HOT TOPICS
LEGAL ISSUES IN PLAIN LANGUAGE

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Human rights

This is the eighty-fifth issue in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is the subject of change or debate.

AUTHOR NOTE

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Main cover image: Crowds gather for the Australia Celebrates Live concert, on the lawns of Parliament House, Canberra, 25 January 2013. Graham Tidy, *Canberra Times*.

Small cover image: UN Secretary-General meets education rights campaigner, Malala Yousafzai. UN Photo/Eskinder Debebe.

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Origins and sources of human rights law

The origins of human rights law can be traced back hundreds of years through developments in the legal history of many Western countries. These developments progressively recognised that human rights are not created or granted, but are grounded in the basic dignity and equality of each person.

PRE-TWENTIETH CENTURY

Elements of human rights were recognised in the English law that was brought to Australia in 1788. In England, the *Magna Carta* (1215) and the *Bill of Rights* (1688) are often said to enshrine human rights, but both deal little with the rights of ordinary people. They are primarily contracts between the King and the barons (*Magna Carta*) or the House of Commons (the *Bill of Rights*). Nevertheless, they were significant in the developing recognition of human rights because they gave some limited rights to particular individuals against the sovereign.

From the 17th to 19th centuries various treaties between countries, and declarations within countries, guaranteed the right of non-discrimination for people according to their religion, for example:

- Roman Catholics and Protestants in the 1648 Treaty of Westphalia;
- Russian Orthodoxy in Turkey in 1774; and
- Jews in the 1815 Congress of Vienna.

From statements of human rights such as these, an international law of human rights started to develop. The French *Declaration of the Rights of Man and the Citizen* of 1789 arose out of the French Revolution. It is a much fuller expression of human rights than is found in English law. The Declaration, and the 'Bill of Rights' amendments to the United States Constitution in the 1790s, are the first expressions in law of rights which are universal in their application to all citizens, not limited to the aristocracy or Members of Parliament.

These political developments reflected contemporary political and philosophical thought, both for and against what were then termed 'natural rights', including the 17th century work of Hugo Grotius and John Locke; Thomas Paine and Edmund Burke in the 18th century; and Jean-Jacques Rousseau, Jeremy Bentham and John Stuart Mill in the 19th century.

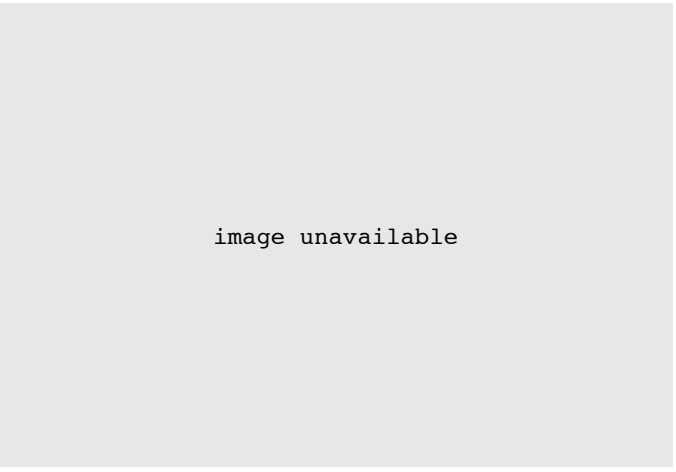
THE TWENTIETH CENTURY

Recognition of human rights on an international scale came from the two major wars of the 20th century. Trench warfare and the use of gas in World War I provoked a desire among nations to regulate weapons permissible in war. The Paris Peace Conference in 1919 had significance for the development of human rights in the 20th century through three outcomes:

1. League of Nations

The first outcome was the establishment in 1920 of the League of Nations, which took responsibility for maintaining international peace. Australia was among the 20 founding member countries, and membership expanded to 54. By mutual agreement (a Covenant), members of the League undertook to promote fair working conditions for their citizens, and humane treatment for indigenous peoples in colonised countries. The League supervised the distribution of former German colonies as trust territories, having regard to the rights of the Indigenous people. Most importantly perhaps, the League of Nations initiated the *Slavery Convention* 1926, to abolish slavery.

As a lasting human rights achievement, the League of Nations was compromised at the outset by the refusal of some founding members, including Australia, to include in the Covenant a commitment to non-discrimination on the basis of race. Despite this, and its ultimate failure to avoid another World War, the League of Nations was a brave experiment which laid the groundwork for the establishment of the United Nations in 1945.



World War I 1914-1918; men of the 55th British Division, casualties of a poison gas attack, 10 April 1918.

2. International Labour Organisation

With much longer lasting effect, the Paris Peace Conference in 1919 resulted in the establishment of the International Labour Organisation (ILO).[1] The ILO was a product of the Treaty of Versailles, one of the peace treaties signed at the Paris Conference. Beyond its role in promoting improved industrial conditions for workers, the ILO works to prevent abuses of human rights in employment, such as discrimination, slavery, child labour, restrictions on freedom of association.

3. War crimes

The Treaty of Versailles also articulated, for the first time, an international resolve to hold individuals accountable for war crimes. The intention was to try people, including the Kaiser, Wilhelm II, for violating the customs of war – in effect, for what later became humanitarian crimes under the Geneva Conventions of 1949. For political reasons the trials never took place in an international court, but the terms of the Treaty of Versailles anticipated the war crime trials in Germany and Japan after World War II.

UNITED NATIONS CHARTER

The events of World War II, particularly the Holocaust, led directly to the establishment of the United Nations,[2] and the modern era of explicit recognition of and commitment to international human rights.

When the United Nations (UN) was established in 1945, its Charter[3] contained the first explicit recognition in international law that an individual was entitled to fundamental rights and freedoms. Among the purposes of the UN set out in Article 1 of the Charter is that of co-operation 'in promoting respect of human rights and fundamental freedoms for all'. Article 55 commits the United Nations to promoting 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'. Article 56 provides that all members 'pledge themselves to take joint and several action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55'.

The Charter specifies that the UN should not impose any restrictions on the eligibility of people to participate in the international community, and gives the General Assembly of the UN responsibilities which include assisting the realisation of human rights and fundamental freedoms for all. Through the Charter, nations that become members of the United Nations commit themselves to its framework of human rights.

image unavailable

Australia signs the UN Charter. At the San Francisco Conference, 26 June 1945, Francis Michael Forde, MP, then Deputy Prime Minister of Australia and Minister for the Army, signs the United Nations Charter.

UN Photo/McLain.

1. For more information see www.ilo.org
2. For more information see www.un.org
3. For more information see www.un.org/aboutun/charter

Modern human rights law

States are the 'parties' that take part in international law – the members of the United Nations are, for example, all 'states'. A 'state' is simply a technical term for a country. Each state is a distinct political entity, independent and, usually, with an effective government.

INTERNATIONAL LAW

International law governs relations between states, in matters such as the drawing of boundaries between states, the laws of war, laws governing international trade, and laws regulating the global environment. As well, international law governs relations between states and individuals. It does this by holding states accountable to the international community for the extent to which they recognise and protect human rights within their borders.

Much international law is created in the various institutions of the UN, which currently has 193 member states. Australia became a member of the UN when it was founded in 1945 and the Australian statesman, Dr H E Evatt, played a significant role in its establishment. Regional organisations such as the European Community and the Association of South East Asian Nations (ASEAN) also contribute to making international law.

Today, most international law takes the form of treaties (also known as covenants, conventions, agreements, pacts and protocols), which are binding agreements between national governments. Statements and resolutions made by international organisations like the United Nations, and customary modes of behaviour by states, also contribute to the formation of international law.

Hot Tip

A treaty is defined as:

'An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'

Article 2, *Vienna Convention on the Law of Treaties 1969*

HUMAN RIGHTS IN INTERNATIONAL LAW

In international law, human rights are recognised in three principal ways:

- international treaties, covenants and conventions (also known as 'treaty law');
- customary international law; and
- resolutions of the United Nations General Assembly.

INTERNATIONAL TREATIES, COVENANTS AND CONVENTIONS

In the area of human rights, 'express agreements', which include treaties, conventions, covenants, instruments, pacts and protocols, are the most significant source of international law.

Hot Tip

The term 'convention' is frequently employed for agreements to which a large number of countries are parties. 'Protocol' usually refers to an agreement that amends or supplements an existing convention or agreement.

The law of treaties concerns obligations that result from express agreements. The basic principle of treaty law is that agreements are binding upon the parties to them and must be performed by them in good faith. Similar to a contract, an international treaty imposes binding obligations on states that are parties to it. The parties accept responsibilities towards each other through mutual obligations and as with a contract, one treaty party can call other parties to account for their actions. Treaties can be bilateral (between two countries) or multilateral (between more than two countries).

Becoming a party to a treaty is a legal process that involves a series of steps. A state usually *signs* an international treaty and later *ratifies* it. A state will *accede* to a treaty it did not sign.

In Australia, treaties can only be entered into with the approval of the Federal Executive Council. In theory, at least, there is no need for parliamentary approval before Australia becomes bound by an international treaty: see ***The treaty-making process in Australia*** on page 16.

THE PROCESS OF MAKING A TREATY

In concluding a multilateral treaty, states generally follow these procedures:

Adoption

The outcome of negotiations is generally the adoption of the text of the treaty in an international forum. Once adopted, the treaty becomes 'open for signature'.

Signature

By signing a treaty, a state indicates its intention to become a 'party' to the treaty. Whilst signature often constitutes the first step in becoming a party, it does not mean that the state is bound by the terms of the treaty.

Ratification and accession

Ratification and accession are formal procedures by which a state indicates that it intends to be bound by a treaty. Once adopted, the treaty remains open for signature for a specified period of time. This time generally allows for ratification by the number of states that are necessary for the treaty to 'enter into force'. Ratification is completed by a formal exchange or deposit of the treaty with the Secretary-General of the United Nations in New York. Accession is the process by which a state becomes party to a treaty it did not sign, and is only used in multilateral agreements. Accession may occur before or after a treaty has entered into force, but is usually used when the agreement has been previously signed by other states. These procedures generally occur when necessary domestic legislation or executive action is complete.

HUMAN RIGHTS IN CUSTOMARY INTERNATIONAL LAW

Customary international law is not set down in treaties or other documents: it comes from the usual behavior of states towards each other. A rule is identified on the basis that states usually act in a certain way, and do so out of a sense of obligation. This source of international law has long been accepted – the law of piracy is an example. Customary law is an important source of international law because it binds all nations, and so is not limited in its application, as a treaty is, by reference to who has ratified it or acceded to it.

The elements of custom are:
> uniform and consistent state practice over time; and
> the belief that such practice is obligatory.

To determine whether a principle has gained the status of customary international law, it is necessary to consider whether there is sufficient evidence both of state practice and acceptance of an obligation to act in a certain way. In international customary law there is the concept of *jus cogens*, or 'peremptory norms' of general international law. These are rules of customary law which are considered so fundamental that they cannot be departed from or set aside by treaty. They can be modified only by a subsequent norm of general international law that has the same character (Article 53, *Vienna Convention on the Law of Treaties 1969*). Examples of *jus cogens* include the principle of self-determination, and prohibitions on slavery, genocide, racial discrimination and the use of force by states.

HUMAN RIGHTS IN UN DECLARATIONS AND RESOLUTIONS

An important source of international human rights law is generated by the United Nations system. The UN adopts a large number of declarations, resolutions and other statements that are not treaties: they do not have parties to them, they are not ratified, and their legal effect is less certain. However, as they are products of the UN system, they are considered to be highly influential, and there is an argument that compliance is a necessary consequence of membership of the UN.

Universal Declaration of Human Rights

The most fundamental document on human rights, the *Universal Declaration of Human Rights* (UDHR),[4] is a product of the UN system. The UDHR was adopted unanimously by the General Assembly of the UN in 1948. It is not a binding treaty that states ratify or accede to. Rather, it is a declaration of 'a common standard of achievement for all peoples and nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.'

Other Declarations

Since the UDHR in 1948 there have been many declarations on human rights adopted by the United Nations' General Assembly, including those dealing with the rights of children (1959), of people with disabilities (1975), of ethnic and cultural minorities (1993); the right to development (1986), violence against women (1993), and with indigenous peoples (2007). To understand the UN machinery of human rights, it is useful to be aware of at least these recent significant declarations made as a result of processes organised under the auspices of the UN.

These are the:
> ***Vienna Declaration and Programme of Action*** – this declaration was adopted in Vienna, Austria during the World Conference on Human Rights in June 1993. The Vienna Declaration put 'beyond question' the universality of human rights standards, and laid the protection and promotion of human rights as the 'first responsibility' of governments. The Conference also declared all human

4. See www.un.org/en/documents/udhr/

rights to be 'universal, indivisible and interdependent and interrelated'. This is a reference to the argument about whether or not civil and political rights should come before economic, social and cultural rights. The declaration says that they cannot be separated.

- ***Beijing Declaration and Platform for Action*** – this declaration and its accompanying Platform for Action were adopted in 1995 by the Fourth World Conference on Women. The Beijing Declaration reaffirmed the fundamental principal that the rights of women and girls are an 'inalienable, integral and indivisible part of human rights'. The Platform for Action calls on states to take action to address areas of critical concern, including for example, violence against women.
- ***Durban Declaration and Programme of Action*** – this declaration was adopted in Durban, South Africa in September 2001 by the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. The Declaration deals comprehensively with the phenomenon of racism, its victims, and strategies both to prevent racism and to protect victims from its impacts. It translates those objectives into a call upon states to take action to implement measures to eradicate racism.
- ***United Nations Declaration on the Rights of Indigenous Peoples*** – this declaration was adopted by the UN General Assembly in September 2007. Its adoption marked the end of a long and contentious process that began in the mid-1980s. Its adoption was frustrated by the persistent unwillingness of some countries, including the United States of America and Australia, to acknowledge indigenous peoples' rights to self-determination. It was finally passed in September 2007 but Australia, together with Canada, New Zealand and the United States of America, voted against the adoption of the declaration. The declaration sets out the individual and collective rights of indigenous peoples, emphasising self-determination and non-discrimination.

As well as declarations, there are also UN statements of lesser status, called principles or guidelines. In recent years, for example, the UN Commission on Human Rights (now the Human Rights Council) and the General Assembly have adopted principles dealing with the rights of the mentally ill and of older people. There are also resolutions of the General Assembly, of the UN Commission on Human Rights (now the Human Rights Council), the Economic & Social Council and of other UN bodies on particular human rights country situations and thematic issues.

