Human Rights

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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
- 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.
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). 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.

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**THE UNITED NATIONS CHARTER**

The events of World War II, particularly the Holocaust, led directly to the establishment of the United Nations, 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 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.

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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

INTERNATIONAL 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 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 189 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.

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
> resolutions of the United Nations General Assembly.

INTERNATIONAL TREATIES, COVENANTS AND CONVENTIONS

In the area of human rights, ‘express agreements’, including treaties, conventions, covenants, instruments, pacts and protocols, are the most significant source 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.’


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.
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. 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 19.

HOT TIP

The Federal Executive Council is made up of the Prime Minister, other Ministers and Parliamentary Secretaries, appointed by the Governor-General on the advice of the Prime Minister. See Hot Topics 60: Australian Legal System

HUMAN RIGHTS IN CUSTOMARY INTERNATIONAL LAW

Customary international law is not set down in treaties or other documents: it comes from the usual behaviour 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 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), is a product of the UN system. The UDHR (reproduced in full on page 16-17) 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 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.

AN 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.

The Universal Declaration of Human Rights

The UN Charter did not define the term ‘human rights’: it is the Universal Declaration of Human Rights 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.

The 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)  
> the right of minorities to protect their language and culture (Article 27).

In mid-2008, 161 countries had ratified or acceded to the ICCPR. Australia became a party to the ICCPR in 1980.

The 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-2008, 158 nations had ratified or acceded to the ICESCR. Australia became a party to the ICESCR in 1976.

The 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 Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984)  
> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) (1990)  

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

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).

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5. For more information see www.ilo.org  
6. For more information see www.unesco.org
## Major Human Rights Treaties

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<tr>
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<th>Instrument</th>
<th>Year in force generally</th>
<th>Year in force for Australia</th>
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<tbody>
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<tr>
<td>2006</td>
<td>International Convention for the Protection of All Persons from Enforced Disappearance</td>
<td>Not yet in force</td>
<td>N</td>
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</table>

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, found at http://www.austlii.edu.au/dfat and 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.
** The Commonwealth Attorney-General, the Honourable Robert McClelland MP, signalled in May 2008 that he has requested that the ratification of the Convention be ‘fast-tracked’. He noted that a National Interest Assessment has been prepared and he has written to the Chair of JSCOT to request expeditious consideration of the Convention.
*** Similarly, the Attorney-General announced in May 2008 that consultations in relation to signing and ratifying the Optional Protocol to the Convention would ‘commence … shortly’.

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REGIONAL RIGHTS FRAMEWORKS


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. 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 and a Court. 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. 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 on Human & People’s Rights in 1998, which came into effect in 2004. The creation of the African Union means that a new African Court of Justice will be established to incorporate the existing African Court on Human & Peoples’ Rights. It is likely to have two chambers, one for general legal matters and another for rulings on human rights standards. It is also intended to establish a Commission with responsibility for human rights.

That is not to say that there has been no legal response to gross human rights violations in Africa, 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. And the Special Court for Sierra Leone, established jointly by

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7. See www.echr.coe.int
8. See www.cidh.oas.org
9. See www.corteidh.or.cr/index.cfm
10. See www.africa-union.org
11. See www.ictr.org
12. See www.sc-sl.org

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Tutsi children, recovering from injuries inflicted in machete attacks during Rwanda's civil war, rest in the International Committee of the Red Cross (ICRC) hospital in Kigali, 12 May 1994.

Photo: Gerard Julien, AAP.
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.


**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, Philippines, Singapore, Thailand and Vietnam) adopted the ASEAN Charter in 2007 (not yet in force). 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. The High Level Panel is (at the time of publication) working to produce an interim report for a Ministerial Meeting in September 2008.

Another regional human rights organisation is the Asia Pacific Forum on National Human Rights Institutions (APF)\(^\text{13}\). Members include the national human rights commissions of Afghanistan, Australia, India, Indonesia, Jordan, Mongolia, Nepal, New Zealand, Philippines, Republic of Korea, Sri Lanka, 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. Other countries in the region that are currently considering the establishment of national human rights institutions include Bangladesh and Papua New Guinea.

