

Protecting Human Rights in Australia



A COMMUNITY EDUCATION KIT

PIAC
PUBLIC INTEREST
ADVOCACY CENTRE

Introduction

CASE STUDIES

Maggie takes her sister, Sandra, who has severe stomach pains to the hospital. They wait two hours before being turned away and told to see her doctor. Sandra's local doctor doesn't bulk-bill anymore and she doesn't have the money to pay \$35 upfront and only get \$25 back from Medicare later. Sandra waits two days for her Centrelink payment before going to the doctor.

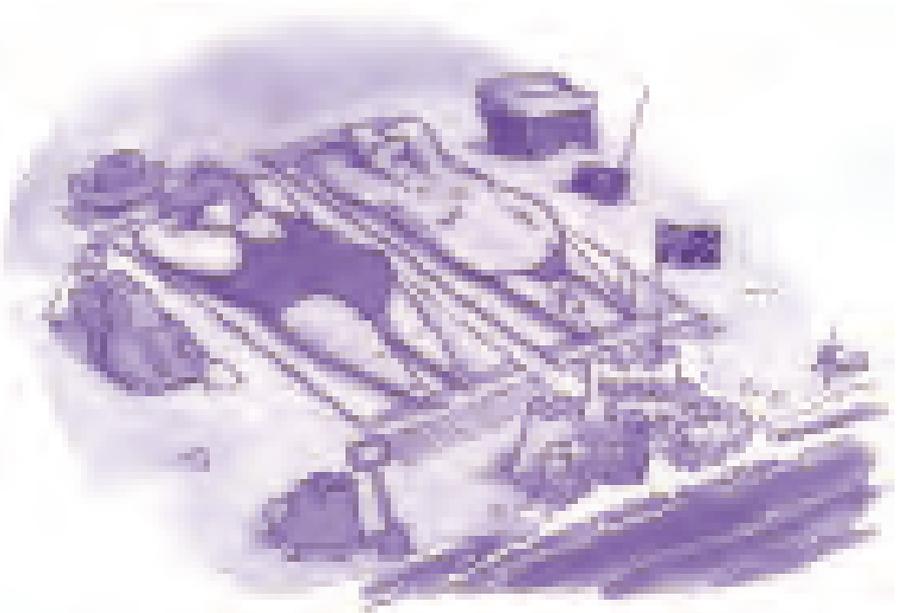
Mary and her family live in a remote Indigenous community, in temporary housing without access to healthy drinking water or a sewerage system that works.

At Julie's job interview the employer says she must sign an individual contract that determines all her working conditions, and that there are no unions allowed in the workplace.

Faduma is a Muslim woman working as a receptionist. She wears the hijab (headscarf) as part of her religious practice. She is subjected to negative attitudes and comments about her appearance from workmates.

Abdullah's house is raided and he is threatened with being taken away and kept for up to 7 days for questioning without being arrested or charged. He is told that he cannot discuss the investigation with anyone.

➡ These events have all happened in Australia recently. They are all violations of internationally recognised human rights.



All these case studies talk about basic human rights that the Australian Government has committed to respecting and providing protection for anyone living in Australia. They include the right:

- to affordable health care
- to safe housing including drinkable water
- to join a union and negotiate working conditions
- to freedom of religion and not to be treated unfairly; and
- to freedom from detention unless charged.

These rights should be available to **everyone** in a democratic country like Australia, but they are not.

What is this education kit about?

The "Protecting Human Rights in Australia" project aims to provide community education on human rights in Australia through a series of fact sheets.

The fact sheets aim to provide you with information about the human rights that affect you, your family and your community in daily life. Some of these rights are currently protected in Australia and some are not.

Each fact sheet deals with a particular issue, and shows the international human rights standards and how human rights protection in Australia could be improved.

There are fact sheets on:

- Background to human rights protection
- Age discrimination
- Civil and political rights
- Disability rights
- Education rights
- Environment and human rights
- Health rights
- Housing rights
- Indigenous rights
- Race and religious discrimination
- Refugee and asylum seeker rights
- Sexuality rights
- Social security rights
- Women's rights
- Workers' rights.

➡ Go to the Public Interest Advocacy Centre's web site, www.piac.asn.au, for ideas on how you can help improve human rights protection in Australia.

Background to Human Rights

What are human rights?

“All human beings are born free and equal in dignity and rights.”

Universal Declaration of Human Rights, Article 1.

International human rights standards are a set of values and guidelines that governments around the world have all agreed are essential for everyone to live with dignity and respect – no matter who they are or where they live.

Human rights are about the responsibility that we all have to recognise and respect that dignity in each other.

Human rights are:

- the same for all people everywhere, rich or poor, men or women, no matter where we live.
- connected to each other. Freedom of speech means little if you are not able to provide basic food, water and shelter for your family.
- not able to be taken away under any circumstances. Your right to education cannot be traded away in return for your right to health.

Governments have a responsibility to *respect* and *protect* the rights and freedoms of all people.

Where do human rights come from?

Ideas about rights can be traced back in history to many societies and religions. For centuries individuals and social movements have struggled for the recognition of human rights. As a result we have the British *Magna Carta* (1215), the French *Declaration of Rights* (1789) and the American *Bill of Rights* (1791).

The first *international* statement of human rights was the *Universal Declaration of Human Rights*, adopted by the member countries of the United Nations in 1948. While not

legally binding, the Declaration affirmed and recognised rights that had been violated by governments that had oppressed, imprisoned and murdered millions of people before and during World War Two.

Australia played a leading role in the development of the basic principles in the Declaration. These principles are not legally binding but are a statement of goals and have had a powerful influence on the development of international law.

There are two United Nations Covenants that translate these principles into international law. Together with the Universal Declaration, these Covenants are referred to as the International Bill of Human Rights.

The International Covenant on Civil and Political Rights deals with the right to participate in the democratic process, including:

- freedom of speech and religion and the right to vote
- freedom from unfair arrest and detention and the right to a fair trial; and
- freedom of association and the right to join trade unions.

The International Covenant on Economic, Social and Cultural Rights deals with rights to basic living standards, including:

- access to food, housing, work, social security, education and health; and
- fair wages and safe working conditions.

Australia has signed both of these Covenants and other international conventions, including:

- *Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination Against Women*
- *Convention on the Rights of the Child*
- *Convention on the Status of Refugees*
- *Convention Against Torture*

- International Labour Organisation Conventions on workers' rights.

Each member country of the United Nations decides whether to sign up to each convention. This commits them to comply with the convention's human rights standards. Conventions are put into action by each country passing laws through its own parliament. These laws commit them to meeting minimum standards and putting them into practice over time.

Governments are legally responsible for protecting our human rights.

Human rights in Australia

Australian governments of all political parties have played a key role in drafting many of the international human rights conventions, and have signed them. But in Australia these commitments do not become real until laws have been passed or government policies, programs and services have been established.

Australia's implementation of human rights protection has not been consistent. Unlike most other industrialised countries, Australia does not have full legal protection of human rights in a Charter or Bill of Rights.

The weakness of human rights protection in Australia has been highlighted in recent years as some rights have been reduced or lost. This has occurred in:

- changes to Medicare and tertiary education
- workplace relations laws
- the treatment of asylum seekers and refugees
- changes to native title laws; and
- anti-terrorism laws.

Even if you think that Australia's human rights record is better than some other countries, it is clear that more steps should be taken to protect these vulnerable rights.

What rights are protected in Australia?

The Constitution

In 1901, the Australian Constitution spelt out the relationships between the Commonwealth and state governments; but it is different from many other countries' constitutions in that it has no Charter or Bill of Rights.

The Australian Constitution provides only limited protection for rights, including:

- freedom of religion
- freedom from discrimination on the basis of state residence
- trial by jury
- acquisition of property on just terms; and
- some rights that can be implied, such as freedom of political expression.

While the Constitution does guarantee some important freedoms, these are few and they have had a limited impact. They generally only apply to federal laws and not to state laws. The High Court, which is the court that applies constitutional law, has interpreted these rights narrowly. For example, the High Court has never applied the right to freedom of religion to override a law that is inconsistent with this right.

Legislation

In Australia, there are also state and federal laws that protect some rights. However, references to human rights are rarely clear in legislation. Rather, rights are understood through the obligations and restrictions on individuals, governments and other bodies set out in legislation.

The exception is anti-discrimination laws, which clearly refer to the human rights they protect and to the international conventions upon which they are based.

For example:

- the *Race Discrimination Act 1975* is based on the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*
- the *Sex Discrimination Act 1984* is

based on the *Convention on the Elimination of All Forms of Discrimination Against Women*; and

- increased awareness and the International Decade of Disabled Persons (1983–1992) helped bring about the *Disability Discrimination Act 1992*.

However, there are gaps in Australia's anti-discrimination legislation. For example, discrimination based on someone's religion or sexuality is not prohibited in federal discrimination legislation. Australia's anti-discrimination legislation is also limited to addressing one form of discrimination at a time; for example, discrimination based on race or sex or disability. This approach does not recognise that people can be discriminated against on the basis of a combination of their race, sex, ability, age, sexuality, religion or cultural background.