International Bill of Rights

The most important human rights treaties are the *International Covenant on Civil and Political Rights* (ICCPR), the First Optional Protocol of the ICCPR, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR): along with the UDHR they form what is generally recognised as the 'International Bill of Rights'. These treaties are supplemented by many others, each of which deal with a particular subject such as racial discrimination, children's rights, and migrant workers and their families for instance.

Universal Declaration of Human Rights

The UN Charter did not define the term 'human rights': it is the *Universal Declaration of Human Rights*[4] which sets out a catalogue of fundamental human rights including:

- the right to be free from torture (Article 5);
- the right to be free from discrimination (Article 7);
- the right to freedom of thought, conscience and religion (Article 18);
- the right to work (Article 23); and
- the right to education (Article 26).

Although the UDHR was not intended to be a formally binding instrument, it is regarded by many commentators as an authoritative interpretation of the human rights provisions of the UN Charter.

International Covenant on Civil and Political Rights

The *International Covenant on Civil and Political Rights* (1966) (ICCPR) is a treaty which binds the nations who ratify or accede to it. It is monitored by the Human Rights Committee (HRC), and protects rights such as:

- the right to life (Article 6);
- the right to liberty and security of person (Article 9);
- the right to equality before the law (Article 14);
- the right to peaceful assembly and freedom of association (Articles 21 & 22);
- the right to political participation (Article 25); and
- the right of minorities to protect their language and culture (Article 27).

In mid-2013, 167 countries had ratified or acceded to the ICCPR. Australia became a party to the ICCPR in 1980.

International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR) is a treaty which binds the nations which ratify or accede to it. It is monitored by the Committee on Economic, Social and Cultural Rights (CESCR), and covers rights such as:

- the right to work (Article 6);
- the right to form trade unions (Article 8);
- the right to social security (Article 9); and
- the right to an adequate standard of living, including adequate food, nutrition, shelter, clothing, education and health services (Article 11).

In mid-2013, 160 nations had ratified or acceded to the ICESCR. Australia became a party to the ICESCR in 1976.

INTERNATIONAL BILL OF RIGHTS AS CUSTOMARY LAW

There is much debate about whether the UDHR can now be considered part of international customary law, and whether it has passed beyond being simply an expression of opinion from the General Assembly to being binding on all nations.

The UDHR was one of the earliest pronouncements of the General Assembly. It was made within the context of the UN Charter itself, which includes a commitment from members to promote human rights. It describes itself as 'a common standard of achievement for all peoples and all nations' and in this way proclaims its universality.

In the *Vienna Declaration on Human Rights* adopted by the 1993 World Conference on Human Rights, it was said that all nations were obliged to comply with the commitment to the Universal Declaration. Most commentators agree that the UDHR is part of international customary law that binds all nations, whether or not they are a party to any of the human rights treaties.

Treaties form a common basis for negotiations between nations. It is more difficult working with those that are outside the treaty system. However, if the UDHR has become part of customary international law binding all nations, it becomes the basis of mutual obligations between states, and nations can be held accountable for their compliance or non-compliance with it regardless of whether individual states have ratified or acceded to the relevant treaties.

There are strong arguments that both the ICCPR and the ICESCR are now also part of customary law, although there is no agreement on this among commentators. Nevertheless, human rights obligations expressed in international instruments are progressively finding their way into the domestic or common law of nations.

OTHER INTERNATIONAL HUMAN RIGHTS TREATIES

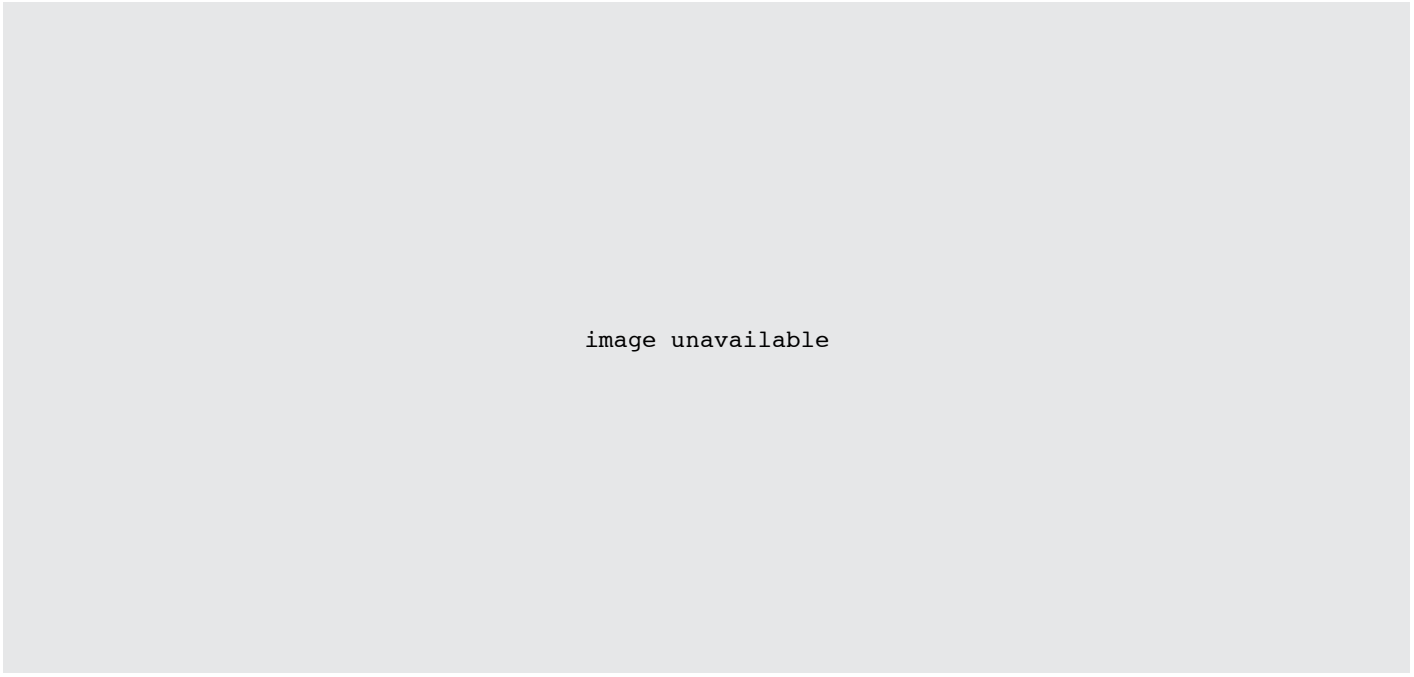
While the UDHR, the ICCPR and ICESCR deal with human rights generally, a variety of other instruments dealing with specific areas of human rights have been adopted by the UN. These include the:

- *Convention on Prevention and Punishment of the Crime of Genocide* (1948);
- *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (1965);
- *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1980);
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) (1984);
- *Convention on the Rights of the Child* (CROC) (1989);
- *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICRMW) (1990);
- *Convention on the Rights of Persons with Disabilities* (2006); and
- *International Convention for the Protection of All Persons from Enforced Disappearance* (2006).

(For a more complete list see the table of *Major Human Rights Treaties* on page 7-8.)

Each of the human rights treaties is monitored by UN Committees of the same name. Some human rights instruments have been adopted and are administered by specialist UN agencies such as the International Labour Organisation (ILO),[5] and the United Nations Economic, Social and Cultural Organisation (UNESCO).[6]

The ILO, for example, administers over 150 current conventions, from Freedom of Association (1948) to Occupational Health and Safety (1991) and Maternity Protection (2000). UNESCO conventions include: Copyright (1952), Natural Heritage (1972), and Technical and Vocational Education (1989).



Bogotá. An ICRC workshop brings together 23 relatives of missing persons to share their stories and get answers from the authorities.
E Alfonso/ICRC.

5. For more information see www.ilo.org
6. For more information see www.unesco.org

MAJOR HUMAN RIGHTS TREATIES

Year of Adoption	Instrument	Year in force generally	Year in force for Australia
1926	Slavery Convention	1927	1927
1930	ILO (Convention No. 29) on Forced Labour	1932	1932
1947	ILO (Convention No. 81) on Labour Inspection	1950	1975
1948	ILO (Convention No. 87) on Freedom of Association and Protection of the Right to Organise	1950	1974
1948	Genocide Convention	1951	1951
1949	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	1949	N
1949	Four Geneva Conventions on International Humanitarian Law	1950	1959
1951	Convention Relating to the Status of Refugees	1954	1954
1951	ILO (Convention No. 100) on Equal Remuneration	1954	1954
1952	Convention on the International Right of Correction	1962	N
1953	Convention on the Political Rights of Women	1954	1975
1953	Protocol Amending the 1926 Slavery Convention	1953	1955
1954	Convention Relating to the Status of Stateless Persons	1960	1974
1956	Supplementary Convention on the Abolition of Slavery	1957	1958
1957	Convention on the Nationality of Married Women	1958	1961
1957	ILO (Convention No. 105) on the Abolition of Forced Labour	1959	1961
1958	ILO (Convention No. 111) on Discrimination (Employment and Occupation)	1960	1974
1960	Convention against Discrimination in Education	1962	1967
1961	Convention on the Reduction in Statelessness	1975	1975
1962	Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages	1964	N
1964	ILO (Convention No. 122) on Employment Policy	1965	1969
1966	International Convention on the Elimination of All Forms of Racial Discrimination	1969	1975
1966	International Covenant on Economic, Social and Cultural Rights	1976	1976
1966	International Covenant on Civil and Political Rights	1976	1980
1966	First Optional Protocol to ICCPR	1976	1991
1967	Refugee Protocol	1967	1973
1968	Convention on the Non-Applicability of Statutory Limitations to War Crimes	1970	N
1973	International Convention on the Suppression and Punishment of the Crime of Apartheid	1976	N
1977	Protocols I and II to the 1949 Geneva Conventions	1978	1991
1979	Convention on the Elimination of All Forms of Discrimination Against Women	1981	1983

Year of Adoption	Instrument	Year in force generally	Year in force for Australia
1981	ILO (Convention No. 155) on Occupational Safety and Health	1983	2004
1981	ILO (Convention No. 156) on Workers with Family Responsibilities	1983	1991
1983	ILO (Convention No. 159) on Vocational Rehabilitation and Employment (Disabled Workers)	1985	1991
1984	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	1987	1989
1985	International Convention Against Apartheid in Sports	1988	N
1989	Convention on the Rights of the Child	1990	1991
1989	Second Optional Protocol to the ICCPR, aiming at the Abolition of the Death Penalty	1991	1991
1990	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	2003	N
1997	Kyoto Protocol to the United Nations Framework Convention on Climate Change (of 9 May 1992)	2005	2008
1998	Rome Statute of the International Criminal Court	2002	2002
1999	ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour	2000	2006
1999	Optional Protocol to the Convention on the Elimination of Discrimination Against Women	2000	N
2000	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	2002	2006
2000	Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography	2002	2007
2002	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	2006	N*
2006	Convention on the Rights of Persons with Disabilities	2008	2008
2006	Optional Protocol to the Convention on the Rights of Persons with Disabilities	2008	2009
2006	International Convention for the Protection of All Persons from Enforced Disappearance	2010	N
2008	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights	2013	N

N = Australia is not a party.

Table adapted from *Australian International Law: cases and materials* edited by Harry Reicher (LBC Information Services, 1995) Chapter 9: Human Rights by Hilary Charlesworth pp 629-630 with additional information taken from Australian Treaty List supplied by the Treaties Secretariat, Department of Foreign Affairs and Trade.

Notes:

* The Rudd Government signalled in early 2008 that it intended to ratify the Optional Protocol to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* that would allow visits to places of detention to monitor the treatment of people detained by the Government. It is still not ratified in mid-2013.

REGIONAL RIGHTS FRAMEWORKS

United Nations involvement in human rights has been mirrored by increasing regional concern with human rights issues. The 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms* came into force in 1953, the 1969 *American Convention on Human Rights* in 1978, and the 1981 *African Charter on Human and Peoples' Rights* in 1987. Despite persistent advocacy in the region, there is still no regional treaty covering Asia or the Pacific.

The terms of the regional treaties substantially overlap with the *International Covenant on Civil and Political Rights* (ICCPR), but both the American and the African Charter go further, covering some rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Many countries have ratified or acceded to the UN Covenants as well as to the regional treaty relevant to them.

Europe

In Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention on Human Rights) has been very successful in setting human rights standards for European citizens, which have been applied through the activity of the Council of Europe, the European Commission on Human Rights and the European Court of Human Rights.[7] The decisions of the Court are generally respected and implemented by the 47 members of the Council of Europe who have, by ratifying the Convention, agreed to amend their domestic laws to ensure compliance.

The Americas

Similarly, in the Americas, the *American Convention on Human Rights* of 1969 (American Convention) creates a Commission[8] and a Court.[9] The American Convention refers directly to civil and political rights. It incorporates economic, social and cultural rights with a separate Protocol. Not all the countries that have ratified the American Convention have also ratified the Protocol. Moreover, the effectiveness of the Inter-American system is limited, however, by the refusal of the United States of America to ratify the Convention, and by the political instability of some of the member nations of the Organisation of American States.

Africa

The African (Banjul) Charter on Human and Peoples' Rights (Banjul Charter) was signed in 1981. It established the Organisation of African Unity (OAU). In 1999, the Organisation of African Unity (OAU) issued the Sirte Declaration to establish a new regional institution, the African Union.[10] The creation of an African Union has brought a renewed focus to democratisation and the protection of human rights in Africa. It replaces the OAU and manages the OAU mechanisms. The OAU passed a protocol to create an African Court in 1998 on Human and People's Rights, which came into effect in 2004. The process of harmonising the new African Court on Human and People's Rights with the African Commission on Human and People's Rights was completed in 2010. The Commission, and States, and in some countries, non-government organisations with standing can bring human rights complaints to the Court.

That is not to say that there has been no legal response to gross human rights violations in Africa, though it has been mainly through prosecutions for genocide and serious violations of international humanitarian law (the law of armed conflict). Consider for instance, the International Criminal Tribunal for Rwanda (established in neighbouring Tanzania) that was established by the UN to prosecute persons responsible for genocide and other serious violations of international humanitarian law (such as crimes against humanity, and war crimes) committed in Rwanda from April – July 1994 in which an estimated 800,000 people were killed.[11] Also the Special Court for Sierra Leone[12] was established jointly by the UN and the Government of Sierra Leone, to try those bearing the greatest responsibility for war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996.

See ***International Criminal Mechanisms***, on page 13.