**CONTENT OF STATE OBLIGATION IN INTERNATIONAL HUMAN RIGHTS LAW**

The long list of international treaties, including the human rights treaties, which Australia has committed itself to 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 *The effect of treaties in Australia* on page 18.

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)\(^\text{14}\), 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 15.

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.

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13. See www.asiapacificforum.net

14. See www.icj-cij.org
CREATION OF THE 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 new, successor organisation, the UN Human Rights Council. This development is part of an ongoing reform process within the UN. The Human Rights Council will now report directly to the UN General Assembly.

The Human Rights Council has 47 state members, representing each of the five UN geographical regions, that are elected by secret ballot cast by the UN General Assembly.

According to the UN, the creation of the Human Rights Council is intended to:
> accord appropriate importance within the UN to human rights by creating a higher status, Council-level organisation, akin to the significance accorded to security (Security Council) and development (Economic & Social Council). All three concepts are central to the UN Charter;
> address a perception that the Commission on Human Rights had become overly politicised, ineffective and selective in its work;
> to make the Human Rights Council a smaller standing body (that means, always working rather than working during only one part of the year) with members elected by all members of the General Assembly, taking into account the candidate state’s contribution to the promotion and protection of human rights and the need for equitable representation across the five UN geographic regions;
> establish a new system of universal periodic review of the human rights performance of UN member states (see opposite).

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 now 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);
> 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 29 thematic and 9 country mandates. Current special procedures cover topics such as adequate housing, arbitrary detention, education, enforced or involuntary disappearances, and extreme poverty, and are working in countries such as Burundi, Cambodia, Haiti and Myanmar.15

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.16

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15. See http://www2.ohchr.org/english/bodies/chr/special/index.htm
16. See http://www.ohchr.org/
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’ 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.

**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*. 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.

The role of non-government organisations (NGOs), such as Amnesty International, in providing independent information to the treaty monitoring bodies is very important to ensure 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;

> 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

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17. See http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx

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Modern human rights law 11
> ICESCR in 1998 and 2008 at hearings before the Committee on Economic, Social & Cultural Rights in 2000 and scheduled for 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 will be questioned in May or November 2009 when the Committee is 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; 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 1998. Australia was due to make its third periodic report to the Human Rights Committee in 1991. It was made late, in 1998, along with the fourth report which had been due in 1996. In July 2000 the Committee, among its concluding observations, said it was concerned 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. Australia’s next periodic report under the ICCPR was due in 2005. It was provided in 2007. A list of issues is due to be adopted by the Human Rights Committee in October 2008, with consideration scheduled for March 2009. A non-government report is expected to be submitted prior to the October review.

**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.

**INDEPENDENT INQUIRY**

ECOSOC Resolution 1235 (6 June 1967) allowed the old Commission of Human Rights to conduct a public inquiry into ‘information relevant to gross violations of human rights and fundamental freedoms.’ If that information showed ‘a consistent pattern of violations of human rights,’ the Commission was allowed to conduct a more thorough examination for report to ECOSOC. This procedure is currently under review by the new Human Rights Council.

**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); or

> 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 recently established 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)
> 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. In 2000, the Howard Government announced that it would not sign the Optional Protocol to CEDAW. The reasons for this are discussed further below. Note that the Rudd Government, elected in November 2007, announced in May 2008 that it intends to ratify the Optional Protocol to CEDAW noting that ‘[t]he Rudd Government is committed to engaging with the international community in vigorously pursuing the promotion of women’s rights’.

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.
CASE STUDIES: COMMUNICATIONS THAT WERE SUCCESSFUL BEFORE UN TREATY BODIES

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 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 (HREOC) 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. The amending measures are expected to be implemented by 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 & 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.