Common law

Common law is the area of law not covered by the Constitution or legislation. The common law includes decisions made by judges, which set a precedent for future decisions, and unwritten principles of law.

The common law concentrates on providing administrative and procedural methods of protection rather than describing any specific human rights protections. This means references to human rights are indirect and scattered.

In the High Court native title decision *Mabo v Queensland (No. 2)*,¹ Justice Brennan said that international human rights standards are "a legitimate and powerful influence on the development of the common law". The *Mabo* decision allows courts throughout Australia to look at international human rights principles when making decisions about peoples' rights.

Australian courts have also decided that international principles can be considered when public officials make decisions that could impact on human rights.²

“What rights are not protected in Australia?”

- ➡ See the fact sheets on individual issues.

How could the protection of human rights be improved in Australia?

Australia is currently the only Commonwealth country, and one of only a few industrialised nations, that has no official legal protection for human rights.

There are a number of ways to improve the protection of human rights in Australia. Governments could pass more legislation to protect specific rights. Human rights education could be delivered to the community, politicians and judges. While these proposals may expand some human rights protections, they would not provide a legal guarantee that would protect human rights consistently across all states and territories.

The most effective way to ensure full and ongoing protection of human rights is to adopt a Charter or Bill of Rights based on international human rights standards.

A number of attempts in the past to introduce Charters or Bills of Rights, both at state/territory and federal levels, have failed. But public opinion may be changing.

Following extensive community consultations, the Australian Capital Territory (ACT) recently adopted the *Human Rights Act 2004* – a legislated charter of human rights. This shows that both political leadership and support from the community are essential if Australia is to improve its protection of human rights.

What form should the protection of human rights take?

There are two basic models that could be adopted for a Charter or Bill of Rights – the introduction of ordinary legislation, or Constitutional reform.

Ordinary legislation

If a Charter or Bill of Rights is introduced as ordinary legislation, it could provide broad guarantees of rights and freedoms that do not currently exist. Parliaments can change and amend legislation to respond to changing times.

New Zealand and the United Kingdom both have legislative Bills of Rights. In both countries courts interpret legislation to be consistent with the Bill of Rights. The courts also have the power to declare that a piece of legislation is inconsistent with the Bill of Rights Act. However, they cannot change the legislation. The parliament still has ultimate responsibility for creating and changing legislation. Declarations by the courts that legislation is not consistent with the Bill of Rights can indicate to parliament the need to consider changing legislation.

The main drawback of protecting human rights by ordinary legislation is that it can be amended. This can be positive, as it can easily accommodate new and emerging issues. However, it can also be changed to reduce human rights protection, or the legislation can be abolished altogether.

This would mean the protection of human rights is subject to the political climate.

Constitutional protection

The alternative to ordinary legislation is the incorporation of a Bill of Rights into the Australian Constitution. This process can only happen through a referendum, where all Australians vote on the issue.

The United States, Canada and South Africa all have constitutional Charters or Bills of Rights. Any laws that are

inconsistent with the Charter or Bill of Rights are not valid and have no force.

The advantage of a Constitutional Bill of Rights is that it protects human rights and fundamental freedoms from being manipulated for short-term political gains. It would not be possible for future governments to withdraw it without the consent of the community. However, some people argue that this makes it difficult to change the law to allow it to keep up to date with new developments in human rights.

Some people argue that a Constitutional Bill of Rights would mean that the elected parliament would no longer have the final say on legislation because the courts would be able to declare legislation to be unconstitutional.

However, in Canada in some cases the parliament can have the final say. The *Canadian Charter of Rights and Freedoms* allows the parliament to

declare that an Act will operate despite certain rights in the Charter. Courts in Canada and South Africa are also directed to uphold an Act where it might breach a right if the law could be “justifiable within a free and democratic society”.

One option in Australia would be to pass an ordinary legislation human rights Act, with the proposal that after a specified period of time all Australian citizens would vote in a referendum on incorporating the protection of human rights into the Australian Constitution. This would enable Australians to trial the improved human rights protection and assess how well it works.

➡ For more information on rights protected and not protected in Australia, see the fact sheets on individual issues.

REFERENCES

- ¹ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1.
² *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* F.C. No. 95/013 [1995] HCA 20.

This education kit has been researched and written by Annie Pettitt and Dr Patricia Ranald, Public Interest Advocacy Centre (PIAC), with support from The Myer Foundation.

PIAC is an independent, non-profit legal and policy centre. PIAC seeks to promote a just and democratic society and to empower individuals and groups, particularly those who are disadvantaged and marginalised.

PIAC
PUBLIC INTEREST
ADVOCACY CENTRE



THE MYER
FOUNDATION

Public Interest Advocacy Centre Limited

Level 9, 299 Elizabeth Street,
Sydney NSW 2000 Australia

DX 643 Sydney

Tel: (02) 8898 6500

Fax: (02) 8898 6555

Email: piac@piac.asn.au

Web site: www.piac.asn.au

A.C.N. 002 773 524

A.B.N. 77 002 773 524

ISBN: 0-9586694-6-5

Age Discrimination

OLDER PEOPLE

CASE STUDY

Retrenchment and redundancy¹

Marcus was 56 years old and had worked at the local bank in a variety of roles – accountant, training officer, credit controller and branch manager – when he lost his job because of “downsizing”. Marcus was doing a good job, had lots of experience and had worked for the bank for 36 years. He had expected to stay until retirement. Marcus was told that he was dismissed because he was not “flexible” and had too little knowledge of the proposed restructure. After six months and over 400 job applications, Marcus now works as a clerk on a relatively low wage.²

Losing a job has a particularly serious impact on mature and older workers, as they find it more difficult to obtain employment once they have lost their jobs.

Age discrimination rights in international conventions

Young and older people have the same right as everyone else to be treated with dignity.

Protection against age discrimination is included in the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) through recognition that all human rights should be equally enjoyed without any discrimination.

The International Labour Organisation’s *Discrimination (Employment and Occupation) Convention 111* prohibits discrimination in employment. Australia has voluntarily specified that this will include age discrimination in Australia.

Older people

The United Nations Principles for Older Persons, the International Plan of Action on Ageing, and the International Labour Organisation’s Recommendation No. 162 concerning the rights of older workers, all reinforce international concern regarding the rights of older persons.

Children and young people

The rights of children are most explicitly recognised in the *Convention on the Rights of the Child* (CROC), which specifically recognises that young people have the right to freedom of association and peaceful assembly.³

Current Australian policy on age discrimination

Australian federal anti-discrimination legislation provides limited protection against age discrimination. The Commonwealth *Human Rights and Equal Opportunity Commission Act 1986* covers age discrimination in employment only,

YOUNG PEOPLE

CASE STUDY

Youth wages

Melinda has worked at a fast food outlet for nearly 3 years. She began working there when she was 16 years old on a casual part-time basis. Melinda worked on average 11 hours a week and was paid around \$8 an hour. When Melinda turned 18, her wage increased to \$10.50 an hour but her shifts were cut back to only 3 hours a week.⁴

Most industrial awards and enterprise agreements include junior rates of pay, or youth wages, based solely on the employee’s age, usually under 18 or 21 years. Using age to determine rates of pay is discriminatory.⁵ Young people are often employed as casual workers and do not receive sick leave or holiday pay. It is common for young people to be retrenched or for their hours to be reduced when they get older and their hourly rate goes up.

and does not make age discrimination unlawful or provide enforceable remedies.⁶

Age discrimination is unlawful in all states and territories of Australia. However, the various laws are not consistent. The right to be free from age discrimination can depend on where you live and who you work for.⁷

In 2003, a federal Age Discrimination Bill was introduced but it has not yet been passed. If it is passed,



OLDER PEOPLE

CASE STUDY

Job placement

Marion is 55 years old and has had several years of experience working in the advertising industry. After working in different industries Marion attempted to re-enter advertising at 53. For two years she has applied for a large number of jobs to which her skills and experience were applicable, but she has been interviewed only twice. Marion has been told that her experience in advertising is no longer relevant and that employment agencies consider her to be “over the hill”.⁸

Age discrimination by employers is common, and many employment agencies make little effort to help older people to find work.

it will provide some additional protection against age discrimination in certain circumstances.

Age discrimination rights not protected in Australia

Older people’s rights not protected

While compulsory retirement is unlawful, older people continue to face indirect discrimination in employment and are often “eased out” when they near retirement age.

There is current debate about improving superannuation arrangements for older people who wish to continue working. However, compulsory superannuation payments by employers stop when an employee turns 70. This means that organisations employing people over 70 are not obliged to make superannuation payments. This disadvantages people over 70 wishing to continue working.

Young people’s rights not protected

The CROC has not been fully implemented in Australian law. For example, citizens have no right to

launch complaints in the local courts on the basis of the CROC.

Young people tend to socialise in public and commercial spaces. Security guards routinely targeting young people at shopping centres is an example of indirect age discrimination.

Indirect age discrimination happens when legislation, policies, practices or organisational structures treat people of a particular age group less favourably.