Asia and the Pacific

There remains no regional human rights treaty covering the Asia and Pacific regions. However, there has been recent progress towards establishing a regional human rights mechanism. The Association of South-East Asian Nations (ASEAN) (Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam) adopted the ASEAN Charter in 2007. Article 14 of the Charter commits ASEAN to developing an 'ASEAN human rights body'. In 2008, the first meeting of a High Level Panel was convened to establish terms of reference for the human rights body. In November 2012, ASEAN produced a Declaration on Human Rights. It is not binding and has no complaints mechanism. Interestingly, it includes rights to development and to peace.[13]

Another regional human rights organisation is the Asia Pacific Forum on National Human Rights Institutions (APF).[14] Members include the national human rights commissions of Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Palestine, the Philippines, Qatar, Republic of Korea, Thailand and Timor Leste. In order to belong to the APF, a national human rights institution must comply with the UN 'Paris Principles', a set of principles that safeguard the independence and mandate of national human rights institutions.

7. See www.echr.coe.int
8. See www.cidh.oas.org
9. See www.corteidh.or.cr/index.cfm
10. See http://au.int/en
11. See www.unictr.org/
12. See www.sc-sl.org
13. See http://au.int/en/
14. See www.asiapacificforum.net

CONTENT OF STATE OBLIGATION IN INTERNATIONAL HUMAN RIGHTS LAW

The long list of international treaties, including the human rights treaties, to which Australia has committed itself, can be seen on page 7. But what does it mean for a state to ratify or to accede to an international human rights treaty?

There are two aspects to this question – the first depends on the constitution of the state, that is, whether the treaty obligation becomes domestic law upon ratification (monist) or if a domestic law must first be passed (dualist). In Australia, domestic laws must be passed to incorporate treaty obligations into our law. See ***Effect of treaties in Australia*** on page 16.

The second aspect goes to what it means, as a state, to be subject to a human rights obligation. States undertake to protect, respect, promote, and fulfil the human rights that are the subject of the treaty.

ENFORCING INTERNATIONAL HUMAN RIGHTS LAW

International law generally suffers from the lack of a central enforcement mechanism, and human rights law is no exception. The international human rights conventions are the product of multilateral negotiation – it is left open to each state that ratifies a convention to bring the standards to life in its domestic context. However, the treaty bodies that monitor each convention produce 'General Comments' as authoritative interpretations of human rights standards to guide states.

The international community is made up of states that are protective of their independence and sovereignty, and have never agreed to establish effective procedures for the enforcement of international law. A permanent court, the International Court of Justice (ICJ),[15] sits in The Hague in the Netherlands. The powers of the Court are however quite limited: it can only hear cases involving countries, rather than individuals, and countries must agree voluntarily to submit disputes to the Court. There is no international police force to help in implementing international law. Since 2002, however, the world has had a new criminal court: see ***International criminal mechanisms*** on page 13.

Nonetheless, it remains true that many rules of international law are very difficult to enforce. To varying degrees, most countries tend to respect or at least wish to be seen to respect the principles of international law because they do not want to be criticised or, in extreme cases, ostracised, by the international community.

In relation to human rights treaties, there is provision for the supervision of implementation by state parties of their obligations, in the following principal ways:

> UN Human Rights Council's special procedures;
> reporting procedures;
> state versus state complaints; and
> individual complaints against states; and
> criminal proceedings in the International Criminal Court.

Some of the human rights treaties are implemented through reporting procedures alone, and others use state and/or individual complaints mechanisms.

UN HUMAN RIGHTS COUNCIL

The UN Commission on Human Rights and its Sub-Commission on the Promotion and Protection of Human Rights were abolished in June 2006, and replaced by a successor organisation, the UN Human Rights Council as part of a program of internal UN reforms. The Human Rights Council reports directly to the UN General Assembly. The Human Rights Council has 47 state members, representing each of the five UN geographical regions, which are elected by secret ballot cast by the UN General Assembly.

The Human Rights Council has:

> accorded appropriate importance within the UN to human rights by creating a higher status, Council level body, akin to the significance accorded to security (Security Council) and development (Economic & Social Council). All three concepts are central to the UN Charter; and
> established the universal periodic review (UPR) system of UN member states' human rights performance.

In order to ensure that human rights violators do not use the Human Rights Council to evade international scrutiny, a member of the Council can be suspended on a two-thirds majority vote by the General Assembly for gross and systematic violations of human rights. No member may serve more than two consecutive terms.

UN HUMAN RIGHTS COUNCIL SPECIAL PROCEDURES

'Special procedures' is a term used by the UN to refer to mechanisms established by the Commission on Human Rights and now administered by its successor, the Human Rights Council, to address either:

> specific country situations – this means the Human Rights Council authorises a so-called 'mandate holder' to investigate, monitor, advise and publicly report on the human rights situation in a particular country or territory (country mandate); or
> thematic issues about human rights – this means the authorised representative of the Human Rights Council (called the 'mandate holder') will investigate, monitor, advise and publicly report on major phenomena of human rights violations worldwide (thematic mandate).

Currently, there are 36 thematic and 13 country mandates. Current special procedures cover topics such as adequate housing, arbitrary detention, the sale of children, sustainable environment, the right to food, education, enforced or involuntary disappearances, the effects of foreign debt and extreme poverty, and are working in countries such as Eritrea, Belarus, Cambodia, Haiti and Myanmar.[16]

15. See www.icj-cij.org
16. See http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx

The mandates are held either by:

- an individual who might be referred to in one of the following ways:
  - Special Rapporteur
  - Representative or Special Representative of the Secretary-General
  - Independent Expert; or
- a working group, usually of five members representing the five organisational regions of the UN.

In order that the mandate holders are, and are seen to be independent, they must serve in their personal capacity and must not benefit financially from their work. The Office of the High Commissioner for Human Rights provides the special mechanisms with personnel, logistical and research assistance to support them in the discharge of their mandates.[17]

The terms of a special procedures mandate are determined by the Human Rights Council resolution creating them, but may involve responding to individual complaints, conducting studies, providing advice on technical cooperation at the country level, and engaging in general promotional activities. Most special procedures receive information about specific allegations of human rights violations, and communicate with governments asking for information and clarification.

REPORTING

Prior to the establishment of the Human Rights Council, states who ratified a human rights treaty agreed to provide a report to the treaty body responsible for monitoring that treaty. The reports were usually required every three or four years, and dealt with the way domestic laws are used to promote and protect the rights contained in the treaty.

Universal Periodic Review

The new Human Rights Council introduced a procedure called 'Universal Periodic Review'[18] by which all UN member states will be required to submit information to allow the Council to monitor the 'fulfilment of its human rights obligations and commitments'. The Council is to take into account information provided by the state, the UN Office of the High Commissioner of Human Rights and by other stakeholders, such as non-governmental organisations. This is not intended to replicate the UN treaty body reporting mechanism described in the next section. However, it will mean that states will provide a core report to the Human Rights Council, and a more detailed report to each treaty body. States will be expected to engage with the Human Rights Council in an interactive dialogue that includes civil society who can prepare 'shadow reports' to give a more balanced view to the UN Committees reviewing the reports prepared by states.

Treaty-body reporting

The treaty body or committee (for instance, the Human Rights Committee (ICCPR), or the Economic, Social & Cultural Rights Committee (ICESCR)) studies the report and then questions the representatives of the country concerned, indicating how better protection of human rights might be achieved. After considering the report, the matters raised at the hearing, and any other submissions, the committee makes 'concluding observations', in which it both compliments the reporting country, and raises issues of concern. The concluding observations are effectively the committee's findings, on which a reporting party is expected to act.

The reporting procedure has been criticised by some international lawyers who say that the monitoring committees cannot effectively uncover violations of treaty obligations because states are likely to present information that is most favourable to their interests.

EXAMPLE – AUSTRALIA'S REPORTING IN RELATION TO ICESCR

Although it ratified the ICESCR in 1976, Australia's first comprehensive report to the Committee on Economic, Social and Cultural Rights was its third report. Due in 1994, it was not submitted by Australia until 1998, and covered the period from 1990 to 1997.[19] At the same time the Australian Social and Economic Rights Project, a coalition of non-governmental organisations in Australia based at the Victorian Council of Social Service, submitted a 'parallel report' (also known as a 'non-government report' or a 'shadow report'), drawing the Committee's attention to issues not addressed by the Australian Government's report. Australia reported again using a streamlined reporting mechanism introduced by the UN Treaty committees, the Universal Periodic Reporting mechanism, in 2009.

The role of non-government organisations (NGOs), such as Amnesty International, is very important. The independent information they provide to treaty monitoring bodies ensures that the reporting system works effectively. The information provided by non-state parties is sometimes called a 'non-government report' or a 'shadow report'.

Recently, non-governmental organisations in Australia (also known as 'civil society') have begun to make more comprehensive use of their ability to make shadow reports to contest the claims of the Australian Government about its compliance with other human rights standards. Influential shadow reports have been submitted in relation to Australia's performance under:

- CERD for hearings before the Committee on the Elimination of Racial Discrimination in 2005. The Committee noted a number of issues of concern, including the abolition of a national Indigenous representative body, the lack of any entrenched protection against racial discrimination in Australian law that would override any subsequent law, the refusal to provide financial compensation for those forcibly and unjustifiably separated from their families (Stolen Generations and children made 'wards of the state'), the disproportionate representation of Indigenous people in gaols and;

17. See http://www.ohchr.org/
18. See www.upr-info.org
19. Available at www.austlii.edu.au/au/other/dfat/reports/icescr.html

- CROC for hearings before the Committee on the Rights of the Child in 2005. The Committee expressed concerns about the disproportionate representation of Indigenous children and young people in the juvenile justice system, children in immigration detention and the spread of homelessness amongst young people, amongst other issues;
- CEDAW for hearings before the Committee on the Elimination of Discrimination Against Women in 2006. The Committee expressed its concern at the lack of implementation of CEDAW in Australia, the absence of an entrenched protection against sex-based discrimination and the absence of maternity leave pay, amongst other issues; and
- ICESCR in 1998 and 2008 at hearings before the Committee on Economic, Social & Cultural Rights in 2000 and 2009. Shadow reports submitted by Australian non-governmental organisations have been very influential in framing the list of issues developed by the Committee on Economic, Social and Cultural Rights on which Australia was questioned in May or November 2009 when the Committee was in session. The Committee's concluding observations in 2000 noted 'with concern' and 'with regret' the comparative disadvantage of Indigenous Australians, particularly in the fields of employment, housing, health and education; amendments to workplace law that the Committee said favoured individual negotiation over collective bargaining; and the failure to strengthen human rights education, amongst other issues. In 2009, the Committee noted its concern with the lack of legal frameworks to protect economic, social and cultural rights in Australia and affirmed the principle of interdependency and indivisibility of human rights. It repeated its concerns in relation to Indigenous Australians, in particular in the context of the Northern Territory Intervention. It was also concerned with adequate housing and health and educational outcomes for Indigenous people. The Committee also raised concerns about, among other things, freedom of association and the right to strike; access to social security for asylum seekers and newly arrived immigrants and new parents; and the ongoing practice of mandatory immigration detention by Australia; and
- Committee Against Torture in relation to Australia's third periodic report, hearings for which were conducted in April 2008. The CAT noted 'with satisfaction the constructive dialogue held with a competent and multi-sectoral [non-governmental] delegation'. It expressed concerns that there is no offence of torture with extraterritorial effect and no Federal Charter of Rights to protect the rights in the Convention Against Torture. It raised concerns in relation to Australia's counter-terrorism laws, in particular the ability of people accused of terrorism to challenge the lawfulness of any detention or restriction of liberty in a court with appropriate procedural guarantees; Australia's policy of mandatory detention of people who enter Australia irregularly, commenting that detention should be a measure of last resort and should be subject to reasonable time limits; and the conditions in which prisoners are held, in particular, conditions of overcrowding and access to mental health services in prison.
- ICCPR in 2009. Australia had previously reported belatedly to the Committee in 1998. In July 2000, when the Committee considered Australia's reports, its Concluding Observations included concerns that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the ICCPR, there are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated. The Committee expressed concerns about the rejection of the Committee's views by the Australian Government in the Communication of *A v Australia*. It said that rejecting the Committee's interpretation of the Covenant when it does not correspond with Australia's interpretation undermines the recognition of the Committee's competence under the ICCPR Optional Protocol to consider Communications. In its Concluding Observations in 2009, the Committee drew attention to some particular concerns including the counter-terrorism legislation introduced in Australia since 9/11; the lack of effective consultation with Indigenous people in decision-making that affects them; and the overall lack of enforceable human rights protection in Australian law.

STATE COMPLAINTS

Some human rights treaties allow parties to the treaty to lodge complaints about other nations that have also accepted the treaty obligations, on the grounds that the latter are failing to adequately fulfil their human rights obligations. This procedure must be agreed to by nations that have accepted the treaty. In fact, no such complaint has ever been lodged in the UN human rights system, presumably because of the intense political hostility it would create, and because countries with poor human rights records tend not to accept this procedure.

INDIVIDUAL COMPLAINTS

There are three ways that an individual can make a complaint against a state:

- for massive violations – individuals or groups can make a confidential complaint to the Human Rights Council in relation to 'consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world' (see ***Human Rights Council complaint procedure*** opposite); or
- for individual abuses – an individual or their representative can complain to a treaty body using the provisions of a human rights treaty or a protocol associated with the treaty by which states agree to allow individuals who allege a violation of a human right to make a complaint to the treaty body that monitors the relevant treaty (see ***Treaty-based complaints*** opposite);
- for either individual or massive violations – an individual or a group can make a complaint to a special procedures mandate holder (see ***UN Human Rights Council Special Procedures*** on page 10).

HUMAN RIGHTS COUNCIL COMPLAINT PROCEDURE

A confidential complaints procedure from the now superseded Commission on Human Rights, referred to as the '1503 complaints procedure', applied to gross violations of human rights or fundamental freedoms anywhere in the world. It could apply to a state regardless of whether it had ratified a relevant human rights treaty. It was adopted by the Commission on Human Rights and named after the number of the Economic & Social Council Resolution that created it.

The Human Rights Council has agreed to continue its own version of the '1503' procedure. The new complaint procedure will address 'consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and in any circumstances'. Complaints are confidential – in fact, the new complaint procedure retains many features of the old 1503 procedure. The complainant(s) must have direct or reliable knowledge (eg, victims, or a non-governmental organisation). The procedure does not lead to a direct remedy to the complainant(s), but is more systematic in its focus.