Iranian 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 8 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). Australia has been found to be in breach of Article 9(1) of the ICCPR in similar circumstances on at least 14 separate occasions by the Committee.
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: the International Military Tribunal (or Nuremberg Tribunal) and the 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

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_Bosnian Muslim women gathered at the offices of the Srebrenica Mothers Association in Sarajevo to watch a live broadcast of the Hague tribunal's indictment reading for Radovan Karadzic in Sarajevo, 31 July 2008. The walls of the association's office are filled with the photographs of their husbands and sons killed in Srebrenica in July 1995. The wartime Bosnian Serb leader, Karadzic, stands indicted for genocide and crimes against humanity during Bosnia's 1992-1995 war, after nearly 13 years on the run._

Photo: Hidajet Delic, AP Photo.
UNIVERSAL DECLARATION OF HUMAN RIGHTS

Preamble
Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,
Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,
Whereas it is essential to promote the development of friendly relations between nations,
Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,
Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for, and observance of, human rights and fundamental freedoms,
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realisation of this pledge,
Now, therefore, THE GENERAL ASSEMBLY proclaims
This Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, 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.

Article 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, birth or status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3: Everyone has the right to life, liberty and security of person.

Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9: No one shall be subjected to arbitrary arrest, detention or exile.

Article 10: Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11:
1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12: No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13:
1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and return to his country.

Article 14:
1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15:
1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16:
1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
2. Marriage shall be entered into only with the free and full consent of the intending spouses.

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

**Article 17:**
1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of this property.

**Article 18:** Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

**Article 19:** Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

**Article 20:**
1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

**Article 21:**
1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

**Article 22:** Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

**Article 23:**
1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

**Article 24:** Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

**Article 25:**
1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

**Article 26:**
1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have prior right to choose the kind of education that shall be given to their children.

**Article 27:**
1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interest resulting from any scientific, literary or artistic production of which he is the author.

**Article 28:** Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.

**Article 29:**
1. Everyone has duties to the community in which alone the free and full development of his personality is possible.
2. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
3. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

**Article 30:** Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.
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 & Reconciliation Commission was established to deal with the legacy of apartheid. Truth and reconciliation commissions have also been established in many other countries; see www.usip.org/library/truth.html#tc 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)\(^{18}\) 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.

In 2003, its inaugural Prosecutor, Mr Luis Moreno-Ocampo from Argentina, was appointed. 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.

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\(^{18}\) For more information see http://www.icc-cpi.int/
The operation of international human rights law in Australia

Note: References in this section to ‘The Human Rights and Equal Opportunity Commission’ or ‘HREOC’ should be taken to refer to the ‘Australian Human Rights Commission’. The new 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) are unchanged.

THE EFFECT OF TREATIES 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. 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 20.

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 the Courts on page 23.

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 law* on page 25.

**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.

**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.

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.

**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. Typically the National Interest Analysis sets out:

- reasons Australia would take to the proposed treaty action
- obligations Australia would assume under the treaty
- manner of implementation
- costs
- outcomes of community consultations.

**Treaties Council and Committees**

The Joint Standing Committee on Treaties 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. The Committee 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. The Prime Minister chairs the Council, and all Premiers and Chief Ministers are members. The Council’s first and only meeting was held in June 1997.

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.

The 1999 review reported that the Committee has significantly enhanced the coordination of consultation between the Commonwealth and the States and Territories. Of the Treaty Council the review said only that the frequency of its meetings is a matter for agreement between the Commonwealth and the States and Territories.

**The 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/dfat/
rest of the document...
President Robert McClelland MP, set out a broader set of commitments to multilateralism, to engaging with the UN and announced an intention to reverse a number of decisions taken by the Howard Government, including the former Government’s refusal to ratify the Optional Protocol to CEDAW.

**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 25.) 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)); and

Additionally, HREOC (see ‘Note’ on page 19) 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 (Human Rights & Equal Opportunity Act 1986 (Cth) (HREOC Act)).

