

Introduction to Human Rights Law

Presented by
Christopher Ward
Barrister

Prepared with the Assistance of
Kate Eastman
Barrister

CLE: Designed by practising lawyers for the whole profession

This paper was presented by NSW Young Lawyers on 6 July, 2000.

Published by NSW Young Lawyers, the Law Society of NSW, 170 Phillip Street, Sydney NSW 2000

NSW Young Lawyers and the authors accept no responsibility for the accuracy of the information or opinions contained herein. Practitioners should satisfy themselves in relation to any matters relating to the contents of this publication.

NSW Young Lawyers accepts no responsibility for any use of gender specific language.

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

UNIVERSAL DECLARATION OF HUMAN RIGHTS (art. 1),

What are human rights?

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

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

The notion of rights may be viewed in three senses:

A right in the widest sense - a claim based on a moral standard. "Right" is used to distinguish right from wrong, fair from unfair.

A right in a more restricted sense - a claim recognised but not necessarily enforceable. It is described as a freedom to act and undertake certain activities. A person is free to act because there is no legal or other restrictions that prevent the person engaging in the activity.

- A right in the narrowest sense - a claim not only recognised by law with legal remedies where the right has been violated.¹

Human rights are about values, and there remains controversy about whether those values are absolute or relative. Human rights are concerned with the inherent dignity of all people and ensuring that an individual's dignity and integrity as a person is respected.

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

The history of human rights

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

See *Retreat from Injustice* at page 23.

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

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

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

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

International human rights laws

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

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

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

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

The UDHR lead to the development of two legally binding conventions - the *International Covenant on Civil and Political Rights* (ICCPR) and the *International*

Covenant on Economic, Social and Cultural Rights (ICESCR). These conventions divide human rights into two categories:

- **Economic, Social and Cultural Rights**

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

- **Civil and Political Rights**

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

Since 1948, the United Nations has worked on many international conventions and declarations which set out the human rights of particular groups of individuals who require special treatment or protection. These include the rights of women, children, minority groups, refugees and Indigenous peoples. (see Appendix A for a list of international conventions. These instruments can be easily located on the internet at: <http://www.unhchr.ch/html/intlinst.htm>). Australia is a party to many of these international treaties.

There has also been a recognition that some human rights are rights which may only be enjoyed as collective rights or group rights. One of these rights is the right to self-determination. The right to self-determination is an example of a collective right.

It is a right which may be enjoyed by Indigenous or colonised peoples. The right to self-determination is a process by which Indigenous people control of the matters which effect their lives. It is the right to determine one's own future, to choose how one would live, to follow traditional laws.

Human Rights in Australian Law

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

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

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

The Constitution

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

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

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

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

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

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

Common law

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

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

Statutes and legislation

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

Civil and political rights in particular:

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

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

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

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

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

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

- ICCPR;
- Declaration on the Rights of the Child;
- Convention on the Rights of the Child;
- Declaration on the Rights of Persons Belonging to National or Ethnic,

- Religious or Linguistic Minorities;
- Declaration on the Rights of the Mentally Retarded Persons;
- Declaration on the Rights of Disabled Persons; and
- Convention on Discrimination in Employment and Occupation (ILO No. 111)

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

International law

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

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

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

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

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. ...

The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform to international law, but 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.²

The third way in which international human rights law may be used is when government decision makers make decisions which affect a person's human rights. Following *Minister for Immigration & Ethnic Affairs v Teoh*, the person is entitled to expect that the decision maker will take human rights into account when making the

² *Mabo v The State of Queensland (No.2)* (1992) 175 CLR 1 at 42.

decision.

Does Australia need a Bill of Rights?

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

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

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

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

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

Sir Harry Gibbs, former Chief Justice of Australia.

How can human rights law be used in Australia?

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

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

Human Rights and Equal Opportunity Commission (HREOC)

The national human rights body is HREOC (<http://www.hreoc.gov.au>). HREOC is

responsible for overseeing all the Commonwealth anti-discrimination laws and provides an avenue for complaints to be made and resolved.

HREOC also investigates human rights issues throughout Australia.

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

Courts

As was described above, there are limited ways in which international human rights law can be relied upon in domestic court proceedings. Obviously, if a relevant statute expressly incorporates a rule of international law, it will be possible to rely on that rule of international law, and potentially relevant international law decisions, to aid in the interpretation of the statute. That is expressly provided in s15AB of the Acts Interpretation Act (Cth).

A large number of Commonwealth statutes refer expressly to, or are based upon international law. For example, the Civil Aviation (Damage by Aircraft) Act 1958 provides in Section 8(1) "[T]he provisions of the [Rome] Convention have the force of law in Australia." Similarly, in the Geneva Conventions Act 1957, to which the relevant Conventions and Protocol I are annexed, it is provided in Section 7(1) that a person who

"...in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence."

If an Act does not refer to an international treaty expressly, it may still be possible to refer to Australia's international obligations. It is a common law principle of statutory construction that parliament is presumed to legislate in accordance with Australia's international obligations. As a result, any departure from that principle should be demonstrated by the use of clear words in a statute. Thus, if a statute appears to be applied in a manner that is inconsistent with Australia's international obligations, that fact could be brought to the attention of a court.