TREATY-BASED COMPLAINTS

Some human rights treaties allow countries to accept the right of an individual to complain to the treaty monitoring body that the country has not properly implemented its duties to protect particular human rights. This process is made possible by the treaty, or by a subsidiary treaty called an 'optional protocol'. The complaints are usually referred to as 'communications'.

Treaties which allow for this process are:

- the *International Covenant on Civil and Political Rights* (ICCPR) (by becoming a party to its First Optional Protocol);
- the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (by making a declaration in accordance with Article 14);
- the *Convention against Torture* (CAT) (by making a declaration in accordance with Article 22);
- the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) (by becoming a party to its Optional Protocol);
- the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (CMW) (by making a declaration in accordance with Article 77); and
- the *Convention on the Rights of Persons with Disabilities* (by becoming a party to its Optional Protocol which is not yet in force) Australia has accepted an individual's right under the first three of these treaties.

MAKING A COMMUNICATION

An individual's complaint under a treaty is called a 'communication'. Under the First Optional Protocol to the ICCPR, the communication is made to the Human Rights Committee (HRC) as the UN body with responsibility for monitoring that treaty. Similarly, a communication under CERD is made to the CERD Committee, under CAT to the CAT Committee, under CEDAW to the Committee on the Elimination of Discrimination Against Women and so on. There are usually two stages to a typical communication procedure to a treaty body or committee. We will assume that the state the subject of the complaint is Australia. After the complaint is received – it must be in writing and may not be anonymous – the treaty body first decides whether it is 'admissible' (whether it satisfies a range of technical requirements). For example, the person making the complaint must have exhausted all available domestic remedies in Australian law for the alleged infringement of rights. In other words, a complainant must have pursued every possible legal avenue for redress, including appealing adverse decisions up to the highest court possible. In reality, this may not be a very demanding requirement in many human rights cases in Australia, because our legal system provides relatively few remedies for breaches of human rights. If the complaint is admissible, the treaty body then considers the merits or the substance of the case, and decides if the particular activity or inactivity complained of breaches one of the rights set out in the relevant treaty. The decision of the treaty body is expressed as the 'views' which it has 'adopted'.

THE EFFECTIVENESS OF COMMUNICATIONS

The right of individual petition in international law is by no means a cure for human rights violations. First, it takes a very long time for a treaty body to make a finding (for instance, the average time for the Human Rights Committee is four years). Second, the treaty body's adoption of views on the substance of a particular case is not strictly binding on the country concerned. The Committee's views are simply forwarded to both the country and individual involved and are published in its annual report to the General Assembly of the UN. However, a treaty body's views on the proper interpretation of the rights guaranteed under the treaty it monitors are considered authoritative, and Australia would be in breach of its obligations under that treaty if it failed to act on the treaty body's views. Nonetheless, this remains a highly politicised question.

This procedure has been used successfully at least 14 times in relation to Australia with regard to subject matter as diverse as arbitrary detention, treatment of individuals while in gaol or detention, interference with family life, freedom of expression, right to a fair trial and unlawful discrimination. In Australia, the government of the day has rarely acted in accordance with the Committee's concluding views.

INTERNATIONAL CRIMINAL MECHANISMS

Violations of human rights can amount to criminal offences, indeed, the most serious crimes imaginable, such as genocide and crimes against humanity. In the wake of World War II, two military tribunals were separately established to try German Nazi officials and officers (International Military Tribunal or Nuremberg Tribunal) and Japanese officials and officers (International Military Tribunal for the Far East or Tokyo Tribunal) for serious crimes committed during the course of the war. These criminal trials are

criticised by some commentators as an example of 'victors' justice'; however, they established fundamental principles of international humanitarian law.

Ad hoc criminal tribunals began to proliferate in the 1990s, usually established by the UN, or the UN in partnership with a state. It seemed that there was no longer a political acceptance of inaction in the face of mass killings, rapes, and forced movements of populations. For example, the following tribunals have now been established:

> UN International Criminal Tribunal for the Former Yugoslavia (1993) – in the face of atrocities, including so-called 'ethnic cleansing', committed during the war in the former Yugoslavia between 1992-1995, the UN established this tribunal at The Hague, The Netherlands;
> UN International Criminal Tribunal for Rwanda (1994) – established by the UN to sit in Tanzania to address the genocide in Rwanda in 1994;
> Special Panels for Serious Crimes, Timor Leste – the UN Transitional Administration of East Timor was established in the wake of the violence that marred the 1999 referendum on independence from Indonesia. In 2000, it created a criminal mechanism to try people responsible for serious crimes committed in 1999;
> Special Court for Sierra Leone – established jointly by the UN and the Government of Sierra Leone in 2002 to try those bearing the greatest responsibility for war crimes and crimes against humanity committed in Sierra Leone since 30 November 1996; and
> Extraordinary Chambers Responsible for the Prosecution of Crimes Committed by the Khmer Rouge – this tribunal began work in 2005 to reach back in time to address the so-called 'Killing Fields' of Cambodia under the Khmer Rouge in the 1970s, during which an estimated 1.5 million Cambodians died.

During the same period, truth and reconciliation commissions also proliferated to bring to light stories of violations committed in the past – for example, when the apartheid regime was removed in South Africa, a Truth and Reconciliation Commission was established to deal with the legacy of apartheid.[20]

20. Truth and reconciliation commissions have also been established in many other countries; see www.usip.org/library/truth.html#tc

COMMUNICATIONS TO THE UN

Australia has agreed, by ratifying Optional Protocols, that individuals can make direct complaints (called 'communications') about the Australian Government to the United Nations.

Communications can be made regarding breaches of the human rights standards contained in the following treaties:

> International Covenant on Civil and Political Rights (ICCPR);
> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);
> Convention on the Elimination of All Forms of Racial Discrimination (CERD);
> Convention on the Elimination of All Forms of Discrimination Against Women; and
> Convention on the Rights of Persons with Disabilities.

In mid-2013, there were 26 communications pending with the Human Rights Committee alleging breaches by Australia of the ICCPR; seven communications pending with the Committee against Torture; and one communication pending with both the Committee on the Elimination of Racial Discrimination and the Committee on the Rights of Persons with Disabilities.

More information on communications can be found at www.humanrights.gov.au/human-rights-communications-about-australia-views-and-responses

Toonen

In 1991, Nicholas Toonen complained to the Human Rights Committee that Tasmania's prohibition of male homosexuality meant that Australia was in violation of the right to privacy guaranteed under Article 17 of the International Convention on Civil and Political Rights (ICCPR). In 1994 the HRC said that in its view the communication established a violation of Article 17. In accordance with its obligations under the ICCPR, the Australian Government acted to address the violation. It introduced Federal legislation to override the Tasmanian law. Before the constitutional validity of the Federal law was tested, Tasmania amended its own law and repealed the offending provision.

Mr A

In 1993, Mr A, a Cambodian asylum seeker, complained to the HRC that his lengthy detention was in breach of Article 9 of the ICCPR. In 1997 the HRC said that in its view the communication established a violation of Article 9: unwarranted detention and no means of challenging it. On this occasion the Australian Government rejected the Committee's view, saying it disagreed with its legal basis. An explicit rejection by a party to the ICCPR, rather than a mere failure to act on the Committee's view, is extremely rare. In its subsequent concluding observations on Australia's periodic report under the ICCPR, the Committee expressed its concern at Australia's response.

Elmi

In November 1998 Mr Elmi complained to the Committee Against Torture. He had been kept in an Australian detention centre since arriving in Australia from Somalia in October 1997, seeking asylum. He was unsuccessful in his application for asylum, and took the claim, ultimately, to the

Typically, truth and reconciliation commissions allow victims to tell their stories, to face the perpetrators of the crimes, and may lead to criminal prosecutions or amnesties. By the end of the 20th century, there was a renewed energy for accountability for the commission of serious crimes. A long-held dream of internationalists for an international body to hold perpetrators of serious crimes accountable has now been realised. The International Criminal Court (ICC)[21] is an independent, permanent court based at The Hague in The Netherlands. Founded in 2002, it is responsible for trying people accused of the most serious crimes of international concern – genocide, war crimes and crimes against humanity.

These crimes are detailed in the Rome Statute of the International Criminal Court. The ICC is a court of last resort, meaning that it cannot take cases that a state is investigating or prosecuting domestically. It can only deal with events that have taken place since 1 July 2002 on the territory or by the nationals of states that have ratified the Rome Statute.

The current caseload of the ICC includes cases dealing with alleged war crimes, crimes against humanity and/or acts of genocide in:

- the Democratic Republic of the Congo;
- Uganda;
- Central African Republic;
- Darfur, Sudan;
- Republic of Kenya;
- Libya;
- Côte D'Ivoire; and
- Mali.

The Office of the Prosecutor is conducting preliminary investigations in other places including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria.

21. For more information see www.icc-cpi.int/

High Court. Mr Elmi complained that his forced return to Somalia by Australia would be a violation of Article 3 of the Convention Against Torture: not to expel or return (*refouler* – French for 'turn back') a person if it is likely they will be subjected to torture. In May 1999 the CAT Committee published its view that Mr Elmi's expulsion would constitute a violation by Australia of article 3. The Australian Government allowed Mr Elmi the opportunity to pursue his claim over again, from the beginning. Rather than remain in detention for a further unknown period, with an unknown future, Mr Elmi left voluntarily to a different country.

Young

In August 2003, Mr Young was successful in his communication to the Human Rights Committee alleging discrimination on the basis of sexual orientation against the Australian Government, in violation of the ICCPR. Mr Young was in a same-sex relationship with a veteran. Due to his sexual orientation, upon his partner's death, Mr Young was denied a pension benefit. The Human Rights Committee found that the denial of the pension violated Mr Young's right to equal treatment before the law and was contrary to Article 26 of the ICCPR. The former Howard Government refused to amend the relevant legislation. In 2006, the Commonwealth Human Rights & Equal Opportunity Commission (now the Australian Human Rights Commission) conducted a review of the Commonwealth laws that discriminate against same-sex couples and their children. It identified at least 58 instances of discrimination. The Rudd Government was elected on a platform of removing those discriminatory laws, and announced measures to amend the discriminatory laws identified by HREOC (now known as the 'Australian Human Rights Commission') in addition to over 40 further instances identified by the Government. Amendments to relevant legislation were passed into law in mid-2009.

Brough

In March 2006, Mr Corey Brough was successful in his communication to the Human Rights Committee. Mr Brough was an Indigenous youth who was an inmate at a juvenile justice centre. He participated in a riot and was transferred to an adult correctional centre where he was held for prolonged periods, alone, in a so-called 'safe cell'. The Committee said that Mr Brough's 'extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal'. The Committee found a breach of Articles 10 and 24 of the ICCPR, and emphasised Mr Brough's right to an effective remedy. No such remedy was granted by either the NSW or the Australian Governments.

Asylum seekers

Australia has been found repeatedly to be in breach of the prohibition against arbitrary detention by virtue of the policy of mandatory detention of people who enter Australia irregularly, often to seek asylum from persecution. In July 2007, a joint communication by eight Iranian asylum seekers who had been held in immigration detention for up to four years was upheld by the Committee as a breach of the prohibition against arbitrary detention (Article 9(1), ICCPR) (*Shams et al v Australia* (2007)). A number of the current communications before the Human Rights Committee are based on similar fact scenarios, that is, ongoing detention in Australian immigration detention facilities.

Domestic operation of human rights law in Australia

The value of international human rights law lies in whether and to what extent it is implemented into domestic law. Australia has ratified most of the major UN human rights treaties, and is accountable to the international community for implementation of its treaty obligations.

EFFECT OF TREATIES IN AUSTRALIA

Consistent with many other countries, however, Australian law itself does not recognise treaty obligations as a source of law unless the treaty is specifically incorporated into Australian law through legislation: see ***Implementing treaties in Australian law*** on page 17.

Each country has its own procedures for implementing international obligations through its domestic law. In some, the constitution specifies that treaties form part of the law of the land ('monist' states). In others, including Australia, an 'act of transformation' such as passing a law for Australia which reflects the terms of the treaty is necessary before treaty obligations have effect in domestic law ('dualist' states). In Australia, specific 'enabling' legislation is necessary in order to implement treaty obligations. If there is no relevant legislation, a treaty cannot create rights in domestic law. However in some circumstances, even without specific enabling legislation, international law and the terms of treaties can be a legitimate influence on the way courts will interpret and apply Australian laws: see ***Human rights in Australian courts*** on page 19.

RELATIONSHIP BETWEEN STATE AND FEDERAL GOVERNMENTS

Australia is organised as a federation – that means that we have a central or federal government, the Commonwealth Government, together with State and Territory governments. We also have a layer of local government in Australia. The Commonwealth or Federal Government bears responsibility for **protecting, respecting, promoting and fulfilling human rights** in Australia. That responsibility includes ensuring that human rights obligations are met by other levels of government, by non-state actors such as corporations, and by individuals.

In federated legal systems, such as Australia's, the requirement of transformation from international to domestic law can create particular difficulties. The Commonwealth Constitution gives the Commonwealth Parliament power to make laws about particular subjects. The remainder is left for the States. That seems simple enough, but the dividing line of Commonwealth/State responsibility is not always clear. For example, section 51(xxix) of the Australian Constitution gives the Federal Government an 'external affairs' power. This has been interpreted by the High Court to include the power to enter into treaties on behalf of Australia, and to pass domestic legislation to implement these obligations. But to fully implement the provisions of an international treaty it is sometimes necessary to enact or amend laws in areas that are traditionally under State or Territory jurisdiction.

Domestic conflicts arising from Federal/State relations cannot be used as an excuse for failure to implement obligations under international treaties. According to Article 27 of the Vienna Convention on the Law of Treaties of 1969, a state cannot use the provisions of its own law or deficiencies in that law to answer a claim against it for breaching its obligations under international law. All levels of government in Australia have to play a role in protecting human rights, but it will always be the Federal Government that is ultimately accountable for any violations to the international community: see ***Human rights in State/Territory law*** on page 20.

THE TREATY MAKING PROCESS IN AUSTRALIA

Under the Australian Constitution, treaty making is the responsibility of the Executive; the Parliament has no formal role in treaty making. In 1996, the Australian Government introduced a new process for treaty-making. As a result, all treaty actions are now tabled in Parliament, with a National Interest Analysis, for Parliamentary consideration. There is a Joint Standing Committee on Treaties in the Commonwealth Parliament, and a Commonwealth-State Treaties Council. In August 1999 the Federal Government reported that the new process was working well. However, consultation between States and Territories on the one hand, and Commonwealth Departments and agencies on the other, was identified as needing improvement.