HREOC is empowered under the Acts listed above (together with the HREOC 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 HREOC 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 Magistrates Court. HREOC can also intervene in litigation, or seek the leave of the court to provide assistance as *amicus curiae* (‘friend of the court’). HREOC’s role as an intervenor or as *amicus curiae* is to provide specialist submissions on human rights and discrimination issues, independent from the parties.

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21. See www.humanrights.gov.au
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 of legislation where the prohibition against racial discrimination was overridden by an Act of Parliament, see Indigenous Australians and human rights on page 28.

Under the HREOC Act, HREOC can also investigate alleged breaches of ‘human rights’ as narrowly defined in that Act: see ‘Note’ on page 19. The rights that HREOC is empowered to deal with are:

- 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

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 operation of international human rights law in Australia

Mal Brough (then Federal Minister for Aboriginal Affairs) confronted by angry protesters as he opens a new Police station, on a visit Mutitjulu community next to Uluru, Northern Territory, 30 June 2007. The Mutitjulu community was at the centre of the Howard Government’s Northern Territory intervention.

Photo: Lyndon Mechielsen, The Daily Telegraph © Newspix/News Ltd.
The extent to which human rights obligations 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 . . .’

\[Mabo v State of Queensland [No 2] (1992)\]

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.

\[HOT TiP\]

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 ADMINISTRATION & 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 \[Teoh’s case\].

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.

\[HOT TiP\]

‘Prorogue’ means to terminate a session of parliament, which places it in recess and causes all unfinished business before it to lapse. It differs from dissolving a parliament in that a prorogued parliament may be called back.

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 22) recognised by the \[Charter of Human Rights & Responsibilities Act 2006 (Vic)\] 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.

\[HCA/1995/20.html\]
At the Federal level, the Attorney-General said in May 2008, in relation to law making and policy development at the Commonwealth level, that he would work with his Ministerial colleagues to ensure that human rights consultation takes place ‘at the policy development stage, and that it not be just a formality or an afterthought.’ He also stated that it is ‘important’ to ensure that the drafting of Commonwealth legislation ‘consistently takes account of implications for [Australia’s] human rights obligations.’

HUMAN RIGHTS IN STATE 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 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;

> 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 Commission24 and in Victoria, the Equal Opportunity Commission has become the Equal Opportunity and Human Rights Commission25.


24. See www.hrc.act.gov.au

25. See www.humanrightscommission.vic.gov.au
Current developments

Proposals that states 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.

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 is waiting on the outcome of the federal consultation on how to protect human rights before acting on these recommendations.


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?’.

Human rights campaigners and members of Hobart’s refugee community gathered at the Royal Tasmanian Botanical Gardens Hobart to call for an end to torture, Christo Sokiri from Sudan, left, and Bedasa Hika, from Ethiopia mark the UN day for the elimination of torture, June 2007.

Photo: Kim Eiszele, The Hobart Mercury, © Newspix/News Ltd.
Current human rights issues in Australia

COUNTER-TERRORISM AND HUMAN RIGHTS

On 11 September 2001, two passenger jets plunged into the twin-towers of the World Trade Centre in New York City, and another jet crashed to the ground in a field in Pennsylvania, apparently without reaching its intended target, and a fourth plane crashed into the Pentagon, in Washington DC. Close to 3000 people are believed to have been killed that day. This event, perhaps more than any other in recent memory, has served to re-focus the attention of governments around the world on the threat of terrorism.

In Australia, the immediate effects of 9/11 were a steady stream of legislation from 2002-2006 that:

> created a new (and controversially indefinitely defined) offence of 'terrorism';

> allowed the Commonwealth Attorney-General to proscribe or ban organisations as 'terrorist organisations', the members and material supporters of which would be committing criminal offences;

> introduced new criminal offences providing and receiving training connected to terrorist acts; possessing 'things' connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; and to do any act in preparation for or planning of terrorist acts. The criminal penalties range from 10 years to life imprisonment;