The status of customary international law as part of the common law is not as clear in Australia as is the case of treaty obligations. It remains possible that a superior court could find that customary international law is an automatic part of the common law. The most recent consideration of the question was given by the Full Federal Court in *Nulyarimma v Thompson*. That case arose out of an application by an aboriginal person to the ACT Supreme Court for the issue of a warrant for the arrest of a number of federal parliamentarians who had been involved in the negotiations surrounding the so-called '10 point plan'. The alleged offence was genocide against the aboriginal people. In the course of determining a challenge

to the refusal of the relevant ACT officer to issue the warrants, the Full Court considered the status of customary international law in the common law. Because genocide was not criminalised as an offence by statute in Australia, it could only have been an offence if customary international law was a part of the common law. Unfortunately there was no clear ratio on that point, and the question remains open.

What is clear is that where the common law is ambiguous, customary international law and treaties can be an important influence. Thus in any case where a common law right is sought to be asserted, attention should be given to the potential relevance of international law. The difficulty is that the body of international law is substantial, and that means that it is hard for any general practitioner always to have a detailed knowledge of the potential relevance of international law.

Pressure Groups

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

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

United Nations

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

Resources

- Bailey P, *Bringing Human Rights to Life*, Sydney, Federation Press, 1992
- O'Neill, N and Handley, R, *Retreat from Injustice*, Federation Press, 1994
- Department of Foreign Affairs, *Human Rights Manual*, AGPS, 1998
http://www.dfat.gov.au/hr/hr_manual/index.html

- Altson, P *Towards an Australian Bill of Rights*, HREOC, 1994.

Websites

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

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

Department of Foreign Affairs & Trade <http://www.dfat.gov.au>

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

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

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

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

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

<http://www.unhchr.ch>

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

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

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

APPENDIX A

MAJOR HUMAN RIGHTS TREATIES BINDING ON AUSTRALIA

International Covenant on Civil and Political Rights (ICCPR) 1966

First Optional Protocol to the ICCPR 1966

Second Optional Protocol to the ICCPR 1989

International Covenant on Economic Social and Cultural Rights (ICESCR) 1966

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

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

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

Convention on the Rights of the Child (CROC) 1989

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

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

UNESCO Convention Against Discrimination in Education (1960)

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

APPENDIX B

KEY DATES FOR HUMAN RIGHTS INTERNATIONALLY AND AUSTRALIA

26 June 1945	Signing of the Charter of the United Nations and Statute of the International Court of Justice.
9 December 1948	General Assembly of the United Nations adopts the <i>Convention on the Prevention and Punishment of the Crime of Genocide</i> (entered into force 1951).
10 December 1948	General Assembly adopts the <i>Universal Declaration of Human Rights</i> .
21 December 1965	General Assembly adopts the <i>International Convention on the Elimination of All Forms of Racial Discrimination</i> (into force 1969). This Convention provides for the establishment of the Committee on the Elimination of Racial Discrimination.
16 December 1966	General Assembly adopts the <i>International Covenant on Economic, Social and Cultural Rights</i> (into force 3 January 1976) and the <i>International Covenant on Civil and Political Rights with an Optional Protocol</i> (into force 23 March 1976). This Covenant provides for the establishment of the Human Rights Committee (see also 28 May 1985).
31 October 1975	The <i>Racial Discrimination Act</i> (1975) comes into operation in Australia
1 June 1977	The NSW <i>Anti-Discrimination Act</i> comes into operation.
18 December 1979	General Assembly adopts the <i>Convention on the Elimination of All Forms of Discrimination against Women</i> (into force 1981). The Convention provides for the establishment of the Committee on the Elimination of Discrimination against Women.
13 August 1980	Australia becomes a party to the ICCPR
10 December 1981	Australia's first Human Rights Commission is established.
1 August 1984	<i>Sex Discrimination Act</i> comes into operation
10 December 1986	Human Rights and Equal Opportunity Commission

established and *Human Rights and Equal Opportunity Commission Act*

- 20 November 1989 General Assembly adopts *the Convention on the Rights of the Child* (into force 1990). The Convention provides for the establishment of the Committee on the Rights of the Child.
- 25 December 1991 Australia ratifies the First Optional Protocol to the ICCPR so complaints can be made to the UN Human Rights Committee.
- 3 June 1992 The *Mabo (No.2)* decision is handed down
- 1 March 1993 The *Disability Discrimination Act* comes into operation.
- 25 May 1993 International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
- 25 June 1993 World Conference on Human Rights adopts the Vienna Declaration and Programme of Action.
- 5 April 1994 Mr. José Ayala Lasso of Ecuador assumes the post of first United Nations High Commissioner for Human Rights.
- 8 November 1994 International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Crimes against Humanitarian Law Committed in Rwanda during 1994.
- 12 September 1997 Ms. Mary Robinson of Ireland becomes the second United Nations High Commissioner for Human Rights.
- 17 July 1998 Diplomatic Conference of Plenipotentiaries adopts the Rome Statute of the International Criminal Court, establishing the International Criminal Court.