Hot Tip

Under the Westminster system, the Executive, made up of the Ministers of government, is one of the three 'arms' of government. The other two are the Parliament, and the Courts or the Judiciary. The distinction between the three arms of government, namely the Executive, Parliament and the Judiciary, is known as the 'separation of powers' and is recognised in the Federal Constitution.

TABLING TREATY ACTIONS

All treaties and related actions, including amendments to and withdrawal from treaties, are tabled in Federal Parliament at least 15 sitting days before the Government takes binding action (with special procedures in cases of exceptional urgency). In most cases this means that treaties are tabled for consideration after signature but before the final step, such as ratification, which would bind Australia under international law.

National Interest Analyses

Each treaty is tabled with a National Interest Analysis giving reasons why Australia should become a party to the treaty. Where relevant, this contains a discussion of economic, environmental, social and cultural effects.[22]

Typically the National Interest Analysis sets out:
- proposed binding treaty action;
- reasons Australia would take to the proposed treaty action;
- obligations Australia would assume under the treaty;
- manner of implementation;
- costs; and
- outcomes of community consultations.

Treaties Council and Committees

The Joint Standing Committee on Treaties (JSCOT)[23] is a parliamentary committee which considers tabled treaties and National Interest Analyses, and other questions relating to international instruments that are referred to it by either House of Parliament or a Minister. While the Treaties Council is little used, JSCOT is active and conducts inquiries, including public hearings, and reports to Parliament. The Treaties Council was established as an adjunct to the Council of Australian Governments (COAG) to consider, at a ministerial level, treaties of relevance to the States and Territories.

Similar national consultation takes place at a departmental level through the Commonwealth-State-Territory Standing Committee on Treaties. The Committee has been considerably more active than the Council, meeting twice yearly to identify and monitor treaties of significance for States and Territories.

Australian Treaties Library

The Australian Treaties Library was established as part of the 1996 treaty-making reforms. It disseminates treaty information to the public through the internet: see http://www.austlii.edu.au/au/other/dfat

AUSTRALIA'S TREATY TABLING ARRANGEMENTS

Treaty text

⮟

Cabinet or Ministerial Agreement

⮟

Federal Executive Council Approval

⮟

Signature

⮟

Consultations continue on final treaty action, including any necessary legislation or changes to practice, with State and Territory Governments, peak industry bodies and NGOs.

⮟

Cabinet or Ministerial Agreement

⮟

National Interest Analysis (NIA) prepared. States and Territories consulted in the development of NIAs in which they have a major interest and views reflected.

⮟

Relevant number of copies of a treaty text and NIA submitted to Treaties Secretariat for tabling in Parliament.

⮟

Table treaty in Parliament at least 15 sitting days prior to Australia taking binding action. Joint Parliamentary Committee on Treaties may consider treaty.

⮟

Final treaty action through exchange of notes, ratification, accession etc. following Federal Executive Council Approval where appropriate.

IMPLEMENTING TREATIES IN AUSTRALIAN LAW

The rights protected under the ICCPR are, in almost every country in the world, implemented by a domestic guarantee of rights, often called a 'bill of rights'. Many such guarantees of rights, most notably in the constitution of South Africa, cover not only civil and political rights, but also the economic and social rights recognised in the ICESCR. At the Federal level, Australia remains the only democracy in the world not to have passed a law directly implementing the ICCPR.

22. See www.austlii.edu.au/au/other/dfat/nia/index.html
23. See www.aph.gov.au/house/committee/jsct/

In 2009, the Federal Government initiated a National Human Rights Consultation. Australia has implemented some of its human rights treaty commitments, and international human rights law has a direct impact on our daily lives. For example, the Commonwealth *Racial Discrimination Act 1975* implements the Convention on the Elimination of All Forms of Racial Discrimination into Australian law, and the Commonwealth *Sex Discrimination Act 1984* implements some (but by no means all) of the rights for women contained in the Convention on the Elimination of All Forms of Discrimination Against Women. Australia has been much slower in implementing other international human rights obligations. For example, there is no national legislation that implements our obligations under the Convention on the Rights of the Child. Australia has announced that it considers the rights protected by the ICESCR to be adequately protected under existing Australian law, a claim disputed by some commentators. Australia has not effectively implemented the rights protected under the ICCPR. In 1986 the Australian Human Rights Commission[24] was established in response to Australia having ratified the ICCPR in 1980.

Although the Commission has powers to investigate some of Australia's human rights obligations, including alleged violations of the ICCPR, it has no powers of penalty or enforcement. Nor does it have powers to investigate breaches of economic, social or cultural rights. This is insufficient to give effect to the requirement of the ICCPR (and other human rights treaties) that a ratifying state ensure that everyone has access to the rights set out in the treaty, together with effective remedies for breaches.

FEDERAL GOVERNMENT POSITION ON HUMAN RIGHTS

The issue of a Bill of Rights of some sort has been avoided as a sensitive political issue in Australia. A direct response to any call for such a guarantee has been typically answered with a claim that the rights protected by the ICCPR and ICESCR are adequately protected by the common law, existing legislation, and the democratic nature of government. Many commentators disagree, and Australia is almost alone in the world in maintaining this view. Recent Federal Governments have differed in the level of their commitment to multilateralism and to international complaints mechanisms.

FORMAL HUMAN RIGHTS PROTECTION IN AUSTRALIA

There is no legislative or constitutional bill of rights federally in Australia. (Human rights legislation in the States and Territories is dealt with on page 20.)

In 2008, the Rudd Labor Government announced that it would support a national community consultation on the most appropriate methods of protecting human rights. The 2008-09 Federal Budget provided $2.099 million for that process. The National Human Rights Consultation Committee issued its report in 2009, which made recommendations including that:

- the Federal Government enact a Human Rights Act in the model of the existing Victorian and ACT legislation (sometimes called the 'dialogue model');
- the right to the highest possible standard of living; the right to the enjoyment of the highest attainable standard of physical and mental health; and the right to education be recognised as a priority, although the Committee said any complaints for breach of those rights should not be heard in Court, but by the Commission;
- education about human rights be a top priority for the Federal Government;
- public servants be required to consider policy recommendations and programs through a human rights lens; and
- new Bills brought before the Federal Parliament be assessed for their compatibility with human rights standards.

In 2011, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) was passed. It commenced in January 2012. It gives effect to one of the recommendations of the National Human Rights Consultation Committee by requiring all Bills and disallowable legislative instruments introduced to the Federal Parliament to be accompanied by a statement of compatibility with human rights standards. The Act also created the Parliamentary Joint Committee on Human Rights to review Bills for human rights compatibility and to advise the Parliament. The Federal Attorney-General's Department has created tools to assist with the preparation of statements of compatibility based on human rights jurisprudence and in particular, the principle of proportionality.

Discrimination law reform

The Commonwealth Parliament has passed legislation that prohibits discrimination and harassment on a number of grounds, including:

- race, including a person's colour, descent, national or ethnic origin, immigrant status and racial hatred (*Racial Discrimination Act 1975* (Cth));
- sex, including a person's marital status, whether they are pregnant, family responsibilities and sexual harassment (*Sex Discrimination Act 1984* (Cth));
- disability, including temporary and permanent disabilities, physical, intellectual, sensory, psychiatric disabilities, diseases and future disabilities, and association with a person with a disability (*Disability Discrimination Act 1993* (Cth); and
- age, including both young and older people (*Age Discrimination Act 2004* (Cth)).

Additionally, the Australian Human Rights Commission (the Commission) can investigate claims of discrimination and harassment in employment, on the basis of a person's sexual preference, criminal record, trade union activity, political opinion, or religion or social origin (*Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).

24. The 'Australian Human Rights Commission' was previously named the 'Human Rights and Equal Opportunity Commission' or 'HREOC'. The change of name was announced on 4 September 2008. The legal name and the name of the legislation by which the Commission was established (*Human Rights and Equal Opportunity Act 1986*) were also changed in August 2009 to the *Australian Human Rights Commission Act 1986* (Cth).

A consolidated form of anti-discrimination legislation has been developed by the Federal Government as a draft exposure bill (Human Rights and Anti-Discrimination Bill 2012 (Cth)). It would consolidate all federal anti-discrimination legislation into a single Act with the purpose of providing a simpler, more consistent system that provides greater certainty; creating clearer complaint resolution processes and shifting the burden of proof to a respondent once a prima facie case of discrimination is made out; and addressing gaps and inconsistencies. The Government proposes that the Act would create a single, simplified test for discrimination on any ground; introduce new protected attributes of sexual orientation and gender identity, *and* recognise the possibility of discrimination on the basis of a combination of attributes. It would preserve the exemptions in current discrimination legislation (religious exemptions and justifiable conduct). Finally, the Bill would give greater certainty to respondents by promoting voluntary compliance that once certified by the Commission and adhered to by an employer, could act as a shield against claims of discrimination.

The Bill was reviewed by the Senate Legal and Constitutional Affairs Legislation Committee (Report, February 2013).

The Human Rights and Anti-Discrimination Bill has not yet been passed and has attracted significant public comment. In the meantime, some of the reforms proposed by Government have been introduced to the Parliament. In 2013, the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) was passed. It expanded the protected grounds in the *Sex Discrimination Act 1984* (Cth) to include sexual orientation, gender identity and intersex status.

The Commission[25] is empowered under the Acts listed above (together with the AHRC Act) to investigate and to conciliate complaints involving discrimination and harassment on the grounds listed above. It is against the law to be discriminated against in many areas of public life, including employment, education, the provision of goods, services and facilities, accommodation, sport and the administration of Commonwealth laws. If the Commission cannot conciliate the complaint so that the parties reach a settlement (a private agreement to resolve the complaint, and might involve an apology, a change in future conduct, and/or a financial payment), a complainant can choose to continue their complaint in the Federal Court or the Federal Circuit Court (formerly the Federal Magistrates Court). The Commission can also intervene in litigation, or seek the leave of the court to provide assistance as *amicus curiae* ('friend of the court'). The Commission's role as an intervener or as *amicus curiae* is to provide specialist submissions on human rights and discrimination issues, independent from the parties.

However, prohibiting discrimination (and proscribing racial vilification) falls short of implementing the range of standards guaranteed in the international conventions on human rights. Also, the existing prohibitions in Australian law against discrimination on enumerated grounds are not 'entrenched'. That means that they can be overridden by subsequent laws if the Parliament wished, rather than setting a standard that subsequent laws must satisfy to be valid laws. For an example, legislation authorising the Northern Territory Intervention sought to limit or to exclude the operation of the *Race Discrimination Act*.

Under the AHRC Act, the Commission can also investigate alleged breaches of 'human rights' as narrowly defined in that Act. The rights that the Commission is empowered to deal with are:[26]

- International Covenant on Civil and Political Rights;
- International Labour Organisation Discrimination (Employment) Convention ILO 111;
- Convention on the Rights of the Child;
- Declaration of the Rights of the Child;
- Declaration on the Rights of Disabled Persons;
- Declaration on the Rights of Mentally Retarded Persons; and
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

It does not include the International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Convention on the Rights of Persons with Disabilities, and other key human rights declarations.

In Australia, although the Commission is empowered to investigate breaches of the rights scheduled to the AHRC Act, it is not unlawful to breach those rights.

The Commission has the power to investigate and to make recommendations. For example, everyone has the right not to be required to perform 'forced or compulsory labour' and the right to have a criminal trial 'within a reasonable time'. If a right like this is breached, the Commission can investigate a complaint, try to resolve it and make recommendations, but no further action can be taken by a complainant in the courts. Reports of the Commission's investigations into human rights breaches under the AHRC Act are tabled in Federal Parliament.

HUMAN RIGHTS IN AUSTRALIAN COURTS

During the 1990s and into the 21st century there has been a significant move in Australian courts towards accepting reference to Australia's human rights obligations as a basis for interpreting Australia law.

The extent to which human rights obligations should influence Australian judges' interpretation is limited and is still contested. One of the earliest and most significant statements was by Justice Brennan in the High Court:

> 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule ...'.[27]

25. See www.humanrights.gov.au
26. Note: this is not an exhaustive list.
27. *Mabo v State of Queensland [No 2]* (1992) 175 CLR 1 at 42; available at www.austlii.edu.au/au/cases/cth/HCA/1992/23.html

The emphasis is on *interpretation* – the law as it is stated will be given effect, but when there is uncertainty, or a gap in the law, then Australia's human rights obligations are relevant. This accords with the 1988 *Bangalore Principles*: 'if an issue of uncertainty arises ... a judge may seek guidance in the general principles of international law, as accepted by the community of nations'. This approach is generally only available to the higher ranked courts, which have a role in interpreting law. There will, however, be occasions when lower level courts and tribunals need to interpret law. It remains to be seen how confident they will be in referring to human rights standards as a means of doing so.

HUMAN RIGHTS IN ADMINISTRATION AND POLICY DEVELOPMENT

In 1995 the High Court decided that people in Australia have a 'legitimate expectation' that government administrators will, where relevant, take into account Australia's international obligations in making their decisions: see *Teoh's* case.[28] The Court agreed that to require a decision to be made *in accordance with* a treaty would be legislating 'by the back door', and therefore would not be permissible. The most an applicant can expect is that the obligations Australia has assumed in relevant treaties will be *considered* when their application is assessed. Since *Teoh*, government decision-makers have taken account of Australia's treaty obligations when considering a decision, but have never been bound by them. There have been some Federal Court applications for review of immigration decisions which argue that the *Teoh* requirement has not been complied with, but the argument has rarely been successful.

Despite this limited role for treaties in administrative decision-making, the then Labor Government argued that the *Teoh* decision interfered with the proper role of Parliament in implementing treaties. In 1995 it introduced the Administrative Decisions (Effect of International Instruments) Bill to negate the effect of *Teoh*. This 'Teoh Bill' lapsed in 1996 with the calling of a Federal Election. In 1997, a similar bill was reintroduced by the new Coalition Government. It lapsed with the calling of a Federal Election in 1998.

The Bill was reintroduced to Parliament in late 1999. Debate lasted into April 2001. Once again, the Bill lapsed with the proroguing of Parliament for a Federal Election in October 2001. In 2000, when considering Australia's compliance with the ICCPR as part of its regular monitoring, the Human Rights Committee in Geneva said of the Teoh Bill that enactment of the Bill would be 'incompatible with the Australia's obligations under the Covenant'.

In both Victoria and the ACT, public servants are now working in an environment in which 'public authorities' are subject to a duty to behave consistently with human rights (see ***Formal human rights protection in Australia*** on page 18) recognised by the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) respectively. In practice, this means that public servants and statutory office holders must, as they exercise statutory discretions, make decisions and develop policies for Ministerial or Cabinet approval, consider the relevant human rights standards.