The United Nations Committee on the Rights of the Child has expressed concern about restrictions placed on young people’s access to public spaces and has stated that such restrictions are an infringement on children’s civil rights, including the right to assembly.⁹

Improving older and young people’s rights in Australia

Although not yet passed the proposed Age Discrimination Bill is a step towards recognising some of the rights of older and young people. However, there are still areas that are not covered by the Bill. It specifically excludes youth wages, making it legal to discriminate against young people in employment,¹⁰ and includes several general exemptions that weaken the Bill.

Protection against age discrimination in line with international standards is required to ensure that people of all ages are treated fairly and with dignity.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

YOUNG PEOPLE

CASE STUDY

Public space

When Ben was 13 years old he was banned from his local shopping centre for three months for stealing a toy. Since the shopping centre was the hub of social activity and the public bus stop was actually on shopping centre property, keeping to a lengthy ban was very difficult. Ben broke the ban and was caught by security guards. He was charged with “entering enclosed lands”. The shopping centre then banned Ben for a further 12 months.¹¹

Young people meet in groups in public spaces more often than older people. Shopping centres are a common meeting place. These centres are legally classified as private property and the owners can control who enters them. Banning young people from shopping centres for minor misbehaviour has become common in all states and territories. Young people from ethnic backgrounds and young Indigenous people often suffer from racial stereotyping. They are often routinely targeted by security guards because they are perceived to cause trouble. Banning is particularly unfair when public utilities and Centrelink offices are inside shopping centres. Some young people have even been banned for life.

REFERENCES

- ¹ Being “retrenched” or made “redundant” means losing your job because it no longer exists.
- ² Human Rights and Equal Opportunity Commission, *Age Matters* (1999), p 23.
- ³ CROC, Article 15. Also recognised in the ICCPR, Articles 21 and 22.
- ⁴ Case study provided by Job Watch – Employment Rights Legal Centre, Victoria.
- ⁵ As footnote 2, p 39.
- ⁶ As footnote 2, p 6.
- ⁷ As footnote 2, p 6.
- ⁸ As footnote 2, p 18.
- ⁹ UN Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child, Australia, 10/10/1997, UN Doc CRC/C/15/Add.79.
- ¹⁰ Age Discrimination Bill 2003 (Cth), Clause 23.
- ¹¹ Case study provided by Marrickville Legal Centre, NSW.

Civil and Political Rights

CASE STUDY

Anti-terrorism laws

Abdullah was recently the subject of an Australian Security Intelligence Organisation (ASIO) investigation. ASIO officers came to his home and said that he was not being charged with any offence, but that they wanted some information from him. Abdullah did not wish to say anything without his lawyer present. The ASIO officers told him that it was a criminal offence to discuss the investigation with anyone, and that he could only have access to a lawyer approved by the government if he was taken into custody. They told him that if he did not co-operate they could take him into custody without charge for seven days, perhaps longer. Abdullah didn't want to leave his wife and children alone, so he agreed to talk to the ASIO officers.¹

Anti-terrorism laws introduced in 2003 make it a criminal offence to disclose any information regarding an ASIO investigation for two years. It is therefore not known how many people have been the subject of investigation, and how many have been forced to "co-operate" without legal advice. These laws also make it illegal for a lawyer or journalist to reveal information they may have relating to an ASIO investigation.

Civil and political rights in international conventions

Fundamental civil and political rights are most comprehensively recognised in the *Universal Declaration on Human Rights* and in the *International Covenant on Civil and Political Rights* (ICCPR).

The ICCPR deals with the right to participate in the democratic process, including the following rights:

- to vote
- freedom of speech and association
- freedom from arbitrary arrest or detention
- to be informed of the reasons for being arrested and any charges laid
- to be brought before a judge promptly, and the right to release while awaiting trial
- to be compensated if unlawfully arrested
- to be presumed innocent until proven guilty according to law
- to defend oneself or use legal assistance of one's own choosing
- not to be compelled to testify against oneself or to confess guilt; and
- not to be subjected to arbitrary or unlawful interference with one's privacy.

Current Australian policy on civil and political rights

Through a combination of the Constitution, legislation and common law precedents, Australia provides certain protections for civil and political rights, including the right:

- to vote²
- to privacy³
- to a fair trial including legal representation⁴
- to remain silent under questioning⁵
- to a speedy trial⁶; and
- not to be disparaged unfairly or untruthfully (defamed).⁷

However, in recent years the Federal Government and some state governments have introduced legislation to reduce these basic rights in certain circumstances. Following September 11, the Federal Government introduced legislation that restricts people's basic civil rights to privacy, to legal advice, and to remain silent under questioning.

CASE STUDY

Freedom of speech

When Pauline Hanson sued performer Pauline Pantsdown for defamation in 1997, her satirical song "Back Door Man" was removed from the ABC Radio Triple J play-list. Although the case has still not gone to trial, the court banned the song from being broadcast in Queensland. It is really a national ban because many broadcasters are national and cannot play something that is banned in one state. The ban is still in force.⁸

The ban on Pauline Pantsdown's political song is unusual, as humour and satire are often used in political debate. This shows that the right to freedom of speech is not fully protected in Australia. Free discussion of public matters is essential to democracy.

Civil and political rights not protected in Australia

Detention without charge

In 2002 the Federal Government introduced laws that enable ASIO and the Australian Federal Police to detain people who are not suspected of having committed, or being likely to commit, terrorism offences, but who may have information related to an anti-terrorism investigation. People may be detained for seven days without charge, with possible extensions.⁹

In a democratic society, even under severe threat, no person should be denied their freedom and subjected to arbitrary detention, unless they are charged and brought before an independent court as soon as possible.

CASE STUDY

Explosion in telecommunications warrants

Matthew is an elected member of a local council. He has been under investigation by the Independent Commission Against Corruption (ICAC) for the past few months for alleged corruption at the Council. Matthew's wife Caroline recently discovered that all her phones had been tapped, including phones at home, work and her mobile. Caroline only became aware that her phones were being tapped when her husband was questioned by ICAC. There were no findings of corrupt conduct against Matthew or Caroline.¹⁰

The number of telephone tapping warrants has increased dramatically over the past five years. There are now more agencies that can apply for warrants, including state and federal police, the Police Integrity Commission, the National Crime Authority, the Australian Securities and Investments Commission (ASIC), ICAC and all royal commissions. In 2001, 20 times more telephone calls were intercepted per capita in Australia than in the United States.¹¹ This does not include telephone interceptions made by ASIO.

While telecommunications interceptions and other surveillance techniques are important for fighting crime, they involve serious invasions of privacy.¹² There should be stronger external monitoring to ensure that they are used in moderation and not abused.

Freedom of speech

In 2003 the Federal Government introduced further amendments to ASIO's powers,¹³ which severely restrict the freedom of the press and the freedom of public discussion. It is now illegal for anyone, including lawyers, journalists or parliamentarians, to report on issues related to an anti-terrorism investigation for two years.

The banning of Pauline Pantsdown's satirical song also shows that the right to freedom of speech is not fully protected in Australia.

Right to privacy

In 2004 the Federal Government introduced a Bill that will extend the scope of telecommunications interceptions to include text and image-based communications, such as email.¹⁴

There is effectively only a limited right to privacy guaranteed in Australia, as there is no remedy or penalty for a breach of privacy.

Right to remain silent

The ASIO anti-terrorism laws and laws establishing the power of statutory commissions, such as the Australian Crime Commission, ASIC, ICAC, and the Police Integrity Commission, limit the right to remain silent under questioning. Even though these bodies are not courts, they can make people answer questions, even if their answers might reveal that they have engaged in criminal conduct.

Right to vote

All Australian citizens over 18 and British subjects who were on the electoral roll before 26 January 1984 have the right to vote in federal elections. However, this fundamental right of citizenship is denied to prisoners serving sentences of five or more years.¹⁵ The right to vote is also denied to Australians who have been living overseas for six or more years.¹⁶

Improving civil and political rights in Australia

Although Australia is a democratic state and has a history of respecting people's civil and political rights, recent amendments to legislation illustrate how easily these basic rights can be reduced.

Protection of civil and political rights and fundamental freedoms in line with international standards is



essential to ensure that everyone in Australia is guaranteed their human rights and dignity.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Case study provided by Council of Civil Liberties, NSW.
- ² *Commonwealth Electoral Act 1918*, section 93.
- ³ *Privacy Act 1988* (Cth); and in relation to a woman's right to have an abortion *R v Davidson* [1969] VR 667 and *R v Wald* (1971) 3 DCR (NSW) 25.
- ⁴ *Dietrich v The Queen* (1992) 177 CLR 292.
- ⁵ *Environment Protection Authority v Caltex Refining Co. Pty. Limited* (1993) 178 CLR 477.
- ⁶ *Jago v The District Court of New South Wales and Others* (1989) 168 CLR 23.
- ⁷ *David Russell Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
- ⁸ *Australian Broadcasting Corporation v Pauline Hanson*, unreported, 28 September 1998, Supreme Court of Queensland, Court of Appeal.
- ⁹ *Security Legislation Amendment (Terrorism) Act 2002* (Cth).
- ¹⁰ Case study provided by Council of Civil Liberties, NSW.
- ¹¹ Attorney General's Department, Annual Report on the *Telecommunications (Interception) Act 2000/01*; Administrative Office of the United States Courts, Annual Wiretap Report 2001.
- ¹² Daryl Melham MP, Shadow Minister for Justice and Customs, *More Telephone Taps in Australia than the United States* (press release), 15/9/2002.
- ¹³ ASIO Legislation Amendment Bill 2003 (Cth) (not yet consolidated although it has been passed in the Senate).
- ¹⁴ Telecommunications (Interception) Amendment Bill 2004 (Cth).
- ¹⁵ *Commonwealth Electoral Act 1918*, section 93(8)(b).
- ¹⁶ *Commonwealth Electoral Act 1918*, section 94(1).