> allows people (including juveniles) suspected to have material information about a terrorist offence to be detained by warrant by the Australian Security & Intelligence Organisation (ASIO), without a court order, for compulsory and secret questioning. An individual can be questioned for up to 24 hours (48 hours if an interpreter is required) and detained for questioning for up to 7 days. Refusal to participate or a breach of the secrecy provisions could result in imprisonment of up to 5 years. There is no right to silence;

> removes the presumption in favour of bail for people accused of terrorist-related offences, modifying the long-held common law assumption to preserve an individual's liberty until proven guilty;

> allows a senior Australian Federal Police officer to issue a preventative detention order that allows a person to be put into detention for between 2-14 days where the officer has reasonable grounds to suspect that the person will engage in a terrorist act, or possesses a thing that is in connection to preparation of a terrorist act, or has done something in preparation for or planning of a terrorist attack, and making the order will substantially assist an 'imminent' terrorist attack that is expected to take place in the next 14 days. No court hearing is required to make the order, but a person can challenge the order in court;

> allows the AFP to apply to a court for a control order if the court accepts the making of the order will substantially assist in preventing a terrorist act, or the person has trained with a terrorist organisation. A control order can require a person to wear an electronic tracking device, to remain at certain premises at particular times, prevent a person from going to a particular place, prevent the person from communicating with particular people and prevent the person from accessing certain forms of technology, for instance, email or a mobile phone. Control orders can last 12 months (3 months for people aged 16-18 years) and may be renewed;

> allows the Commonwealth Attorney-General (rather than the presiding judge) to order both criminal and civil court hearings to be closed to the public and the media, and to control the disclosure of information deemed to be 'national security information' such that an accused person and their lawyer may not be entitled to see the evidence put against the accused person.

Together, these reforms modify the principle of presumption of innocence of an accused person until proven guilty, the doctrine of separation of powers by which the judiciary exercises judicial power without interference from the Executive branch of government, and the principle of the transparent administration of justice such that justice is done, and seen to be done.

From the perspective of human rights principles, states are permitted to ‘derogate’ or suspend their compliance with certain human rights standards in times of ‘public
emergency which threatens the life of the nation', provided the derogation is notified to the international community, limited in time and is strictly proportionate to the threat the state faces and are not discriminatory. Some rights can never be limited – for instance, Article 5 of the ICCPR means that it is not possible at international law to suspend the obligation to protect the right to life; to ensure no person is subjected to cruel, inhuman or degrading treatment; to ensure individuals are recognised as a person before the law; and to ensure individuals have the right to freedom of thought, conscience, and religion.

Australia, together with many other similar states, has given to the Executive branch of government (eg, the Attorney-General and the intelligence and police forces) coercive power that is not subject to the review of the judiciary. Whilst certain judicial officers are involved in the administration of the counter-terrorism regime, they exercise those powers in a personal capacity, rather than as officers of the court. Some commentators suggest that this changes the balance of power and the human rights of those subject to the counter-terrorism laws unacceptably. Some commentators also say that there can be no lawful derogation at international law as the Australian Government seems to be responding to an open-ended threat colloquially referred to as the ‘war on terror’ without satisfying the requirements at international law for a written notification of a public emergency that threatens the life of nation, limited in time, and with strict proportionality of the measures taken to the threat faced. Meanwhile, critics of the Government’s counter-terrorism reforms say that individual’s rights, such as to a fair trial before their freedom is denied, are being violated. For more information, see Hot Topics 58: Terrorism available at www.liac.sl.nsw.gov.au/hot/pdf/terrorism_58.pdf

INDIGENOUS AUSTRALIANS AND HUMAN RIGHTS

In 1992, in response to recommendations arising from the Royal Commission into Aboriginal Deaths in Custody, a role of Aboriginal & Torres Strait Islander Social Justice Commissioner (Social Justice Commissioner) was created at the Human Rights & Equal Opportunity Commission (HREOC). The job of the Social Justice Commissioner is to monitor the enjoyment and exercise of human rights by Indigenous Australians. Each year, the Social Justice Commissioner produces a Social Justice Report to describe both progress and challenges in the enjoyment of human rights amongst Indigenous Australians.

