

HUMAN RIGHTS AND DISCRIMINATION

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

UNIVERSAL DECLARATION OF HUMAN RIGHTS (art. 1)

What are human rights?

It is difficult to define human rights and most commentators describe human rights rather than define the phrase.

The starting point is the concept of a 'right'. Rights may be the basis for a claim that is recognised and enforced by law, or rights may simply be about setting a moral or fair standard of treatment.

Human rights are about values. Human rights are concerned with the inherent dignity of all people and ensuring that an individual's dignity and integrity as a person is respected.

Human rights law is about setting standards of what is and is not acceptable treatment. Human rights law is about the relationship between the individual and the State. The 'laws' set the minimum standard of treatment which an individual can expect from the government.

The history of human rights

Minimum standards of fair and just treatment of individuals have been recognised in religious teaching for centuries. Religion and the concept of natural law was one of the early sources of the concept of human rights. It was said that there were rights derived from nature which were inalienable to men.

Political struggles over the centuries saw the relationship between the State and individuals being described in terms of rights and duties. One of the earliest human rights documents is the *Magna Carta* in 1215. The *Magna Carta* set out the rule of law and provided some protection against the abuse or arbitrary power by the King. The rights were further refined in 1689 in the *Bill of Rights*. Both *Magna Carta* and the *Bill of Rights* remain an important source of the Australian common law.

The struggle for civil and political rights can be seen in the French Declaration of the Rights of Man 1789 and the American Declaration of Independence in 1776. Both these declarations sought to protect the individual from the tyranny of the majority and the tyrant of the State.

The modern notion of human rights has developed at an international level through the work of the United Nations. The aftermath of World War II saw a commitment by all nations to prevent the atrocities occurring again. The United Nations was created in 1945 with the objective of maintaining peace and promoting respect for human rights. The United Nations worked to achieve these objectives by creating internationally legally binding standards which applied to all countries for all individuals.

Traditionally international law was about the relationship between countries and had not been concerned with the rights of individuals or groups of people. Prior to the 1940's there were very few international laws which promoted or protected human rights. Those international laws which promoted or protected human rights. Those international laws which were in place did not provide individuals with a remedy if their rights had been violated.

International human rights laws

International human rights laws are generally found in written agreements referred to as treaties, conventions or declarations.

Treaties and conventions are like written contracts between nation states. The treaties and conventions create legal obligations, but are only binding on the countries that agree to become a part to the treaty or convention.

Declarations are also an important source of modern human rights law. Unlike treaties or conventions, declarations are not binding in international law. They are usually in the form of a resolution of the UN General Assembly.

The development of modern human rights law starts with the United Nations *Universal Declaration of Human Rights* (1948) (UDHR). The UDHR is a human rights “blue-print”. It contains a comprehensive statement of the core human rights which all individuals, regardless of their race, sex or residence are entitled to enjoy. As a declaration, the UDHR did not create binding legal obligations at the time. However, it is a document with great persuasive moral force.

The UDHR led to the development of two legally binding conventions – the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). These conventions divide human rights into two categories:

- **Economic, Social and Cultural Rights**

These include the right to health, housing and an adequate standard of living. They are sometimes described as aspirational rights, not immediately binding and rights which create “positive” obligations on the government to ensure protection of the rights.

- **Civil and Political Rights**

These include freedom of speech, freedom of assembly, freedom of thought, the right to liberty and a fair trial. These rights are not aspirational in the sense that they are rights which will take time to achieve. They are immediately capable of recognition and protection. These rights are traditionally considered as rights which are “negative” obligations.

Since 1948, the United Nations has worked on many international conventions and declarations which set out the human rights of particular groups of individuals who require special treatment or protection. These include the rights of women, children, minority groups, refugees and Indigenous peoples. Australia is a party to many of these international treaties.

There has also been a recognition that some human rights are rights which may only be enjoyed as collective rights or group rights. One of these rights is the right to self-determination. The right to self-determination is an example of a collective right. It is a right which may be enjoyed by Indigenous or colonised peoples. The right to self-determination is a process by which Indigenous peoples have control of the matters which affect their lives. It is the right to determine one’s own future, to choose how one would live. To follow traditional laws.

Human Rights in Australian Law

Australia has no bill of rights or charter of rights. There is no single comprehensive statement of Australians’ human rights.

Protection of human rights in Australian law is piecemeal and is to be found in:

- The Constitution
- Common law
- Statutes at a Commonwealth and State level
- International law

The Constitution

The Australian Constitution has very few human rights protections for individuals, when the Constitution was drafted, the founding fathers did not think Australia required a bill or girths like the American Bill of Rights and considered that the rights of individuals could best be protection by the courts and through the operation of common law or by Parliament enacting laws to protect individuals.