Disability Rights

CASE STUDY

Abuse and neglect of people with disability

Neil has an autism-related disability. While attending a public school in Perth that specifically caters for children with disability, he was repeatedly locked up in an outside caged enclosure for bad behaviour. The cage was enclosed by a 3.5 metre-high wire fence, backing onto a demountable building, and had no toilet or access to water. It had been purpose-built for Neil, and he was put in the enclosure almost every day, sometimes several times a day, for periods of up to one hour and 20 minutes, over several months.¹

The Western Australian Education Department agreed to remove the enclosure, but refused to provide assurance that outdoor enclosures would not be used again.

People with disability in Australia

In 1998, there were 3.6 million people with disability in Australia (19% of the population).² This number includes people with intellectual, psychiatric, physical, sensory, and acquired disability. The majority of these (87%) experienced restrictions in activities such as mobility or communication, or in their ability to take part in schooling or employment.³

Disability rights in international conventions

People with disability are entitled to the full range of rights in both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the

International Covenant on Civil and Political Rights (ICCPR).⁴ Both covenants prohibit discrimination of any kind. The Committee on ICESCR requires governments to protect against disability discrimination and to take positive action to reduce disadvantages. Positive action means giving preferential treatment to people with disability to help them achieve full participation and equality in society.⁵ The rights of children with disabilities are also recognised in the *Convention on the Rights of the Child* (CROC).⁶

Numerous barriers to the use of ICCPR and ICESCR by people with disability have been identified.⁷ As a result a separate UN Convention focusing on people with disability is currently being drafted.⁸

Current Australian disability policy

The Australian Government has tried to improve the rights of people with disability through the *Disability Discrimination Act 1992* (DDA) and the *Disability Services Act 1986* (DSA). Federal, state and territory governments share responsibility for funding services for people with disability.⁹

The DDA makes it unlawful to treat someone less favourably because of their disability – directly or indirectly. Direct discrimination is when someone with a disability is clearly treated less favourably than someone who does not have that disability. Indirect discrimination occurs when a policy or practice that applies to everyone, and appears to be neutral, is actually more difficult for a person with disability to comply with. For example, stairs at the front of a building can prevent access by people in wheelchairs.

The DDA prohibits discrimination against someone with a disability in:

- employment
- education

- access to premises
- provision of goods, services and facilities
- accommodation
- clubs and sport
- land use; and
- administration of federal laws and programs.

The DDA also makes it unlawful to harass someone with a disability in:

- employment
- education; and
- the provision of goods and services.

All states and territories have similar legislation, making it unlawful to discriminate against someone because of their disability.

The DSA establishes the provision of support services for people with physical, psychiatric, intellectual and sensory impairment in the areas of accommodation, employment and community participation.

Disability rights not protected in Australia

Australian disability services and discrimination laws do not guarantee that positive measures will be taken to ensure that people with disability can participate equally in society.¹⁰ For example, many buildings, forms of public transport and workplaces remain physically inaccessible for people with disability. If an obligation to take positive measures existed in law, this would not be the case.

Discrimination legislation is focused on individual complaints rather than on addressing systemic discrimination.

Systemic discrimination happens when legislation, policies, practices, organisational structures or workplace cultures treat people with disability less favourably.

Australia has a long history of putting people with disability into

CASE STUDY

Abuse and neglect of people with disability

79-year-old Catherine has a mobility impairment and lived in a nursing home in Sydney. Often when she asked for help to go to the toilet, staff members said they were too busy and placed a folded sheet between Catherine's legs and told her that she'd have to make do with that. Ashamed and embarrassed, Catherine was forced to urinate in her bed.¹¹

Darren was 9 years old and was living in a state institution for people with disability in regional Queensland. He was under-nourished, became ill and was transferred to a large hospital in Brisbane. On admission, the state authority and the hospital arranged for a "Not for Resuscitation" ("NFR") order to be placed on Darren's medical file. This authorised the hospital to take no active measures to resuscitate Darren, if resuscitation was needed to keep him alive. Concerned staff at the institution notified a government-funded advocacy organisation, which intervened and demanded that the NFR order be lifted. Darren eventually gained weight, recovered from his illness, and returned to the institution.¹²

institutions. Since the 1970s, though, there has been a policy of integrating people with disability into the community. However, many people with disability continue to require assistance to live in the community, which is often not provided. Living in the community is a basic human right often denied many people with disability in Australia.

There are serious systemic problems in how people with disability are treated. We can see this in the continuing abuse, neglect and preventable deaths of people with disability in a range of settings.

Improving disability rights in Australia

While Australia has a relatively good record in promoting and protecting the rights of people with disability, we have failed to implement the full range and scope of rights in the international conventions. Improvements that have been made in protecting the rights of people with disability could still be subject to change by future governments.

When the Federal Court found that addiction to a prohibited drug could be regarded as a disability, the Federal Government introduced the Disability Discrimination Amendment Bill 2003. The proposed amendment seeks to make it lawful to discriminate against a person because of their addiction to a prohibited drug. Although the bill has not yet been passed, the proposed amendments illustrate how easy it is for a government to reduce human rights protections.

Protection of the rights of people with disability in line with international standards, including positive measures, is essential. For disability rights to improve in Australia, the Federal Government should support and implement the proposed new United Nations Convention on the rights of people with disability.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**



REFERENCES

- ¹ *The Australian*, 9/2/2004, p 3; and 10/2/2004, p 5.
- ² ABS, Disability, Ageing and Carers: Summary of Findings, cat. no. 4430.0, Canberra (1999), p 13.
- ³ The Productivity Commission, Review of the Disability Discrimination Act 1992 (2003), p 34.
- ⁴ ICESCR Article 2 and ICCPR Articles 2 and 26.
- ⁵ CESCR General Comment 5 – Persons with Disabilities, eleventh session (1994), UN Doc E/1995/22 (paras 5 and 9); also recognised in the Standard Rules on the Equalization of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (para 17).
- ⁶ CROC Article 23 (1989) UN Doc A/RES/44/25.
- ⁷ Gerard Quinn and Theresia Degener, "Human Rights and Disability: The current use and future potential of United Nations human rights instruments in the context of disability", UN Doc HR/PUB/02/1 (2002).
- ⁸ People with Disability Australia Incorporated, www.pwd.org.au (accessed on 31/3/2004).
- ⁹ Australian Government, Third Periodic Report on ICCPR: Australia, UN Doc CCPR/AUS/98/3, 22 July 1999, pp 13–15.
- ¹⁰ The Standard Rules and CESCR General Comment 5 are not incorporated into the DDA or the *Human Rights and Equal Opportunity Act 198* (Cth).
- ¹¹ Case study provided by People with Disability Australia Incorporated.
- ¹² Case study provided by Queensland Advocacy Inc.

Education Rights

CASE STUDY

School closures

In 1994, when Jordan was 6 years old and in Year 2, his primary school in rural North-East Victoria was closed. He liked his school and teacher, even though there were only 20 other students at the school. Since then Jordan has had to travel one hour each way to get to the closest school. When he was younger he was often so tired by the time he got to school that it was hard to concentrate.¹

Research shows that 20–25% Victorian students in Years 9 and 10, many of whom were affected by school closures and increased class sizes in 1993–1995, have reading and maths skills below the state’s minimum standard.²

CASE STUDY

Access to education

Brother and sister, Marguerite and Paul, attend a public high school in the western suburbs of Melbourne. In 2003, they were in Years 8 and 9, but were not allowed to use the school computers during or outside class time because they had not paid the computer fee of \$180 each the school required. While their mother, a single parent earning a low income, received a government subsidy of \$127 per child, it wasn’t enough to cover the cost of uniforms, books, school camp and computers. All the other students in Marguerite and Paul’s classes did their assignments on the computer. They felt singled out because they couldn’t afford the fees.³

The right to education in international conventions

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory.”

Universal Declaration of Human Rights, Article 26.

Article 13 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* establishes that governments must provide:

- compulsory and free primary education
- secondary education that is available and accessible and progressively made free
- higher education that is equally accessible to everyone, and progressively free; and
- intensified education for those who have not completed primary education.