At the time of writing, the most recent Social Justice Report reflects on the Federal Government’s intervention in the Northern Territory from a human rights perspective. On 21 June, 2007 the Howard Government announced a series of measures to be introduced in Aboriginal communities in the Northern Territory in order to address the ‘national emergency confronting the welfare of Aboriginal children’, particularly in relation to their education and to ensure that they are not abusing the drug ice.
to family violence and child abuse. The measures
introduced by the Government include:
> alcohol restrictions
> ‘quarantining’ welfare payments into Government
control to ensure the money intended for children’s
welfare is spent on the children
> linking welfare payments to school attendance
> health checks
> changing community living arrangements to resemble
private market tenancies
> banning pornography
> scrapping the permit system that allowed Aboriginal
people to control access to their lands.

The legislation that introduced this package of reforms
specifically suspended the operation of the Racial
Discrimination Act 1975 (Cth) and, in the alternative,
the legislation explicitly states that that the intervention
is protected by the Act as a ‘special measure’, that is, a
measure that benefits Indigenous people and should not
be considered to be unlawfully discriminatory.

The Social Justice Commissioner’s Social Justice
Report calls for the reinstatement of protections against
discrimination, and for the re-engagement with and
fostering of participation by Indigenous people as
partners with government in the process of protecting
children. The Commissioner takes a human rights
approach by emphasising a methodology that begins
with the participation and direction of the policy
response by those affected by the policy, the Indigenous
people themselves.

REFUGEES AND HUMAN RIGHTS

Australia is a party to the 1951 Convention Relating
to the Status of Refugees, and the 1967 Protocol to the
Convention. Australia’s obligations under those treaties
have been given domestic effect in the Commonwealth
Migration Act 1953. A person seeking refugee status (an
‘asylum seeker’) under the Convention must establish a
well-founded fear of persecution in their own country on
the basis of their race, religion, nationality, membership
of a social group, or political opinion.

The controversy in Australia in the later part of 2001,
and particularly in the weeks leading up to the Federal
election in November of that year, focused on asylum
seekers who arrived on Australian territory by boat from
Indonesia. The issue was put in terms of ‘legality’ and
‘border protection’. From a human rights perspective, the
legality of asylum seekers’ presence in Australian territory
derives from the right in the Universal Declaration of
Human Rights ‘to seek … in other countries asylum
from persecution’. Whether an asylum seeker is actually
a refugee can then be determined according to the
Migration Act.

Responding to the phenomenon of boats arriving
from Indonesia, the Australian Government passed
laws which, among other things, limited the extent
of Australia’s compliance with its obligations under
the Refugee Convention, redefining the meaning of
‘persecution’ inconsistently with international law.

In 2001, the Australian Government significantly
changed the way in which Australia implements the
Refugee Convention. Two of the many changes to the
Migration Act relate to the definition of ‘refugee’, and to
the application of the Migration Act in Australia.

Australia no longer uses the internationally recognised
concept of ‘well-founded fear of persecution’ as a basis
for identifying a refugee. Instead, Australia has limited
the effect of the Refugee Convention. Australia requires
an asylum seeker to prove that the reason for their fear
of persecution is ‘the essential and significant reason’
for their fear. As well the person must prove that the
persecution involved ‘serious harm to the person’, and
‘systematic and discriminatory conduct’. According to
many commentators, these requirements do not exist in
international law.

Further, the extent to which Australia has given ‘domestic
effect’ to the Convention has been limited; the Migration
Act does not extend in its operation to prescribed parts
of Australia, including those parts such as Christmas
Island where some asylum seekers have been arriving.
The Rudd Government announced the closure of
Australian-funded refugee processing centres in Nauru
and Papua New Guinea (the so-called ‘Pacific Solution’),
by which asylum seekers seeking Australia’s protection
were denied entry to Australia, and were processed at
Australian-funded facilities ‘offshore’. However, certain
parts of Australia remain ‘excised’ from the operation of
the Migration Act today, and so-called ‘unauthorised
arrivals’ are processed there.

