend a resolution to the legislature within six months.

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Victoria has a Charter of Human Rights and Responsibilities Act (2006). Like the ACT legislation, the Act requires consideration by the legislature of human rights concerns in developing new legislation and by the courts in interpreting existing legislation. It also relies on the courts to identify incompatible legislation and refer it to the Parliament for resolution.

These initiatives have been praised as providing a good democratic balance; they allow independent judges to freely interpret human rights provisions while leaving legislation ultimately in the hands of elected members of parliament. However, they ignore important economic, social, and cultural rights. Constitutional scholar George Williams calls them a “promising start to the debate” over protection of rights by Australian governments.

Significant Human Rights Issues Facing Australia

Zifcak and King record that the UN Human Rights Treaty Committees have become progressively more critical of Australia’s handling of human rights issues since the early 1990’s. The Committees’ report on the performance of countries in meeting their obligations to the treaties they have signed had been generally approving of Australia’s activities. Recent reports, however, criticise Australia in three main areas.

Indigenous peoples

The differences between the health, education and housing standards of indigenous and non-Indigenous Australians has grown over the past decades. Mandatory detention laws have had a disproportionate effect on indigenous Australians and the rate of imprisonment remains high. No effective reconciliation with members of the Stolen Generation has taken place.

Asylum seekers

Mandatory detention policies mean asylum seekers are imprisoned for long periods and in unsatisfactory circumstances.

Not Enough Domestic Human Rights Protection

Although Australia is a signatory to several important conventions and protocols, it has not enacted them in domestic law. This means it is difficult for individuals to access the protections of many international covenants and conventions in any meaningful way. Alone among English speaking common law countries, it has no national overarching bill or charter of rights. In April 2010, the Attorney-General announced the “Human Rights Framework”, the Federal Government’s response to the Human Rights Consultation. The framework excludes a charter or bill of rights in favour of more human rights education and consultation, and the merging of current domestic human rights in to a single piece of legislation. Father Frank Brennan, who chaired the Human Rights Consultation, and a number of others have criticised the government’s rejection of a bill, which was a key recommendation of the consultation.

The arguments for and against the introduction of a national Charter of Rights and Responsibilities are discussed in a companion piece, “Arguments for and against a national charter of rights and responsibilities”.

Sources

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About the Human Rights and Equal Opportunity Commission

<http://www.hreoc.gov.au/about/legislation/index.html>

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