While the goal is for all forms of education to be provided free of charge, this can be achieved progressively – starting with primary schooling and later extending this to secondary and higher education.⁴

The United Nations’ Committee on the Rights of the Child explains that the right to education rests on access and curriculum content and quality.⁵ Governments need to establish mandatory minimum educational standards, which recognise “that every child has unique characteristics, interests, abilities, and learning needs”.⁶ The UN Committee on ICESCR states that these educational standards should be:

- *available* – delivered through functioning and quality educational institutions
- *accessible* – non-discriminatory, physically within reach, affordable by all and progressively free of charge
- *acceptable* – using

curriculum and teaching which is culturally appropriate and of good quality; and

- *adaptable* – responsive to the needs of changing societies, communities and students.

Current Australian education policy

In Australia, the legal responsibility for education rests largely with the states and territories. Broadly following the scheme of the ICESCR, Australian education policy includes a major emphasis on primary-level schooling. The various state and territory education policies set out the:

- rules for the establishment of schools
- age of compulsory school attendance
- parents’ responsibility for sending their children to school; and
- establishment of minimum school curriculum.

School curriculum objectives are based on the National Goals for Schooling.⁷ These set out that:

- schooling should fully develop the talents and capacities of all students
- students should attain high standards of knowledge, skills and understanding through a comprehensive and balanced curriculum; and
- schooling should be non-discriminatory and should promote understanding of diversity.



A number of the states and territories make provision for “special” schools, which are intended to provide appropriate schooling to children with special needs. In some cases there is provision made for home schooling.

Rights not protected in Australia

Australian laws provide a narrower entitlement to education than the ICESCR or the *Convention on the Rights of the Child* and provide limited protection for an individual’s right to education. For example, in NSW the law emphasises the obligation of parents to ensure children attend school, rather than the government’s responsibility to provide schooling that meets the needs of all students.⁸

All state and territory governments allow the exclusion (i.e. suspension or expulsion) of children who have been judged not to conform with behavioural standards. This exclusion means that the fundamental right to education for these children is being breached. Children who do not receive quality education are at risk of unemployment and may face barriers to fully participating in society. Indigenous students receive a disproportionate number of long suspensions and expulsions.⁹

Many Australian governments fail in their obligation to make schooling available and free of charge. The NSW *Education Act 1990* stipulates that tuition in government schools shall be free, yet current policy encourages “voluntary” fees. Many governments encourage public schools to charge fees, though sometimes only for certain subjects. Most governments target “overseas” students for “full” tuition fees. In all cases, schools charge for excursions, materials and equipment. This can make it difficult for students from low-income backgrounds to participate in these activities.

Inequality of schooling outcomes persists in Australia. There is a considerable gap in the proportion of boys and girls who start high

school and stay to finish Year 12 – 70% for boys and 81% for girls. However, the rate for Indigenous students is only 39%.¹⁰

The cost of tertiary education for students in Australia continues to rise. This makes it increasingly difficult for low-income families to afford tertiary education for their children. Participation by students from low socio-economic backgrounds actually declined during the 1990s.¹¹ The number of both working-class and Indigenous people in Australian universities remains very low compared to the general population.

Public funding of fee-charging non-government schools can reduce the funds available for public schools. The ICESCR gives parents the right to choose non-government schools for religious reasons.¹² However, in Australia “private” schools (religious and secular) receive more than half their total income from public sources – 57% in 2001.¹³ This funding comes at the expense of the public system.

International example of education rights protection

In Germany in the 1970s, several universities put a limit on the number of students they would admit. A complaint was made by students who failed to gain entry to medical school.¹⁴ It was claimed that the criteria used to select students were arbitrary and that it was a violation of their right to choose both where they studied and their occupation.

While the court refused to rule on whether the state had a constitutional obligation to provide sufficient educational capacities for all courses of study, it held that the government was required to prove that the number of spaces available was the maximum possible and must cease using arbitrary criteria for selection.

Improving education rights in Australia

While Australia has a policy of compulsory school attendance and a minimum school curriculum, there

are few guarantees of the quality, accessibility and affordability of education for all. Indeed, Australia is increasingly moving away from the provision of free tertiary, secondary and primary education. The United Nations Committee on Economic, Social and Cultural Rights has stated that any reduction or move away from progressively improving the right to education must be carefully considered and fully justified.

Protection of education rights in line with international standards is required to ensure that all people are guaranteed a quality, accessible education.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Case study provided by the Victorian Council of Social Service.
- ² Victorian Education and Training Department, *Annual Report 2002–2003*.
- ³ Case study provided by the Victorian Council of Social Service.
- ⁴ United Nations Committee on Economic, Social and Cultural Rights, General Comment 13, “The right to education”, 8/12/1999, UN Doc. E/C.12/1999/10, para 14.
- ⁵ Committee on the Rights of the Child, General Comment No. 1, “The Aims of Education”, 17/4/2001, UN Doc CRC/GC/2001/1, para 3.
- ⁶ As footnote 5, para 9.
- ⁷ Developed by the Ministerial Council on Education, Employment, Training and Youth Affairs (MCEETYA), the full text is at www.curriculum.edu.au/mceetya/nationalgoals/natgoals.htm (accessed on 2/4/2004).
- ⁸ *Education Act 1990* (NSW) s 4.
- ⁹ Gonczi, A. and Riordan, G. *Measuring and Reporting on Discipline and Student Suspensions in NSW Government Schools*, University of Technology, Sydney, September 2002, p 4.
- ¹⁰ Australian Bureau of Statistics, *Schools, Australia*, cat. no. 4221.0, 2004, www.abs.gov.au (accessed on 9/3/2004).
- ¹¹ DETYA, *Equity in Higher Education*, Occasional Paper Series, Higher Education Division, Department of Education, Training and Youth Affairs, March 1999, Table 15, p 57.
- ¹² ICESCR, Article 13(3).
- ¹³ 2001 Commonwealth Budget Paper No. 1, cited in Australian Education Union, *What Money Do Public and Private Schools Get?* AEU Federal Election Factsheet No. 3, September 2001.
- ¹⁴ *Numerus Clausus I* case, German Constitutional Court (1972) 33 BverfGE 303.

The Environment and Human Rights

CASE STUDY

Tina lives in a regional mining town. Her son suffers from high lead levels in his blood – a result of extensive lead contamination in the town due to past mining activity. Modern mining practices have reduced the environmental health impacts of mining in the area, but Tina is concerned about a recent proposal to establish an open-cut mine close to the town. Staff at the local health centre told Tina that dust from the open-cut mine may increase her son's exposure to lead. The local council is strongly in favour of the proposal, as it will help to revive the town's ailing economy. Recently Tina's son has been getting sick a lot and has been struggling with school-work. Tina is worried that her son may become seriously ill if the project is allowed to go ahead.¹

Evidence shows that long-term exposure to lead can cause brain damage, serious illness, cancer and death.²

International human rights and the environment

The right to a healthy environment has not yet been recognised separately in international human rights law. However, the right to a healthy environment has been recognised as an aspect of the right to health.³ Long-term fulfilment of basic human rights depends on a healthy and ecologically sound environment.

Human rights can not be secured in a degraded environment. Contamination and excessive use of water, erosion of agricultural land, air pollution, disruption of natural ecosystems and unsustainable use of natural resources threaten the

fulfilment of fundamental human rights to life, health, livelihood and development.

The 1994 Draft Declaration on the Principles of Human Rights and the Environment highlights the internationally recognised links between human rights and the environment. It states that all people have the right to a secure, healthy and ecologically sound environment. This right and other human rights are connected to each other, should be the same for everyone, and should not be taken away under any circumstances.

Current Australian policy on environmental protection

In Australia, each state and territory has laws to protect the environment. These laws cover a wide range of issues, such as:

- air pollution
- water pollution
- contaminated land
- forestry
- mining
- fisheries

- wildlife protection
- threatened species; and
- protected areas.

There are also federal laws to protect some aspects of the environment.

These laws help to protect human health, conserve natural resources and preserve the natural environment. Some environmental laws require governments to provide information about environmental issues and allow public participation in environmental decision-making.

Some government agencies and departments play a role in enforcing environmental laws. The community can sometimes take legal action to enforce environmental laws.

Rights not protected in Australia

In Australia, there is no legal guarantee that the government will act to protect environmental rights.

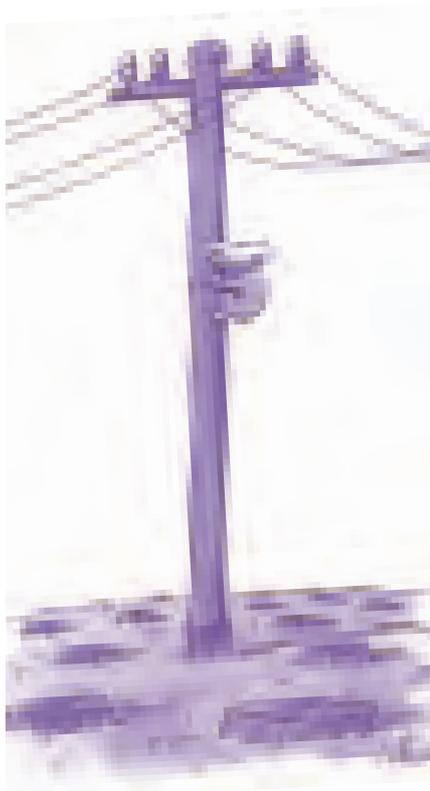
Environmental laws vary from state to state. In most cases, governments have wide discretion about whether to allow environmentally harmful activities, as shown in the case study above.