A consistent criticism of Australia’s refugee policy has
been the requirement under the Migration Act that all
non-citizens unlawfully in Australia must be detained
and kept in immigration detention until granted a
visa or removed from Australia (mandatory detention).
Mandatory detention can be indefinite.26

MANDATORY DETENTION

This policy has been heavily criticised, particularly
with regard to the impact of mandatory detention on
children.27 In June-July 2005, the Howard Government
introduced reforms by which children and their primary
caretakers were moved from immigration detention centres
to ‘immigration residential housing’ in the community.
Although they remained under detention at law, they
were no longer within a detention facility.

On 29 July 2008, the Rudd Government announced that whilst mandatory detention would remain ‘an essential component of strong border control’, it would be reformed to ensure that detention is a measure of last resort, and will be used only where there is an established need to do so, for instance, to manage health, security and flight risks. The Rudd Government intends to reverse the presumption in favour of detention, and will require an immigration officer to justify why an individual should be detained. The Rudd Government has also stated a commitment to ensure that immigration detention is ‘for the shortest duration possible but also in the least restrictive form appropriate to an individual’s circumstances’.

**HOMELESSNESS IN AUSTRALIA**

Australia has enjoyed 16 years of uninterrupted economic growth, yet the last Australian Census tells us that on any night, approximately 100,000 Australians are homeless. Almost half of the people who are homeless on any night are staying with family and friends but have no home of their own. Fourteen per cent sleep rough in parks, tents or on the streets. A further 23 per cent are living in insecure accommodation such as boarding houses. Currently, homelessness services provide accommodation to only 14 per cent of those who are homeless each night. Of the 100,000 people who are homeless on any one night there are:

- 10,000 children under the age of 12
- 6745 families (consisting of 23,000 people)
- 36,173 young people between the ages of 12 and 24
- 58,116 single people, many in the prime of their lives
- 6000 people over the age of 65

Additionally, Indigenous Australians are significantly over-represented in the homeless population. Seventeen per cent of the government-funded Supported Accommodation Assistance Program (SAAP) service users are Indigenous, making Indigenous people eight times more likely to use emergency accommodation than non-Indigenous people. The problem of homelessness is growing – census data shows an upward trend, and a recent report produced by the St Vincent de Paul Society found that in the period from 2002-2007, there was a 30 per cent increase in families with children seeking assistance from homelessness services (Don’t Dream It’s Over, 2007, p. 7).

The ICESCR guarantees to every person in Australia an adequate standard of living, including shelter, food, and clothing. In January 2008, the Federal Government announced an intention to develop a new, comprehensive and long-term plan to address homelessness. The Federal Human Rights Commissioner, Mr Graeme Innes, welcomed the announcement at the time, commenting that homelessness affects a person’s ability to exercise other rights, for instance, rights to health and education; the right to personal security is under constant threat for those sleeping rough on the streets; and the right to vote can become difficult to exercise without having a fixed address in order to enrol.

The Federal Government claims that its commitment to address homelessness is an essential part of its so-called ‘social inclusion agenda.’ The Government says that its new approach to homelessness will aim to:

- prevent homelessness
- improve crisis services
- create exit points to secure longer term housing
- stop the cycle of homelessness


The Government does not use the language of human rights to describe the problem, its causes or the appropriate policy responses. However, when Australia appears before the Committee on Economic, Social and Cultural Rights in March or November 2009, it will be questioned about how much money is spent on mental health care; the nutritional status of homeless people and their ability to access adequate, affordable and appropriate food and water; and the steps being taken to develop a national housing strategy, including the extent to which the needs of marginalised and disadvantaged people are being taken into account, how they are participating in the development of the strategy, and how the structural causes of their exclusion are being addressed. See also Hot Topics 57: Shelter, available at [www.liac.sl.nsw.gov.au/hot/pdf/terrorism_58.pdf](http://www.liac.sl.nsw.gov.au/hot/pdf/terrorism_58.pdf)

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28. Senator the Honourable Chris Evans, Minister for Immigration and Citizenship, ‘New Directions on Detention – Restoring Integrity to Australia’s Immigration System’ (Speech, Australian National University, Canberra, 29 July 2008).