Hot Tip

In 1988 in Bangalore, India, a group of judges and lawyers from common law jurisdictions within the Commonwealth met to consider the long-term implications for the domestic law of their countries of developments in international human rights law. The public statement which provided a summary of the proceedings is known as the 'Bangalore Principles'. The participants included representatives from Pakistan, Zimbabwe, Papua New Guinea, Malaysia, Australia, India, Mauritius, Sri Lanka and the United States. (1988) 14 Commonwealth Law Bulletin 1196.

HUMAN RIGHTS IN STATE/TERRITORY LAW

All Australian States and Territories have enacted anti-discrimination legislation. Under the Australian Constitution they can do so, as long as the State laws are not inconsistent with Federal laws. Often the State laws go further in the protection they offer because states are not limited in their powers, as the Federal Government is, by the terms of international treaties. Some State laws, for example, protect against discrimination on the ground of religion or sexuality, grounds not covered by Federal laws.

State and Territory human rights protections

The Australian Capital Territory (ACT) was the first Australian jurisdiction to pass a version of a Bill of Rights, the *Human Rights Act 2004* (ACT). In 2006, Victoria followed suit and passed the *Charter of Human Rights & Responsibilities Act 2006* (Vic). These laws are not 'supreme' laws like a constitution would be – they are simple Acts of Parliament that can be easily changed or overridden by a clear Parliamentary intention in a later Act. Neither the ACT *Human Rights Act* nor the Victorian *Charter* cover the field of human rights standards to which Australia has subscribed. Both Acts cover a selective range of rights, predominantly taken from the ICCPR. Both Acts recognise their selectivity and do not claim to be an exhaustive statement of individuals' human rights.

These Acts are modelled on the United Kingdom *Human Rights Act 1998* (UK). They are described as creating a 'dialogue' on human rights standards between the Executive, Parliament, the Judiciary and the community. They are also described as 'preventative' models as they aim to put human rights at the forefront of governmental decision-making. The main features of the Victorian and the ACT Acts are that they:

- create a process by which all new legislation must be scrutinised for its human rights implications, and be accompanied by a statement of compatibility with human rights before it is passed by the Parliament. Parliament has the power to legislate in a way that is contrary to the

28. *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 available at www.austlii.edu.au/au/cases/cth/HCA/1995/20.html

protected human rights, but this will be explicit at the time it passes such law and any limitation or override of human rights will be justified;

- create a new rule of statutory interpretation to require courts and administrative decision makers to interpret existing and future legislation consistent with human rights, 'so far as it is possible to do so consistently with [the law's] purpose'. International law, and the judgments of foreign and international courts and tribunals may be used in interpreting the recognised human rights. If it is not possible to interpret the law in question consistently with human rights, courts can issue a declaration of incompatibility (ACT) or declaration of inconsistent interpretation (Victoria) that places the law back before the Executive and Parliament to decide whether or not to amend the law in question. The government of the day must respond within six months, in writing, and table the response in Parliament. The court's declaration does not make the law invalid;
- create a duty incumbent on 'public authorities' to act consistently with human rights, unless the law clearly authorises decisions or conduct that is inconsistent with human rights. A 'public authority' is any organisation (including its staff) that provides services of a public nature – for example, a private company that runs a prison on behalf of government. Both the ACT (from January 2009) and the Victorian Acts allow individuals to approach a court for a remedy (other than financial compensation) in relation to a violation of a protected human rights by a 'public authority';
- establish periodic reviews to consider expanding the scope of protected human rights to include economic, social and cultural rights. Notably, in 2012 the ACT amended its *Human Rights Act* to include the right to education; and
- attempt to engender a human rights culture by measures such as appointing human rights commissioners responsible for reporting on the use of the relevant Act, monitoring compliance, educating the public service and the public at large, and promoting awareness of human rights. In the ACT, there is a Human Rights Commission[29] and in Victoria, the Equal Opportunity Commission has become the Equal Opportunity and Human Rights Commission.[30]

Current developments

Proposals that States and Territories have their own Bills of Rights have become more frequent in the last few years, particularly since the passage of the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). In both Western Australia and Tasmania, state governments have conducted community consultations in relation to how to protect human rights. In 2006, the Tasmanian Government commissioned the Tasmanian Law Reform Institute to report how human rights are currently protected in Tasmania and whether human rights can be enhanced or extended. In October 2007, the Tasmanian Law Reform Institute reported back, recommending the adoption of a Human Rights Act in Tasmania. No such Act has been passed.

In Western Australia, the State Government appointed a committee in May 2007, called the Committee for a Proposed WA Human Rights Act, to determine if there is support in the community for such an Act in Western Australia, and more broadly, what the Western Australian Government and the community can do to encourage a 'human rights culture' in the State. At the same time, the State Government released a proposed Human Rights Act for discussion. In November 2007, the Committee reported back recommending that in light of clear support for a Human Rights Act in the community, that such an Act be passed. The state government waited on the outcome of the federal consultation on how to protect human rights before acting on these recommendations. It has not moved to pass a Human Rights Act.

The Queensland Electoral and Administrative Reform Commission published a major report in 1993 proposing a Bill of Rights for Queensland. In 1998, the Queensland Parliament's Legal, Constitutional and Administrative Review Committee recommended against the adoption of a Bill of Rights in Queensland. Community debate continues in Queensland.

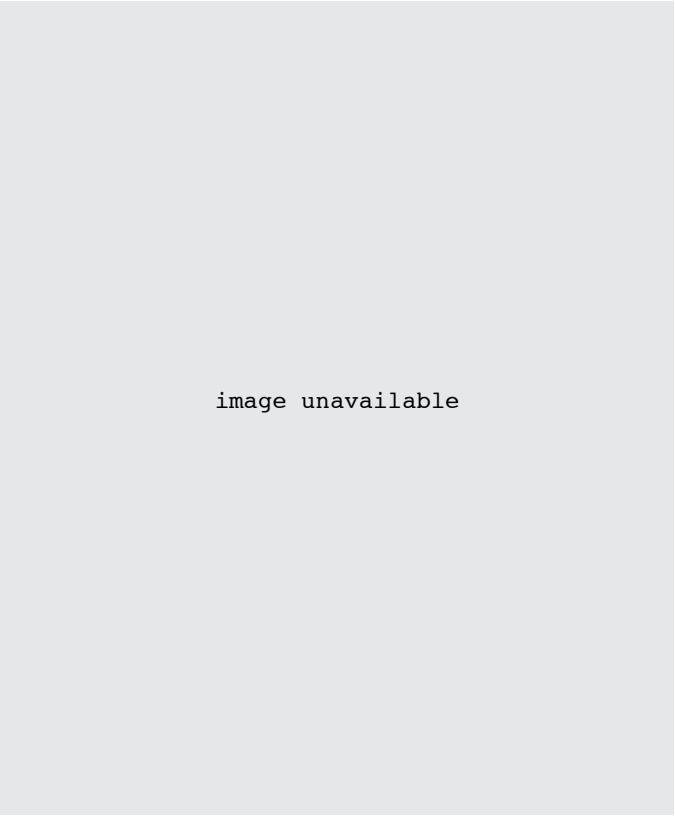
In 2001, a NSW Parliamentary committee inquired into a Bill of Rights for NSW. Consistent with the widely publicised views of the then NSW Premier, the Honourable Bob Carr MP, the committee recommended against a Bill of Rights, but proposed the establishment of standing committee to scrutinise legislation for compliance with human rights standards (which was established). The former Attorney General of NSW, the Honourable Bob Debus MP, was in favour of a community consultation about formal human rights protection in NSW. However, in April 2007, his successor, the Honourable John Hatzistergos MP, rejected the idea of a Bill of Rights in NSW. Community debate continues in NSW. In South Australia, a private member's bill entitled Human Rights Bill 2004 was introduced to the South Australian Parliament by the leader of the South Australian Democrats, the Honourable Sandra Kanck MLC. It did not progress beyond the first reading. Ms Kanck introduced a further private member's bill in 2005 entitled, Human Rights Monitors Bill 2005, which also did not proceed. A community-based campaign advocating for a Bill of Rights in South Australia continues.

In the Northern Territory, there have been two examinations of the question of a Bill of Rights. Neither has resulted in legislative reform, and the question of a Bill of Rights has become related to the broader political question of whether the Northern Territory should become a State. In 1995, a Legislative Assembly Committee published a discussion paper, 'A Northern Territory Bill of Rights'. In 2005, in consideration of the question of whether the Territory should 'graduate' to Statehood, the Statehood Steering Committee was established by the Legislative Assembly to consult and educate the Territory's community. In May 2007, the Steering Committee's discussion paper, 'Constitutional Paths to Statehood', was released. It contained a section about a Northern Territory Bill of Rights and has been complemented by a fact sheet entitled 'What is a Bill of Rights?'

29. See www.hrc.act.gov.au
30. See www.humanrightscommission.vic.gov.au

Bringing the standards to life

Two rights standards – health and housing – were recognised by the Australian National Human Rights Consultation Committee (along with the right to education) as 'the primary economic and social rights… that are of the greatest concern to those who participated in all aspects of the [2009] Consultation', and the Committee recommended that they be included by the Federal Government in an interim list of rights to be protected and promoted immediately, as the question of how Australia should best recognise human rights at law is resolved.[31] This recommendation has not been implemented to date.



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This section will outline the practical meaning of rights standards, first, by considering what a rights-based approach looks like. Following sections will look at the content of the rights to health and housing as interpreted internationally; and then consider potential use of those interpretations in Australia.

RIGHTS-BASED APPROACHES

What does it mean to adopt a rights-based approach? The international aid and development sector has led the development of human rights based approaches. As rights standards are incorporated into Australian law (for example, Victoria and the ACT), rights-based approaches are being used to guide government departments, public agencies and community organisations performing public roles in how to ensure that they protect, respect, promote and fulfil rights. An understanding of a rights-based approach is useful for citizens, advocates, service providers and managers alike.

A human rights based approach seeks to realise human rights in practice. It frames poverty or disadvantage as an injustice, and is concerned with the interaction between a rights-holder and a duty-bearer. It transforms consumers/clients/constituents from a person deserving of charity (charity approach) or who has an unmet need (needs approach), to a person who holds or should be helped (empowered) to hold a right (rights-holder). Understood this way, the provision of services; the creation of policy; and the shaping of priorities are informed by the objective of duty-bearers fulfilling the rights of rights-holders. Who are the duty-bearers and how can they be enabled to meet their obligations to rights-holders?[32]

While our governments are the primary duty-bearers in relation to protecting and respecting our rights, they have associated duties to *promote* and to *fulfil* the promise of the rights standards. This means that governments must ensure that third parties (eg, corporations, other individuals) do not breach the rights of others.

31. See National Human Rights Consultation Committee Report, pp. xxx, 356 – 7 (30 September 2009), http://www.ag.gov.au/RightsAndProtections/HumanRights/TreatyBodyReporting/Pages/HumanRightsconsultationreport.aspx
32. *Applying a rights-based approach: an inspirational guide for civil society*, Jakob Kirkemann Boesen & Tomas Martin, Danish Institute for Human Rights, 2007; available at http://www.humanrights.dk/files/pdf/Publikationer/applying%20a%20rights%20based%20approach.pdf; Victorian Equal Opportunity & Human Rights Commission, *From Principle to Practice: Implementing the Human Rights Based Approach in Community Organisations* (2008).

COMMON UNDERSTANDING OF HUMAN RIGHTS PRINCIPLES

United Nations agencies, in 2003, committed to a set of principles to use in coordinating their work in development cooperation and developing programming.[33] They provide a neat statement of the principles that inform human rights practice and can be drawn upon in framing rights-based arguments and initiatives.

STATE OBLIGATION – RESPECT, PROTECT, PROMOTE, FULFIL

To use human rights standards, you need to be able to activate the multilayered nature of state obligations under human rights treaties – to respect, protect, promote and fulfil human rights standards. Human Rights Internet, a respected online portal on human rights, summarises the obligations as follows:

> the obligation to respect rights requires states to refrain from any action that would interfere with citizens' enjoyment of their rights; including actions people take in efforts to realise their rights.
> the obligation to protect rights requires states to take action to prevent violations of human rights by others. This obligation involves encouraging individuals and organisations to respect the rights of others, as well as imposing sanctions for violations that are committed by private individuals or organisations.
> the obligation to fulfil rights requires states to take action to achieve the full realisation of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies...[34]

PROGRESSIVE IMPLEMENTATION

The rights to health, housing and education are set out in the International Covenant on Economic, Social & Cultural Rights (ICESCR). Article 2(1) of ICESCR is understood to impose two different types of obligations. The first is a *core minimum obligation* to ensure a minimum standard of protected rights; and that those rights are enjoyed without discrimination. This obligation is coupled with an obligation to *progressively improve performance* as the state's capacity grows – for example, how much money, staff, material

HUMAN RIGHTS PRINCIPLES

Universality and Inalienability

Human rights are universal and inalienable. All people everywhere in the world are entitled to them. The universality of human rights is encompassed in the words of Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights.'

Indivisibility

Human rights are indivisible. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. Thus, the right of everyone to an adequate standard of living cannot be compromised at the expense of other rights, such as the right to health or the right to education.

Interdependence and Interrelatedness

Human rights are interdependent and interrelated. Each one contributes to the realisation of a person's human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. For instance, fulfilment of the right to health may depend, in certain circumstances, on fulfilment of the right to development, to education or to information.

Equality and non-discrimination

All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.

Participation and inclusion

All people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. Rights-based approaches require a high degree of participation by communities, civil society, minorities, women, young people, indigenous peoples and other identified groups.

Accountability and Rule of Law

States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in international human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law. Individuals, the media, civil society and the international community play important roles in holding governments accountable for their obligation to uphold human rights.

33. *The Human Rights Based Approach to Development Cooperation. Towards a Common Understanding Among the UN Agencies*, Interagency Workshop on a Human Rights Based Approach in the context of UN Reform, 3- 5 May 2003, available at http://www.unfpa.org/rights/approaches.htm
34. Human Rights Internet, 'State Obligations to Implement International Human Rights' in For the Record: A Focus on Canada – Bringing Economic, Social and Cultural Rights Home – Guide, vol 1, Part 6, available at www.hri.ca/fortherecordcanada/vol1/guide-part_6.htm

resources it can reasonably harness. So, the obligation upon Australian governments is to take reasonable measures, within available resources, to progressively achieve the full realisation of the rights recognised in ICESCR.