Government agencies are not always obliged to enforce environmental laws. There is no guarantee in federal or state constitutions that governments will not change the law to allow environmentally harmful activities.

International example of environment and human rights protection

The relationship between human rights and the environment has been more clearly recognised in other regions and countries.

In Africa, Europe and the Americas, regional human rights conventions



provide specific protection for the right to a healthy environment.

Other regional conventions recognise the importance of community participation in environmental decision-making. For example, the 1998 *Aarhus Convention* of Europe recognises the right of the public to access information, participate in decision-making and take legal action in relation to issues that affect the environment.⁴

Over sixty countries around the world have recognised the human right to a healthy environment in their national constitutions. For example, the South African Constitution states that:

“Everyone has the right:

- to an environment that is not harmful to their health or well-being; and
- to have the environment protected, for the benefit of present and future generations.”⁵

Other countries have recognised the right to access information and seek legal remedies for environmental harm. For example, in the Constitution of the Russian Federation, the right to a favourable environment includes access to reliable information and compensation for damage to one’s health or property caused by environmental violations.⁶

Constitutional protection of environmental rights provides an opportunity for people to challenge government decisions that may have a bad effect on human communities or the natural environment.

Improving environmental rights in Australia

While Australians have a history of enjoying the environment, legal protection for environmental rights is limited.

Protection of environmental rights in line with international standards would ensure that everyone, including future generations, would have access to a healthy and sustainable environment.

WATER AND HUMAN RIGHTS

In Australia, thousands of people living in remote communities do not have access to safe drinking water. Indigenous communities are most affected, with many communities relying on water supplies that do not meet minimum health standards.

The *Universal Declaration of Human Rights* recognises the dignity and the equal rights of all human beings. There are certain basics that are essential for a dignified life, indeed for life itself. Water is one of these essential human needs.

Access to water is explicitly recognised under the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*.⁷ The right to drinkable water and adequate sanitation is also recognised as an essential part of the right to health and the right to an adequate standard of living in the *International Covenant on Economic, Social and Cultural Rights*.⁸

In 2003, the United Nations expressly stated that the human right to water entitles everyone to sufficient, safe, acceptable, accessible and affordable water for personal and domestic uses.⁹

Human rights and environmental provisions relevant to the right to water can also be found in the national constitutions of several countries. For example, the South African Constitution states that everyone has the right to sufficient water.¹⁰

In 2001, the South African High Court found that a local council decision to disconnect the water supply to a block of flats was a breach of the constitutional right to access to sufficient water and made an interim order to reconnect the water supply.

In Australia, local, state and federal governments are *not* legally obliged to ensure that everyone has access to sufficient safe water.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Case study provided by the Environmental Defender’s Office, NSW.
- ² The Lead Education and Abatement Design Group website, www.lead.org.au (accessed on 25/3/2004).
- ³ United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, “The right to the highest attainable standard of health”, 11/8/2000, UN Doc E/C.12/2000/4, para 9.
- ⁴ United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998.
- ⁵ Constitution of the Republic of South Africa 1996, Section 24.
- ⁶ Constitution of the Russian Federation 1993, Article 42.
- ⁷ CEDAW Article 14(2)(h) and CROC Article 24(2)(c).
- ⁸ United Nations Committee on Economic, Social and Cultural Rights, General Comment 15, “The right to water”, 20/1/2003, UN Doc E/C.12/2002/11 and General Comment 14, as footnote 3.
- ⁹ General Comment 15, as footnote 8.
- ¹⁰ Constitution of the Republic of South Africa 1996, Section 27.

Health Rights

CASE STUDY

Access to affordable health care

Maggie's sister, Sandra, had severe stomach pains. Maggie took her to the Royal Hobart Hospital. They waited two hours before being turned away and told she should see her doctor. Sandra didn't have any money to go to the local doctor, who doesn't bulk-bill anymore. She'd have to pay \$35 upfront and only get \$25 back from Medicare later. Sandra waited two days for her Centrelink payment before going to the doctor.¹

Under Medicare, all Australians pay taxes for health care through the Medicare levy. The bulk-billing system, under which the government pays doctors, was designed to ensure access on the basis of need, not ability to pay.

Reduction in bulk-billing by doctors limits the accessibility and affordability of primary health care throughout Australia. This is a real concern, especially for people living in rural and regional areas. With declining numbers of bulk-billing doctors, people are forced to either pay upfront or miss out on medical treatment.

The right to health in international conventions

The human right to health is recognised in the *International Convention on Economic, Social and Cultural Rights* (ICESCR).²

The right to health is closely related to and dependent on other human rights that are determinants of health. These include food, housing, access to safe and drinkable water and adequate sanitation, safe and healthy working conditions, a



healthy environment, and access to health-related education and information.³

The ICESCR acknowledges resource limitations and provides for the progressive realisation of the right to health through law and policy. However, it does impose minimum standard obligations on governments that must take immediate effect. These include:

- ensuring equitable access to health facilities, goods and services, on a non-discriminatory basis, especially for vulnerable or marginalised groups
- providing essential drugs
- ensuring access to reproductive, maternal and child health care
- providing immunisation against major infectious diseases
- taking measures to prevent, treat and control diseases
- providing education and access to information concerning health issues; and
- developing and putting into action a national public health strategy and action plan.

There should be no discrimination of any kind in the delivery of health services. People living in rural communities should have access to the same services as people living in the city. Health services must be

CASE STUDY

Universal access to health care

Nupur has lived in Australia for more than thirty years, having arrived when she was 10 years old with her parents. Having spent most of their working lives in Australia, Nupur's parents returned to their country of origin five years ago. Nupur's father recently had a heart attack and her mother is no longer able to care for him. The only way Nupur can care for her parents is if they return to Australia. Her parents have not maintained their Australian residency visas. Nupur has just found out that her parents will not be eligible for Medicare if they return to Australia on a "temporary parent visa".⁴

Medicare is commonly understood as a universal health insurance scheme. However there are some people who are excluded from accessing basic health services provided through Medicare. For example, non-Australian parents of Australian citizens, or permanent residents who hold a "temporary visa".

CASE STUDY

Indigenous health

Leenie and her husband, Wally, are Indigenous people who live in a country town. When Wally was complaining of abdominal pain, Leenie took him to see his doctor. The doctor did not examine Wally, but gave him tablets for his ulcer and told him to stop drinking alcohol. Later Wally collapsed at home. The doctor wouldn't come out to see him and when Leenie called an ambulance and gave their address she was told to find someone else to bring Wally to the hospital. Once at hospital, all the other patients received medical attention before Wally. When a doctor finally did examine Wally, it was discovered that he had acute appendicitis and had to be operated on immediately.⁵

Many Indigenous people are treated unfairly when they seek medical services.

Indigenous Australians experience higher levels of ill health, disease and death rates across all age groups. In 2001 life expectancy for Indigenous men was 56 years, compared with 77 years for all Australian men. Life expectancy for Indigenous women was 63 years, compared with 82 years for all Australian women. Indigenous life expectancy in 2001 was comparable to the life expectancy for all Australian men in 1901–1910 and all Australian women in 1920–1922.⁶

Indigenous people experience a higher incidence of common diseases such as heart disease, diabetes, obesity and kidney disease.⁷ Indigenous people are less likely to have access to drinkable water, adequate sanitation, nutrition, and housing.

Indigenous people often experience difficulties in accessing health services, such as affordability, distance, availability and transport. Health services may not always be culturally appropriate.

affordable. Equality of access must be demonstrated in equality of health outcomes.

The right to health also provides that health services should be culturally and gender appropriate, should meet basic ethical standards and must be of a good standard.⁸ It also includes the right to control one's health and body, the right to sexual and reproductive freedom, and the right to be free from interference (e.g. torture, or treatment without consent).

International human rights law specifically requires special measures for health services provided to Indigenous peoples. These measures require that services are culturally appropriate, incorporate traditional care and medicines, link the health of individuals to the health of the community, and that resources should be provided for "Indigenous peoples to design, deliver and control such services".⁹

Governments must also refrain from taking steps that would in any way reduce those aspects of the right to health that are already guaranteed in law, policy or practice.

Current Australian health policy

In Australia there is legal protection against discrimination in relation to accessing health services under federal and state anti-discrimination laws. This means that you should not be refused services or receive services that are of a lower standard than others because of your race, ethnicity, sex, sexuality or ability. In addition, most states and territories have a Health Act, which provides that the state or territory will deliver health services.

Rights not protected in Australia

Anti-discrimination and health legislation, however, do not fully guarantee all people living in Australia access to basic health services. The United Nations Committee on ICESCR, in its review of Australia in 2000, was concerned about the difficulties of realising the right to

health within current legislative and funding frameworks.¹⁰

Improving health rights in Australia

While Australia has a history of providing quality health care to the community, there are no guarantees that health care will continue to be delivered on the basis of need, rather than ability to pay.