Further information

The Legal Information Access Centre (LIAC) can help if you need more information about the law, including cases and legislation. The service is free and confidential. Contact details on back cover.

BOOKS


#Discrimination toolkit: your guide to making a discrimination complaint, T Balgi, M Osborne & F Pace, Legal Aid Commission NSW, 2007.


#Human rights in Australia: treaties statutes and cases, M Flynn, LexisNexis Butterworths, 2003.


Australian anti-discrimination law: text cases and materials, N Rees, K Lindsay & S Rice, Federation Press, 2008.

The laws of Australia, loose-leaf service – Title 21: Human rights, P Baily (original editor), Thomson Lawbook co.


# These books are part of the Law books for libraries collection available in some public libraries – check the Find Legal Answers website www.legalanswers.sl.nsw.gov.au for details.

JOURNALS

Australian journal of human rights

The human rights defender

Human rights defender
University of New South Wales, Human Rights Centre 1992.

INTERNET SITES

United Nations
www.un.org

This is the main website for the United Nations. Web addresses for other relevant UN bodies are also listed below:

> United Nations Development Fund for Women (UNIFEM) http://www.unifem.org
> International Service for Human Rights http://www.ishr.ch/

United Nations Office of the High Commissioner of Human Rights
www.ohchr.org

> For the official texts of international human rights treaties www2.ohchr.org/english/law/index.htm#treaties


# These books are part of the Law books for libraries collection available in some public libraries – check the Find Legal Answers website www.legalanswers.sl.nsw.gov.au for details.
For a compilation of many relevant declarations, resolutions statements and other instruments:

> United Nations Treaty Bodies
www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx

> Human Rights Issues
www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx

**Australian Human Rights Commission**
www.humanrights.gov.au

**ACT Human Rights Commission**

**Victorian Equal Opportunity & Human Rights Commission**

**Australian Treaties Database**
www.austlii.edu.au/au/other/dfat
Includes the ‘Australia and International Treaty Making Information Kit’ in the Treaty Law Resources section of the site

**Commonwealth Attorney-General’s Department**
www.ag.gov.au

**Commonwealth Department of Foreign Affairs & Trade**
www.dfat.gov.au

> Department of Foreign Affairs Human Rights
www.dfat.gov.au/hr/

Contains general information about Australia’s human rights policy, UN Delegation Statements, reports to Parliament and UN bodies on human rights, key human rights treaties and links to other human rights agencies

**Australian Parliamentary Library**

**ACT Bill of Rights Unit, Department of Justice & Community Safety**

**Human Rights Unit Victorian Department of Justice**

**Human Rights Law Resource Centre**
www.hrlrc.org.au

**NSW Charter Group**
http://www.nswcharterofhumanrights.org/

**Human Rights Coalition**

**A Human Rights Act for Australia**

**Gilbert + Tobin Centre of Public Law**
University of NSW
www.gtcentre.unsw.edu.au/

**Castan Centre for Human Rights Law**
Monash University
www.law.monash.edu.au/castancentre/

**ACT Human Rights Act Research Project**
http://acthra.anu.edu.au/

**Australian Human Rights Centre**
University of New South Wales
http://www.ahrcentre.org/

**Centre for Citizenship and Human Rights**
Deakin University

**Centre for Comparative Constitutional Studies**
University of Melbourne

**Regulatory Institutions Network**
Australian National University
http://regnet.anu.edu.au/

**Human Rights Watch**
http://www.hrw.org

**Amnesty International**
http://www.amnesty.org

**Centre on Housing Rights & Evictions**
http://www.cohre.org/

**Centre for Economic & Social Rights**
http://www.cesr.org/