Advocacy and policy work around these rights will always be connected to questions of budget, capacity and resourcing; and arguments as to what is reasonable, expeditious and effective.

Importantly, the obligation to progressively achieve the full realisation of the right means that governments cannot enact regressive steps that take away from what is already in place. For more detailed analysis of the nature of the State obligation under ICESCR, see UN Committee on Economic, Social & Cultural Rights, *General Comment No. 3, The nature of States parties obligations*, UN Doc. E/1991/23 (14 December, 1990).

Hot Tip: Performance indicators

The Australian Bureau of Statistics produces a number of useful statistical profiles, including: Australian Economic Indicators, Census data, Measures of Australia's Progress, National Accounts, and Population products (see www.abs.gov.au).

The Australian Government produces budget materials for the public, consistent with the framework established by the *Charter of Budget Honesty Act 1998* (Cth) (see www.budget.gov.au).

State and Territory governments, their departments and agencies; local governments (councils); and community service providers all produce yearly budgets and report on those budgets. Their websites, annual reports and financial statements are very useful in measuring performance and making a case for full realisation of economic, social and cultural rights, for example, health, housing and education.

POLITICAL CONTEXT

Civil and political rights have been explicitly recognised in both the ACT and in Victoria. Legal recognition of economic, social and cultural rights (ESCR) has been harder to achieve in Australia despite recommendations for explicit protection by independent experts in the ACT, Western Australia and Tasmania, and strong community support expressed in Victorian and federal human rights consultation processes.

Despite the indivisibility of human rights, Australian governments have been nervous about the following issues:

- the economic implications of recognising ESCR;
- whether courts (rather than Parliament) are the right forum for social and fiscal policy to be scrutinised; and
- the lack of analogous case law by which Australian judges could be guided in interpreting ESCR if they were legally recognised

  (For example, some argue that the economic differences between South Africa and Australia mean that the judicial reasoning in South African case law, where the Constitution protects ESCR, are not applicable here).

Most human rights experts and advisory committees have disputed these reservations and recommended the recognition of a limited range of ESCR in Australia (eg, Tasmanian Law Reform Institute; ACT Economic, Social & Cultural Rights Research Project; Consultation Committee for a Proposed Human Rights Act in Western Australia).[35]

There has been a greater willingness by governments to consider ESCR in the context of policy-making and resource allocation. However, as the respected members of the ACT Economic, Social & Cultural Rights Research Project write:

> *the ESCR debate to date in the ACT, the rest of Australia and in comparable jurisdictions such as the United Kingdom has shown that that the relevant question is no longer whether ESCR are legitimate human rights, but whether the courts have an appropriate role to play in their implementation and, more generally, whether and how governments should be held accountable for fulfilling ESCR.*[36]

EFFECTIVE REMEDIES

The final piece of the puzzle is to know that where there are rights, there are remedies. The human rights treaties require an 'effective remedy' in case of breach of the rights standards they codify.

The Committee has said that while legal or judicial remedies are not always called for, and 'accessible, affordable, timely and effective' administrative remedies could suffice, all Covenant rights contain significant justiciable dimensions (meaning they can be heard and decided by a court). It said that to adopt a

> *... rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of courts would ... be arbitrary and incompatible with the principle that the two sets of human rights [civil and political and economic, social and cultural rights] are indivisible and interdependent. It would also drastically curtail the capacity of the court to protect the rights of the most vulnerable and disadvantaged groups in society.*[37]

Currently, the Australian Human Rights Commission is not empowered by legislation to investigate or conciliate breaches of economic, social or cultural rights.

35. The Victorian Human Rights Consultation Committee followed the Victorian Government's Statement of Intent in which the Government excluded ESCR. Nonetheless, it recommended that ESCR be considered for inclusion when the *Charter for Human Rights and Responsibilities Act 2006* (VIC) was reviewed.
36. ACT Economic, Social & Cultural Rights Research Project, *Report* (September 2010), para. 2.60 available at http://regnet.anu.edu.au/sites/default/files/u82/ACTESCR_project_final_report.pdf
37. UN Economic, Social & Cultural Committee, *General Comment No. 9*, 'The domestic application of the Covenant' UN Doc. 1/ E/19991/23, annex III (3 December, 1998), para. 10.

Case study 1: the right to health

Contemporary health practice and debates in Australian about our health systems reflect core components of the contents of the right to health. This section considers international interpretations of the right to health; what that means for Australian governments and other duty holders; and points to existing practices and ways to shape advocacy positions in Australia that are consistent with the right to health.

INTERNATIONAL SOURCES

Standards

UDHR, Article 25(1) – right to an adequate standard of living for self and family including food, clothing, housing and medical care; necessary social services and social security.

ICESCR, Article 12 – the right to the enjoyment of the highest attainable standard of physical and mental health.

CEDAW, Articles 11(1)(f) & 12 – elimination of discrimination against women in health care, including family planning.

CERD, Article 5(e)(iv) – the right to public health, medical care, social security and social services.

CRoC, Article 24 – the right of the child to the enjoyment of the highest attainable standard of health.

Convention on the Rights of Persons with Disabilities, Article 25.

Interpretation

UN Committee on Economic, Social & Cultural Rights, General Comments, *General Comment No. 14*, 'The right to the highest attainable standard of health' (8/11/2000), UN Doc. E/C.12/2000/4.

CONTENT OF THE RIGHT TO HEALTH

Implementation of the right to health has been interpreted by the United Nations Committee on Economic, Social and Cultural Rights (the Committee) to include both entitlements and freedoms.

People are to be free to control their own bodies and health, including their sexual and reproductive health; and to be free from interference with their bodies and health (for instance, medical experimentation against their will, or torture).

People are entitled to the equality of opportunity to enjoy the highest attainable standard of health.

The Committee has fleshed out the meaning of the right to health to incorporate the following elements:

- *Availability* – Sufficient quantity of functioning public health and health-care facilities, good and services including, at a minimum, safe and potable drinking water; adequate sanitation; hospitals, clinics and other health buildings; trained medical and professional personnel who receive domestically competitive salaries; and essential drugs (General Comment No. 14, para 12(a)).
- *Accessibility* – All people in the country (regardless of whether they are citizens or not, and especially if they are vulnerable or marginalised), have equitable access to health facilities; goods; and services without discrimination. Accessibility has four overlapping dimensions:
  i. Non-discrimination
  ii. Physical accessibility – health facilities, goods and services and the underlying determinants (eg, safe water and sanitation) must be within safe physical reach for everyone. This is important in a country like Australia with a large physical area, much of it remote, and a dispersed population;
  iii. Economic accessibility (affordability)
  iv. Information accessibility – this means that health consumers can participate in decisions about their health and have confidentiality of their health information protected.

  (General Comment No. 14, para. 12(d))
- *Acceptability* – Health facilities, goods and services should be respectful of medical ethics and be designed to respect confidentiality and improve the health of consumers. They should also be designed to ensure that people receive treatment appropriate for their culture, gender and stage of life (General Comment No. 14, para. 12(c)).

- *Quality* – Health facilities, goods and services must be scientifically and medically appropriate and of good quality (General Comment No. 14, para. 12(d)).

The right to health is *not* a right to be healthy – people are free to make choices that are unhealthy. Rather, the right is concerned with the systems, facilities, services and conditions that are necessary for everyone to achieve the highest possible standard of mental and physical health.[38]

The starting point in animating the right to health is seeing that it is *interdependent* with other human rights (eg, the right to food; to housing; to work; to education; to dignity; to life; to be free from discrimination; to be free from torture; to privacy; to access information; to associate with others).

A more sophisticated understanding incorporates the underlying structural, economic and social determinants of health. This is sometimes called a 'social determinants of health' approach,[39] which informs local health initiatives such as the *Close the Gap* campaign, and the response from Australian governments, *Closing the Gap: the Indigenous Reform Agenda*.[40]

The objectives of this package are to:
- close the current life expectancy gap within a generation;
- halve the gap in mortality rates between Indigenous and non-Indigenous children under five within a decade;
- halve the gap in reading, writing and numeracy achievement between Indigenous and non-Indigenous students within a decade;
- halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade;
- in the year before formal schooling, provide all Indigenous children in remote communities with access to early childhood education within five years; and
- halve the gap for Indigenous students aged 20 to 24 years old in Year 12, or equivalent, attainment rates by 2020.

AUSTRALIAN APPLICATION

You will remember that the right to health imposes on Australian governments both immediate obligations, and obligations that must be progressively realised according to the resources available.

At a minimum (that is, for immediate implementation), the right to health means that governments:
- must not interfere in the enjoyment of the right – for instance, by preventing access to sexual or reproductive health services and information, or by criminalising people with mental illness rather than ensuring they receive treatment;
- must take active steps to ensure equitable and non-discriminatory access to health care and services and distribution of health goods, whether or not they are provided by the state or by private/community organisations, for example, by legislating or developing and implementing policy;
- must ensure essential drugs are available;
- must ensure people have access to minimum essential food that is nutritionally adequate and safe;
- must ensure people have access to shelter, housing and sanitation and an adequate supply of safe drinking water;
- must ensure drugs and treatments on the market are safe; and that staff providing health services are appropriately skilled, qualified and performing their work consistently with professional standards;
- must develop a comprehensive and coordinated health strategy that addresses structural barriers to securing the right to health and that gives priority to the needs of the most vulnerable people in the population;
- must develop a and implement a public health strategy and mechanisms to monitor effectively the implementation of the right to health; and
- must ensure that people, and especially vulnerable groups, can participate effectively in the making of decisions, policies, and laws that affect them.

The Committee last considered Australia's performance of its obligations under ICESCR in 2009. It raised concerns including:
- the gap between Indigenous and non-Indigenous health indicators and educational opportunities (paras 28 & 31);
- appropriateness and adequacy of health care in prisons (para. 29); and
- insufficient supports for people with mental health issues, in particular, for Aboriginal and Torres Strait Islander people; prisoners; and asylum-seekers in detention (para. 30).[41]

INDUSTRY STANDARDS

The *Australian Charter of Healthcare Rights* was developed by the Australian Commission on Safety and Quality in Healthcare, and was adopted by State and Federal health ministers in 2008.[42] The Charter, while not legally binding, makes an explicit commitment in terms of rights to consumers of health care incorporating important aspects of the international rights standard, notably of:
- timely access;
- safety;
- respect;
- communication;
- participation;
- privacy; and
- accountability.

38. See United Nations Committee on Economic, Social & Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, para. 8.
39. For an outline of the social determinants of health approach, see Richard Wilkinson & Michael Marmot (eds), *Social Determinants of Health: The Solid Facts*, 2nd edition (World Health Organisation, 2003), available online at http://www.euro.who.int/__data/assets/pdf_file/0005/98438/e81384.pdf
40. https://www.humanrights.gov.au/publications/close-gap-community-guide
41. UN Committee on Economic, Social & Cultural Rights, "Concluding Observations. Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Australia", UN Doc. E/C.12/AUS/CO/4 (12 June 2009).
42. See http://www.safetyandquality.gov.au/our-work/national-perspectives/charter-of-healthcare-rights/

An implementation guide for health service providers, health service organisations and patients/consumers accompanies the Charter. Health services, including public health departments, around the country give this undertaking to their patients.

RIGHTS-BASED APPROACH TO DESIGN, DELIVERY AND EVALUATION

The *Close the Gap* campaign, supported by the National Aboriginal Community Controlled Health Organisation (NACCHO), takes an explicitly human rights based approach. It uses the Australian Human Rights Commission's Social Justice Report (2005), calling for:

> an accountable, comprehensive and long-term plan of action that is based on evidence, targeted to address needs, and capable of addressing existing inequalities in health services in order to achieve equality of health status and life expectancy between Aboriginal and Torres Strait Islander people and non-Indigenous Australians by 2030; and
> full participation of Aboriginal and Torres Strait Islander people and their representative bodies in all aspects of addressing their health needs.[43]

Strategies to 'close the gap' have been adopted by the consortium of Australian governments through partnerships reached at the Council of Australian Governments (COAG). The strategies adopted include improved access to appropriate health care, but reach beyond primary health care into education; housing; community safety; employment; culture and language; community development; and rates of contact with the criminal justice system. It involves partnerships between the federal and state/territory governments (National Partnerships on Indigenous Health Outcomes) that committed $1.57 billion over four years to improve Indigenous health outcomes (2009-2013). A National Strategic Framework for Aboriginal and Torres Strait Islander Health was established, and will be replaced by the incoming National Aboriginal and Torres Strait Islander Health Plan.

SPECIFIC HEALTH ISSUES

Interpretation of the right to health can be particularly useful to advocates and service providers concerned with the following:

> women;
> young people;
> Indigenous people;
> people with disabilities;
> non-citizens;
> people living with HIV/AIDS;
> prison populations;
> homeless people;
> people experiencing mental health issues; and
> climate change and the environment.

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Minister for Indigenous Health, Warren Snowdon, at the launch of the national Indigenous anti-smoking campaign at Parliament House, Canberra, 28 March 2011.

Alex Ellinghausen, Fairfax.

43. For more information about the Social Justice Report (2005) and the ongoing work by the Australian Human Rights Commission see: https://www.humanrights.gov.au/close-gap-indigenous-health-campaign
For information on how Aboriginal-controlled health services, through NACCHO, are holding Australian Governments accountable see: http://www.naccho.org.au/aboriginal-health/close-the-gap-campaign/
Federal and state/territory government responses to this campaign can be found at: http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/closing-the-gap

Case study 2: the right to housing

There is no legally actionable right to shelter (nor for that matter, to food or clothing) in Australia. In this case study we will focus on the component of the right to an adequate standard of living that is concerned with housing. Waiting lists for public housing in Australia are long – for instance, in 2013, someone seeking housing in central Sydney will have to wait at least two years, and more likely, more than five years for housing to become available.[44]

CONTENT OF THE RIGHT TO HOUSING

First, let's consider what 'right to housing' might mean. The UN Committee for Economic, Social & Cultural Rights (the Committee) has said that it is not only the right to have shelter over one's head. Rather, it is the right to live somewhere in security, peace and dignity.[45]

How did they build that argument? It is based on the *interdependency of rights standards* (eg, without shelter and food, there can be no life and no dignity) and the fundamental principle of the *inherent dignity of the human person* on which human rights are based.

INTERNATIONAL SOURCES

Standards

UDHR, Article 25(1) – right to an adequate standard of living for self and family including food, clothing, housing and medical care; necessary social services and social security.

ICESCR, Article 11(1) – the right to an adequate standard of living including adequate food, clothing and housing, and to the continuous improvement of living conditions.