Protection of the right to health in line with international standards is required to ensure that everyone is guaranteed universal access to quality health care.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Case study reported in Anglicare Tasmania (Submission 142) to Senate Inquiry into Medicare (first inquiry), July 2003, p 7.
- ² The right to health is also found in UDHR Article 25.1; ICESCR Article 12; CERD Article 11.1(f); CEDAW Article 12; CROC Article 24.
- ³ United Nations Committee on Economic, Social and Cultural Rights, General Comment 14, "The right to the highest attainable standard of health", 11/8/2000, UN Doc E/C.12/2000/4, paras 3, 4 and 11.
- ⁴ Case study reported to Public Interest Advocacy Centre.
- ⁵ This scenario is based on one provided in *Tracking your Rights* (1994), published by the Human Rights and Equal Opportunity Commission.
- ⁶ Australian Bureau of Statistics, 4704.0 *Indigenous Health: Greater Risks, Shorter Life Expectancy*, 30/8/2001: www.abs.gov.au (accessed on 27/11/2003).
- ⁷ Australian Institute of Health and Welfare, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples 2003*, AIHW Cat. No. IHW-11.
- ⁸ As footnote 3, para 12.
- ⁹ As footnote 3, para 27.
- ¹⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, 1/9/2000, UN Doc E/C.12/1/Add.50.

Housing Rights

CASE STUDY

Unfair eviction and blacklisting by landlords

Nancy, a single mother of two, has been waiting for public housing for 5 years. Nancy's last landlord refused to do essential repairs, so she told him she would complain to the Tenancy Tribunal. He threatened to put her on the national tenancy database used by real estate agents that lists "problematic" tenants. Nancy was evicted. She cannot find rental housing now because she is listed on the database. Nancy and her children stayed with friends and are now living with Nancy's mother in a single-bedroom flat. She wonders if she will ever have a place of her own again.¹

CASE STUDY

Lack of affordable housing

Bert is a 70-year-old single man on a disability pension. He lives in a room in an inner-city boarding house and cannot afford to rent a house or flat on his own. He shares a kitchen and bathroom with the three others on his floor. Bert has been in the boarding house for 5 years but the building is to be pulled down for re-development. He worries about where he will go.²

CASE STUDY

Lack of emergency housing

Julie ran away from home on her 17th birthday after abuse from a family member. She went to a refuge but they didn't have any room. Tonight she'll sleep on the streets.³

Homelessness in Australia

On census night in 2001 there were at least 100,000 homeless people. Of these, 78% were single people, 13% were couples and 9% were families (including 13,401 children).⁴ Just below half (42%) of the homeless were women,⁵ and almost half (46%) were under 25 years; 26% were between 12 and 18 years, and 10% were children under 12 years.⁶

Most homeless people are sheltered somewhere at night, about half staying temporarily with friends and relatives. About 14% of homeless people sleep outside or in impoverished shelter.

Indigenous people are more likely to experience homelessness than non-Indigenous Australians. While Indigenous people make up 2% of the total Australian population, it is estimated that they make up at least 9% of the total homeless population, 19% of people in improvised housing, and 11% of the clients of supported accommodation services.⁷

The right to housing in international conventions

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁸ recognises the right to an adequate standard of living, including food, clothing and housing, which includes the continuous improvement of living conditions.⁹

Housing rights include:

- protection against unfair forced eviction (security of tenure);¹⁰
- access to adequate housing that enables a person to live with dignity and in peace and security; and
- access to clean drinking water; energy for cooking, heating and lighting; sanitation and washing facilities; food storage; refuse disposal; site drainage; and emergency services.

A home must also be:

- affordable – so that its cost does not threaten other basic needs;
- accessible – to everyone, without discrimination of any kind;
- habitable – an adequate space with protection against the weather;
- reasonably close to employment and social services, and not in polluted areas; and
- culturally adequate – to allow for cultural diversity.¹¹

Current Australian housing policy

Australia has put in place policies to provide some forms of housing to some people in need.

Governments provide funding for low-cost public and community housing under the Commonwealth – State Housing Agreement.¹² In the past ten years, this funding has been reduced by 54%.



There is also some funding for supported accommodation services, such as refugees.

The Federal Government's Commonwealth Rent Assistance Program provides money to people on pensions to help cover the cost of renting privately. However, Rent Assistance is not available to students over 25 receiving Austudy, or people on low wages. Also, Rent Assistance does not take into account the higher rents in city areas.¹³

The Government accepts that housing is not affordable when the cost of housing exceeds 30% of the household income. However, more than one third (330,360) of Rent Assistance recipients spend more than 30% of their income on rent, with 85,000 spending more than 50% on rent.

State and territory governments have tenancy laws setting out minimum rights and responsibilities. However, there is no national policy approach to tenancy laws.

Housing rights not protected in Australia

Australia has some legislation and policies to provide people with adequate housing. However, there are no laws that require governments to ensure that people have access to adequate housing or that allow people to complain about lack of housing.

For example, tenancy laws in most states and territories allow landlords to evict tenants without a reason, or increase rents by as much as they want. Only Queensland, South Australia and Victoria have laws that provide boarders and lodgers with basic tenancy rights.¹⁴

In August 2000, the United Nations Committee on Economic, Social and Cultural Rights expressed concern about the lack of protection against eviction and unfair rent increases, which was a particular problem in Sydney in the lead-up to the 2000 Olympic Games.¹⁵ The Committee recommended the Australian Government create a National Housing Strategy for states and

territories to establish consistent housing policies that progressively implement the right to adequate housing.¹⁶ This has not occurred.

In Darwin, there is a chronic lack of low-cost accommodation for Indigenous people. European-style housing is often culturally unsuitable. Some people are forced to live in public places, yet local council by-laws make it illegal for a person to fall asleep in a public place between sunset and sunrise. About 70% of people fined for sleeping in public in 2001 were Indigenous.¹⁷

International examples of housing rights protection

The South African *Constitutional Bill of Rights* includes a right to adequate housing. In October 2000, the Constitutional Court of South Africa found that the South African Government had breached the right to adequate housing of 900 people who had been forcibly evicted from their "illegal" homes with no alternative accommodation available.¹⁸ The Court found that the state's housing program should provide temporary relief to those in desperate need, and the government agreed to provide temporary accommodation, sanitation, basic services, and running water.

In 2001 and 2003 the Scottish Government introduced legislation requiring local authorities and agencies to provide interim, "last resort" accommodation to "roofless" people. The *Homelessness Etc (Scotland) Act 2003* states that by 2012 people will be able to take legal action to assert their right to re-housing.¹⁹

Improving housing rights in Australia

While Australia has a history of providing housing schemes that encourage housing affordability and crisis accommodation, people do not have a legally enforceable right to adequate housing, as defined under international law. There is a growing gap between the amount of affordable

accommodation available and the number of people who need it.

Protection of housing rights in line with international standards is required to ensure that everyone is guaranteed adequate and affordable housing.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N° 1: **Background to Human Rights**

REFERENCES

- ¹ Based on case studies in Tenants' Union of NSW, *Submission to the Residential Tenancy Database Working Party*, December 2003.
- ² Based on case studies compiled by Rough Edges, St John's Anglican Church, Darlinghurst, NSW.
- ³ As footnote 2.
- ⁴ ABS, Australian Census Analytic Program, *Counting the Homeless 2001*, November 2003, pp 2-3.
- ⁵ As footnote 4, p 3-4.
- ⁶ As footnote 4, p 3.
- ⁷ As footnote 4, p 5.
- ⁸ Other international human rights conventions also recognise the right to housing; however, the ICESCR is the broadest recognition.
- ⁹ ICESCR, Article 11.
- ¹⁰ General Comment 7 states that forced evictions are the permanent or temporary removal – against the will of individuals, families and/or communities – from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. United Nations Committee on Economic, Social and Cultural Rights, "The right to adequate housing (Art.11.1): forced evictions", 20/5/1997.
- ¹¹ United Nations Committee on Economic, Social and Cultural Rights, General Comment 4, "The right to adequate housing", 13/12/1991.
- ¹² *Housing Assistance Act 1996* (Cth).
- ¹³ National Shelter and Australian Council for Social Service, "Rent Assistance: does it deliver affordability?", September 2003.
- ¹⁴ Peter Alexander, 'Great Expectations: In Pursuit of Legislative Reform for Boarders in NSW', *Parity*, February 2004, p 77.
- ¹⁵ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, 1/9/2000, UN Doc E/C.12/1/Add.50, para 21.
- ¹⁶ As footnote 15, para 34.
- ¹⁷ Cassandra Goldie, "Living in public space: a human rights wasteland?", *Parity*, December 2002, p 279.
- ¹⁸ Constitutional Court of South Africa, *Government of Republic of South Africa and others v Grootboom and others*, Case CCT 11/00, 4 October 2000, www.concourt.gov.za (accessed on 24/3/2004).
- ¹⁹ Robina Goodlad, "Housing and Social Justice: the case of Scottish homelessness policy", presented at Housing Futures – the Australian National Housing Conference, 27 November 2003.