The Australia Constitution refers to some rights but they are not a source of human rights in any real sense. To the extent that the rights exist, they operate to prevent Commonwealth passing laws which would take away or impair those rights. The rights include:

- the right to trial by jury (section 80);
- freedom of religion (section 116);
- freedom of interstate travel (section 92);
- the right to be compensated on just terms for compulsory acquisition of property (section 51(31))

In addition to these express rights in the Constitution, there are some implied rights, such as the right to freedom of speech for discussion of political matters.

The Constitution is also important for demarking the areas where the Commonwealth Parliament can make laws and those areas which are left to the States and Territories. Section 51 of the Constitution sets out the areas where the Commonwealth can make laws. There is no head of power which enables the Commonwealth to make laws for human rights. This means that human rights laws should be left to the States and Territories.

However, the Commonwealth Parliament may make laws to give effect to Australia's international legal obligations. This head of power enabled the Commonwealth to pass human rights laws which give effect to the many human rights conventions and declarations.

Common law

Australia inherited a common law system from the United Kingdom. The common law is not written code but law developed through judicial decisions. The common law has very few positive statements about human rights or what standards are expected of Governments. The extent to which the common law protects human rights depends on the judges who interpret and develop the law.

Generally, the common law protects human rights in Australia by acknowledging freedoms. An individual is free to do whatever he or she wishes up to the point that a law or other restriction prevents them from engaging in the activity or their actions cause harm to others. For example, individuals are free to assemble and hold a meeting in any public place provided that they do not trespass on property, block traffic or prevent other individuals from going about their businesses.

Statutes and legislation

As discussed above, the Commonwealth Parliament has no power to make general human rights. Laws, but it can pass laws to give effect to Australia's international human rights obligations. In 1975, the *Racial Discrimination Act* was passed to make racial discrimination unlawful throughout Australia. The *Racial Discrimination Act* was based on the *International Convention on the Elimination of All Forms of Racial Discrimination* and guarantees a range of human rights including:

Civil and political rights in particular:

- equal treatment before the courts;
- protection by the Government against violence or bodily harm;

- participate in elections and to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- freedom of movement and residence;
- right to own property alone as well as in association with others;
- right to freedom of thought, conscience, religion, opinion and expression and of peaceful assembly and association.

Economic, social and cultural rights, in particular rights to:

- work
- housing
- public health, medical care, social security and social services
- education and training;
- equal participation in cultural activities;
- access to any place or service intended for use by the general public.

In 1984, the *Sex Discrimination Act* was passed to give effect to international human rights laws protecting women's human rights.

In 1992, the *Disability Discrimination Act* which makes disability discrimination unlawful gave effect to several international conventions and declarations addressing disability rights.

One of the few comprehensive human rights statutes which implements international human rights is the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* ('HEROCA') and *Human Rights And Equal Opportunity Commission Regulations*. HEROCA gives effect to the following international conventions and declarations:

- ICCPRC;
- Declaration on the Rights of the Child;
- Convention on the Rights of the Child;
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities;
- Declaration on the Rights of the Mentally Retarded Persons;
- Declaration on the Rights of Disabled Persons; and
- Convention on Discrimination in Employment and Occupation (ILO No. 111)

In addition to Commonwealth laws, all Australian States and Territories have anti-discrimination laws in place. The prevention of discrimination in employment, education and the provision of services or goods is the main area where human rights are protected in Australia.

International law

As a member of the United Nations (UN), Australia is required to comply with the UN Charter. Australia is also a signatory to many international human rights conventions. Australia through its UN membership participates in conferences and the General Assembly debates which have led to UN human rights declarations.

International law is not automatically part of Australian law. International human rights treaties do not create individually enforceable rights in an Australian court. However, this does not mean international laws have no relevance to Australian law.

First, international laws allow the Commonwealth to pass laws to give effect to the Australian laws.

Secondly, judges may take international law into account in making their decisions and deciding what the common law is. The judges may also take international human rights laws into account in interpreting statutes. In *Mabo v Commonwealth* (No. 2) Brennan J observed that international treaties provide a legitimate and important influence upon the common law.

The third way in which human rights law may be used is when government decision makers make decisions which affect a person's human rights. The person is entitled to expect that the decision maker will take human rights into account when making the decision.

Does Australia need a Bill of Rights?

Most countries that share a common law system of law have a bill of rights. A bill of rights is a comprehensive statement of basic human rights. The bill of rights must be entrenched in the country's constitution or it might be a statute law like the *Racial Discrimination Act*.

There have been attempts to enact a bill of rights in Australia based on the rights set out in the ICCPR. These attempts have failed and there has been an ongoing debate about whether Australia needs a bill of rights.