ICCPR, Article 17 – includes the right to be free from arbitrary or unlawful interference with privacy, family, and home, and to be protected by law against such interference.

CEDAW, Article 14(2)(b) & (h) – right for rural women to participate in, and benefit from rural development including the right to access adequate health care, including family planning; and the right to enjoy an adequate standard of living including housing, sanitation, electricity and water supply, transport and communications.

CERD, Article 5(e)(iii) – the prohibition against racial discrimination and the guarantee to the right to housing.

CROC, Article 27(3) – obligation on States, consistent with their means, to assist parents/ carers to realise the child's right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development particularly with regard to food, clothing and housing.

Convention relating to the Status of Refugees, Article 21 – obligation upon States to provide housing to refugees lawfully in the State on terms as favourable as possible, and no less favourable than any other non-citizen.

Interpretation

UN Committee on Economic, Social & Cultural Rights, *General Comment 4, The right to the adequate housing*, UN Doc. E/1992/23, annex III (13 December, 1991).

UN Committee on Economic, Social & Cultural Rights, *General Comment 7, The right to adequate housing: forced evictions*, UN Doc. E/1998/22, annex IV (20 May, 1997).

44. See Housing NSW, *Expected Waiting Times for Social Housing 2012*, available at http://www.housingpathways.nsw.gov.au/NR/rdonlyres/B263B6D6-7FC4-48DC-B74C-6F7A0C9FE7A6/0/CentralSydneyRegion.pdf
45. UN Committee on Economic, Social & Cultural Rights, *General Comment No. 4: The right to adequate housing* (13 December, 1991), para. 7.

In its General Comment No. 4, the Committee has interpreted the right to housing to be the right to *adequate* housing, incorporating the following attributes:

Legal security of tenure

Regardless of whether people are tenants, owners, boarders, in emergency or informal housing, they should have security of housing tenure that protects them against forced evictions or harassment (para 8(a)). The Committee has produced another General Comment specifically on the question of forced evictions, whether because of conflict and violence, or in the name of development. It links the right to housing to the right to be free from unlawful or arbitrary interference with one's home (ICCPR, Article 17(1)) and narrows the circumstances in which people can be properly removed from their homes.

Only following due consultation; proper procedures such as adequate notice and information; provision for alternative accommodation; provision for legal remedies and adequate compensation can a person be removed whether by an Australian government, or a third party (like a developer). It is the responsibility of all levels of government to ensure third parties do not breach a person's right to adequate housing.[46]

Availability of services, materials, facilities, and infrastructure

Adequate housing must contain facilities essential for health, security, comfort and nutrition. People should be able to have:

- sustainable access to safe drinking water;
- energy for cooking;
- heating and lighting;
- sanitation and washing facilities;
- means to store food;
- refuse disposal;
- site drainage; and
- emergency services (para. 8(b)).

Affordability

The cost of housing should not threaten or compromise a person's ability to satisfy other basic needs. Australian governments should make housing subsidies and forms of housing finance available, and to protect tenants against unreasonable levels or rent, or increases in rent (para. 8(c)).

Habitability

To be 'adequate', housing should provide inhabitants with adequate space and protect them from weather, structural hazards, means of transmitting diseases (eg, stagnant water; insects; vermin), and other threats (eg, natural disaster) (para. 8(d)).

Accessibility

Policies and procedures must be developed that are designed to ensure that people most in need (eg, people with disabilities; terminally and chronically ill; victims of natural disasters; the homeless) are prioritised and given appropriate housing (eg, no steps for a person who uses a wheelchair) (para. 8(e));

Location

Adequate housing is within reasonable distance to employment, health services, education, child care and other social facilities. It is not in disaster-prone, polluted or dangerous zones (para. 8(f));

Cultural adequacy

We should pay attention to the materials, design and construction of housing to ensure cultural identity and diversity is expressed – that is, it is important to guard against 'one size fits all' housing solutions (para. 8(g)).

AUSTRALIAN APPLICATION

Recalling the two layers of obligation – immediate and progressive implementation – Australian governments are required to take 'deliberate, concrete and targeted' steps to progressively realise the right to adequate housing by:

- developing a housing strategy that prioritises the most vulnerable and that addresses structural issues (eg, affordability, supply of housing stock);[47]
- taking steps, directly or through the private sector, to enable individuals to access adequate housing in the shortest possible time and with the benefit of the maximum available resources;
- ensuring that vulnerable groups can participate in decision-making and deliberation about laws, policies and decisions that affect them; and
- providing for appropriate complaint and legal mechanisms that provide remedies in relation to evictions; housing conditions; and discrimination.

Australian governments have immediate obligations to:

- protect against forced evictions;[48]
- ensure there is reasonable access for vulnerable and marginalised people to seek emergency accommodation and relief;[49] and
- developing mechanisms to effectively monitor the implementation of the realisation of the right to adequate housing;[50] and
- ensure that housing policies and laws do not discriminate without reasonable justification.

46. *General Comment No. 7, The right to adequate housing (Art. 11.1): forced evictions*, (20 May 1997), paras 13–16.
47. General Comment No. 7, para. 12.
48. General Comment No. 7, para. 8.
49. Consider for example, Scotland where local authorities have a statutory duty to offer a minimum of temporary accommodation, advice and assistance to all homeless households and those at risk of homelessness.
50. General Comment No. 7, para. 13.

The Committee last considered Australia's performance of its obligations under ICESCR in 2009. It raised concerns which included:

> increasing rates of homelessness, particularly amongst Aboriginal and Torres Strait Islander people (para. 26); and
> rates of domestic violence and support for survivors, including access to shelters (para. 22).[51]

EXISTING PROTECTION OF THE CONTENT OF THE RIGHT TO HOUSING

The most basic indicator of the realisation of the right to adequate housing is the number of homeless people. On Census night in 2011, official estimates of homelessness run to more than 105,000 people. Sixty per cent of them were under 35 years-of-age.[52] This figure is said by many to be a gross underestimation.

Hot Tip: ABS definition of 'homelessness'

The Australian Bureau of Statistics uses a cultural definition of homelessness, that is, whether a person falls outside contemporary community standards about what is adequate housing. Under the ABS definition, a person is homeless if they do not have suitable accommodation alternatives and their current living arrangement:

> is in a dwelling that is inadequate; or
> has no tenure, or if their initial tenure is short and not extendable; or
> does not allow them to have control of, and access to space for social relations.

Non-discrimination

The core human rights prohibition against discrimination in the provision of goods or service (for example, offering a residential property for rent) is protected at a Commonwealth level and in all Australian states and territories[53]. The prohibition against discrimination includes both *direct* and *indirect* discrimination.

Hot Tip

Direct discrimination means someone is treated less favourably than another person because of a particular characteristic, for example, an Aboriginal applicant for a lease is knocked back by a landlord or agent in preference for a non-Aboriginal applicant on the basis of race.

Indirect discrimination means that the application of a rule, a policy, a standard or some other apparently neutral criteria has the effect of disadvantaging a class of people in comparison to other people on the basis of a protected characteristic (eg, race, age, sex, sexuality, disability). For example, applicants for social housing might be required to have held a tenancy for more than five consecutive years to be eligible, which would exclude young people and newly arrived migrants.

Security of tenure

In addition, tenants and more recently, in some jurisdictions, residents of boarding houses, enjoy some protection of their tenancy or occupancy by law.[54] There is a marked difference in the security of housing tenure that boarders (less protection), as opposed to tenants (more protection), possess in Australia. Other elements of the right are not legally recognised but are nonetheless part of the policy and service landscape in Australia.

Availability, affordability, accessibility

Housing is the constitutional concern of states, rather than the Commonwealth. However, there is a history of joint Commonwealth/state approaches to housing, tied to funding.

Housing legislation is in a state of transition. In 2008, a Green Paper, *Which Way Home?* was issued as the basis of consultation for a new direction in housing policy. The White Paper *The Road Home* was released later in 2008 with two key objectives, namely to:

> halve overall homelessness by 2020; and
> offer supported accommodation to all rough sleepers who need it by 2020.

The strategy aims to achieve this by early intervention to prevent homelessness; more services to end homelessness through sustainable housing and greater economic and social participation; and ongoing support to ensure people do not return to homelessness.

51. UN Committee on Economic, Social & Cultural Rights, "Concluding Observations. Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Australia", UN Doc. E/C.12/AUS/CO/4 (12 June 2009).
52. Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness*, 2011.
53. See *Hot Topics 75: Discrimination*; available at http://www.legalanswers.sl.nsw.gov.au/hot_topics/pdf/discrimination_75.pdf
54. See for instance, *Residential Tenancies Act 1997* (ACT); *Residential Tenancies Act 2010* (NSW); *Residential Tenancies Act 1999* (Northern Territory); *Residential Tenancies and Rooming Accommodation Act 2008* (Qld); *Residential Tenancies Act 1995* (South Australia); *Residential Tenancy Act 1997* (Tasmania); *Residential Tenancies Act 1997* (Victoria); *Residential Tenancies Act 1987* (Western Australia).

A five-year National Affordable Housing Agreement was created between Australian governments in 2009. It expires in 2013. It devotes $6.2 billion to affordable and sustainable housing that promotes economic and social participation. The package deals with social housing, homelessness, and housing for Aboriginal and Torres Strait Islander people living in remote places. The six objectives of the Agreement are:

> people who are homeless or at risk of homelessness achieve sustainable housing and social inclusion;
> people are able to rent housing that meets their needs;
> people can purchase affordable housing;
> people have access to housing through an efficient and responsive housing market;
> Indigenous people have the same housing opportunities (in relation to homelessness services, housing rental, housing purchase and access to housing through an efficient and responsive housing market) as other Australians; and
> Indigenous people have improved housing amenity and reduced overcrowding, particularly in remote areas and discrete communities.

At the time of publication, a new draft of a Commonwealth housing law was in circulation for comment. It is part of the Commonwealth Government's response to the Commonwealth Parliament's House Standing Committee on Family, Community, Housing and Youth's inquiry into homelessness legislation, *Housing the Homeless* (2009). The Committee recommended that a rights-based approach to housing be adopted in Australia.[55]

The proposed Homelessness Bill 2012 (Cth) will replace the *Supported Accommodation Assistance Act 1994* (Cth). It does not recognise adequate housing as a right, and seems, as currently drafted to frame homelessness as a choice. Many submissions from service providers and rights commentators have commented on this aspect of the Bill.

The most recent data reported to the Council of Australian Governments (COAG) indicated that:

> housing affordability had not improved;
> rental affordability had worsened, particularly in major cities; and
> houses were less affordable for purchasers.

Data in relation to homelessness and Indigenous housing was not reported. The lack of reliable data in relation to homelessness and social housing in Australia was criticised by the 2006 UN Special Rapporteur on Adequate Housing, Miloon Kothari.

SPECIFIC HOUSING ISSUES

Interpretation of the right to housing can be particularly powerful to advocates and service providers concerned with the following:

> homeless people;
> children and young people;
> women (including women affected by domestic violence; women in rural and regional Australia; pregnant women; women with new-born children and single women with children);
> Indigenous people;
> people with disabilities and health problems (including mental illness, HIV/AIDS);
> people with low incomes;
> non-citizens including refugees, asylum seekers and migrants;
> people living with HIV/AIDS;
> prisoners and persons released from gaol or detention;
> elderly people; and
> people in rural and remote areas.

image unavailable

Evening on the streets of Canberra in the week of the annual CEO sleepout, 19th June 2013.
Karleen Minney, Canberra Times.

55. See www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=fchy/homelessness/report.htm

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Use our ***HSC Legal Studies News Watch*** blog to find the latest information: **http://blog.sl.nsw.gov.au/hsc_legal_studies/**

Commonwealth Attorney-General's Department

www.ag.gov.au/RightsAndProtections/HumanRights/Pages/default.aspx

Australian Human Rights Commission

www.humanrights.gov.au

The Commission provides a useful set of links to organisations, information and human rights education:

www.humanrights.gov.au/links-human-rights-organisations-and-resources#hr

Human Rights Law Centre

www.hrlc.org.au/

An NGO dedicated to promote and to protect human rights in Australia and beyond through evidence-based advocacy, research, litigation and education.

Office of the High Commissioner for Human Rights

www.ohchr.org/EN/Pages/WelcomePage.aspx

You can access the full text of human rights treaties here, as well as the deliberations, comments and recommendations of UN treaty bodies.

Human Rights Council of Australia

www.hrca.org.au

An organisation committed to promoting universal human rights for all without discrimination. Website also has information and links to other human rights organisations.

NSW Council for Civil Liberties

http://www.nswccl.org.au/

An organisation that attempts to influence public debate and government policy on a range of human rights issues. The organisation prepares submissions to government, conducts court cases defending infringements of civil liberties, engages regularly in public debates, produces publications, among many other activities.

Australian Treaties Database

www.dfat.gov.au/treaties

The Australian Treaties Database is an online resource for researching treaties to which Australia is a signatory, or where Australia has taken other treaty action.

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85 Human rights
An overview of human rights law from its origins and sources, through to the development of modern human rights law. Discusses the domestic operation of human rights law and examines rights-based approaches, with case studies on housing and health in Australia.

84 Voting and elections
Over a 3-4 year cycle, Australians vote for representatives in legislative bodies at national, state and local levels – each election will be based on different laws. This issue explains the key features of our electoral laws, main differences between laws, who can vote, who can be an election candidate and how votes are counted.

83 Consumer law
This issue looks at the new national consumer legislation, the Australian Consumer law (ACL), which provides new laws relating to product safety, unfair contract terms, national consumer guarantees, door-to-door sales, lay-by agreements and information standards for services as well as products. The issue looks at the complexity of creating this national legislation and what the changes mean.

82 Families
This issue looks at the different concepts attached to the idea of 'family'. Some families are vulnerable and require more support, while some undergo changes such as separation, divorce and repartnering. it looks at money and property after separation, child support, adoption and courts dealing with family issues.

81 Child care and protection
Responsibility for decisions about a child's health, schooling and cultural upbringing in Australia generally lies with parents; but when families cannot provide adequate care and protection for their children, the State may intervene in various ways. This issue discusses Australia's obligations to implement and report under the UN Convention on the Rights of the Child, as well as parental responsibility, children in out-of home care and initiatives to improve protection for children.

80 International humanitarian law
IHL is the branch of international law that deals with armed conflict. It seeks to place limitation on the damaging effects of armed conflict especially on the vulnerable and to impose restrictions on the means and methods of warfare that are permissible.

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All other issues have now been withdrawn.

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Monday to Friday 10 am to 5 pm
Sunday 1.30 pm to 5 pm