Proponents of a bill of rights say that a bill of rights provides certainty and clear standards against which Government decisions and legislation can be judged. A bill of rights will fill the gaps left by the common law and statutes which only deal with specific subject matter. It is argued that a bill of rights will provide Australian's with a remedy when their rights have been breached, and will give effect to Australia's international human rights obligations.

Opponents of a bill of rights say that reducing rights to a written document is inflexible and may prevent human rights developing to meet the needs of the time. Some opponents believe that a bill of rights will give too much power to the judges and courts. It is argued that the existing Australian laws adequately protect human rights. As one retired High Court judge has said:

"If society is tolerant of racial, it does not need a Bill of Rights. If it is not, no Bill of Rights will preserve it."

Sir Harry Gibbs, former Chief Justice of Australia.

How are human rights enforced in Australia?

Most of the Commonwealth and State anti-discrimination laws provide a remedy to unlawful discrimination. A complaint can be made to the body which has been established to investigate complaints. In New South Wales it is the Anti-Discrimination Board (<http://www.lawlink/nsw.gov.au/adb.nsf/pages/index>). When a complaint is made the Board will try to bring the parties together to conciliate the complaint and if that is not possible refer the complaint to a Tribunal for a hearing of the complaint.

If a tribunal finds there has been discrimination, the person may receive some compensation for the unlawful discrimination or some other order to redress the person's feelings or loss caused by the discrimination.

Human Rights and Equal Opportunity Commission (HREOC)

The national human rights body is HREOC (<http://hreoc.gov.au>). HREOC is responsible for overseeing all the Commonwealth anti-discrimination laws and provides an avenue for complaints to be made and resolved.

HREOC also investigates human rights issues throughout Australia.

As discussed above one of the important human rights laws is HREOCA. This law does not make all breaches of international human rights conventions and declarations unlawful. Nor does it provide the regular civil remedies. It enables the Human Rights Commissioner to investigate complaints of breaches of these conventions and declarations by Commonwealth Government agencies. If the Commissioner finds a contravention, then he or she prepares a report which is tabled in Federal Parliament.

Pressure Groups

In some cases, lobbying politicians, using the media or street protests may be an effective way of bringing attention to human rights issues and encouraging the Governments to adopt policies to redress the human rights situation.

Australia is required to lodge reports to the UN outlining how Australia complies with its international obligations. The UN committee then question Australian officials about problem areas and what the Government proposes to do to remedy the human rights concerns. To engage in this dialogue, the UN committees rely on information provided by pressure groups and NGOs (Non-government organisations).

United Nations

Finally, where there are no effective Australian human rights protections or remedies, or where all Australian remedies have been exhausted, an individual may lodge a complaint with a specialist United Nations human rights committee. A complaint can be made to the United Nations bodies for alleged breaches of the ICCPR, CERD or CAT. The committees can investigate the claims and request the Australian Government's response. If the committees find that there has been a breach of international laws, the committee can make recommendations to the Australian government to remedy the human rights breaches. The committees' recommendations are not legally binding but they have much moral and persuasive force.

Websites

Amnesty International <http://www.amnesty.org/>

National Children's Legal Centre and Children's Rights <http://www.lawstuff.org.au>

Australian Human Rights Information Centre <http://www.austlii.edu.au/au/other/ahric/>

United Nations websites which include information designed to assist school students find human rights, understand the United Nations and ask human rights questions:

<http://www.un.org/Pubs/CyberSchoolBus/humanrights/>

Background United Nations Information <http://www.un.org/rights/HRToday/>

Home page for the United Nations Commissioner for Human Rights which contains all the international human rights conventions and declarations

<http://www.unhchr.ch>

UNICEF <http://www.unicef.org>

Australia Human Rights and Equal Opportunity Commission <http://www.hreoc.gov.au>

Universal Human Rights Network http://www.universalrights.net/main/educ_fm.htm

MAJOR HUMAN RIGHTS TREATIES BINDING ON AUSTRALIA

International Covenant on Civil and Political Rights (ICCPRC) 1966

First Optional Protocol to the ICCPR 1966

Second Optional Protocol to the ICCPR 1966

International Covenant on Economic, Social and Cultural Rights (IESCRC) 1966

International Covenant on the Elimination of all Forms of Racial Discrimination (CERD) 1966

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 1979

Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishment (CAT) 1984

Convention on the Rights of the Child (CROC) 1989

Convention on the Prevention and Punishment of the Crime of Genocide 1948

Convention Relating to the Status of Refugees 1951 and related Protocol 1968

UNESCO Convention Against Discrimination in Education (1960)

ILO Discrimination (Employment and Occupation) Convention (No. 111) concerning Discrimination in respect of Employment and Occupation