Indigenous Rights

CASE STUDY

Right to family

“The biggest hurt, I think, was having my mum chase the welfare car – I’ll always remember it – we were looking out the window and mum was running behind us singing out to us. They locked us in the police cell up here and mum was walking up and down outside the police station and crying and screaming out for us. There was 10 of us”.

Testimony from a woman removed in the 1960s and placed in Parramatta Girls Home, NSW.¹

Australia’s practice of separating Indigenous children from their families was part of a strategy in which the state controlled every aspect of Indigenous peoples’ lives. Indigenous people were presumed unfit to be parents because of their race. This policy continued until the 1970s and destroyed families, culture and human dignity. Many Indigenous people still suffer from the effects of forced removal on their families.

Indigenous rights and international conventions

The rights of Indigenous people are included in United Nations Conventions recognising human rights relevant to everyone.² As a result of the special circumstances of Indigenous people, the United Nations declared 1995–2004 the International Decade of the World’s Indigenous People.

The *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) recognises the right of Indigenous people not to be discriminated against.



While it is not legally binding, the rights of Indigenous people are most explicitly recognised in the Draft Declaration on the Rights of Indigenous Peoples.³ The Draft Declaration indicates a strong international commitment to human rights principles, including the right to equality and self-determination in political, social and economic terms.

Acknowledging cultural and kinship relations, the Draft Declaration recognises the collective or group rights of Indigenous peoples. It also acknowledges the special relationship of Indigenous peoples to the land and recognises the right of Indigenous peoples to practice their culture.

These rights are not protected in Australia.

Current Australian policy and Indigenous rights

Social and economic situation

The Indigenous population is 2.4% of the total Australian population.⁴ Indigenous Australians have lower incomes than the non-Indigenous population, higher rates of unemployment, poorer educational outcomes, and are less likely to own a home.⁵ The life expectancy for Indigenous men is 56 years (Australian average 77 years), and for Indigenous women 63 years (Australian average 82 years).⁶

Improving human rights protection for everyone in Australia will have a positive effect on the daily lives of Indigenous Australians.

Stolen generations

In the *Stolen Generations* case⁷ the High Court considered for the first time whether the government policy of forcible removal of Indigenous children was legal. However, the High Court found that the Constitution was unable to provide protection for Indigenous rights.

Sovereignty and self-determination

For Indigenous people, sovereignty can mean many things including:

- recognition of past injustices
- autonomy and decision-making powers in areas that affect Indigenous people’s daily lives
- recognition of land rights and the right to negotiate native title claims
- protection of cultural practices and customary laws; and
- equal protection of rights.⁸

Self-determination is the right of Indigenous people to make their own choices and work towards economic self-sufficiency. Meaningful participation in the democratic process is an important part of this.

Some steps to improve Indigenous self-determination have been taken, such as the establishment of Indigenous health and legal services. However, the Commonwealth

CASE STUDY

Administration of justice

Amanda has been in and out of foster homes and has had no contact with her family since she was 4 years old. She has been living on the streets since her 14th birthday. She was 15 when she came before a children's court on her fourth charge of shoplifting minor amounts of food and toiletries. Amanda pleaded guilty and spent two-and-a-half months in custody waiting for a sentencing report. The Magistrate sentenced Amanda to a good behaviour bond, but she expressed concern that a child who had committed such petty offences had spent so long in custody.⁹

In June 2003, Indigenous women were jailed at a rate 19.3 times that of non-Indigenous women.¹⁰ Since 1999 Indigenous people have constituted 20% of the adult prison population and over 40% of juveniles in detention.¹¹ Indigenous people are currently jailed at 16 times the rate for non-Indigenous people.¹²

Government has recently announced its intention to abolish the Aboriginal and Torres Strait Islander Commission. It also said that it no longer supports elected Indigenous representation in decision making about services for Indigenous people.

Native title

The 1992 High Court's *Mabo (No. 2)*¹³ decision was the first official recognition of the prior ownership and the pre-existing land rights of Indigenous people. This case overturned the 200-year-old doctrine that Australia was *terra nullius* ("empty land") before colonisation. *Mabo* recognised native title as the right of Indigenous peoples to possess, occupy and enjoy their traditional lands when they can demonstrate continuous connection with the land. The *Native Title Act 1993* (Cth) generally adopted this definition of native title and provided

for compensation where native title had been extinguished after the introduction of the *Racial Discrimination Act 1975*. In 1998 the Howard Government introduced the *Native Title (Amendment) Act 1998* (Cth). This Act made it harder for native title holders to negotiate on pastoral leases, exploration and government activities, and made successful native title claims less likely.¹⁴

A series of native title decisions have made it increasingly more difficult for Indigenous people to enforce their native title rights. The requirement of continuous connection to the land is extremely difficult for many communities to prove – especially for those who were forced off their land during colonisation.

Improving Indigenous rights in Australia

General rights and special measures

Improving the general protection of human rights in Australia will substantially improve the rights of Indigenous communities. In addition, as a result of over 200 years of discrimination and oppression, special measures or affirmative actions are required to ensure equal enjoyment of human rights. Special measures are not discriminatory because they are intended to ensure the "adequate advancement" of a particular disadvantaged group. They are permitted and required by the United Nations *Convention on the Elimination of All Forms of Racial Discrimination*.¹⁵

International concern about the rights of Indigenous Australians

In 2000 the United Nations Committee on the Elimination of All Forms of Racial Discrimination found that the Australian Government had failed to meet its obligations, particularly with regard to Indigenous Australians.

The Committee criticised continuing social, economic and cultural discrimination faced by Indigenous Australians and the high numbers of Indigenous people in jails and other corrective institutions. It concluded that mandatory sentencing laws target offences committed by

Indigenous people, and seriously questioned their compatibility with the Convention.¹⁶ The Committee expressed concern about provisions in the *Native Title (Amendment) Act 1998* which allow state and territory governments to reduce protection of native title rights.¹⁷ Finally, the Committee noted that the Australian Government has failed to apologise to the Stolen Generations.¹⁸

Respect and protection of the rights of Indigenous people in line with international standards is essential and must include protections in law and practice.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ *Bringing Them Home*, National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997), p 48.
- ² Article 27 of the *International Covenant on Civil and Political Rights* and Article 30 of the *Convention on the Rights of the Child* recognise the right of ethnic, religious and linguistic minorities to enjoy their culture, religion and language.
- ³ Draft Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/1995/2.
- ⁴ HREOC, "A statistical overview of Aboriginal and Torres Strait Islander peoples in Australia", www.humanrights.gov.au/social_justice/statistics/index.html (accessed 4/2/2004).
- ⁵ As footnote 4.
- ⁶ As footnote 4.
- ⁷ *Kruger & Ors v Commonwealth of Australia* (1997) 190 CLR 1.
- ⁸ Behrendt, L. (2003), *Achieving Social Justice – Indigenous Rights and Australia's Future*, Federation Press, Sydney, p 48.
- ⁹ Case study provided by Sydney Regional Aboriginal Corporation Legal Service, Redfern.
- ¹⁰ As footnote 4.
- ¹¹ As footnote 4.
- ¹² As footnote 4.
- ¹³ *Mabo & Ors v Queensland* (No. 2) (1992) 175 CLR 1.
- ¹⁴ As footnote 8, pp 86–117.
- ¹⁵ *Convention on the Elimination of All Forms of Racial Discrimination*, Articles 1(4) and 2(2).
- ¹⁶ Mandatory sentencing laws were abolished in the Northern Territory in 2002, but still exist in Western Australia.
- ¹⁷ Decision 2(54) on Australia: Australia 18/3/1999. A/54/18, para 21(2).
- ¹⁸ Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia, 19/4/2000, UN Doc CERD/D/304/Add.101.

Racial and Religious Discrimination

CASE STUDY

Religious discrimination

Faduma, a Muslim woman working as a receptionist, wore the hijab (headscarf) to work. After 11 September 2001, she was subjected to comments and negative attitudes about her appearance by her workmates.¹

Since September 2001, many Muslim and Arab women in Australia have been abused, being called “terrorists”, among other things. Many are still afraid of catching public transport, and even of travelling in their own cars. Many parents do not allow their daughters to go out, and young women are becoming even more isolated.

Racial and religious discrimination rights in international conventions

The *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin”.² The Convention came into force in Australia in 1975.

Both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) prohibit discrimination. They cover discrimination based on “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.³

Racial discrimination is when someone is treated less favourably because of their race, colour, descent, or national or ethnic origin.⁴

Article 4(a) of CERD requires governments to make the following into offences punishable by law:

- spreading ideas of racial superiority or hatred; and
- inciting racial discrimination.

Australia has a reservation to this Article, which means that our government has not agreed to implement it.

Current Australian race and religious discrimination policy

The federal *Racial Discrimination Act 1975* (RDA) incorporates much of CERD into Australian law, making it unlawful to treat a person or group differently because of their race, colour, ethnicity or nationality.

Racial discrimination can be “direct” or “indirect”. Direct discrimination is when someone is treated unfairly, or less favourably, compared to someone of a different race, colour, ethnicity or nationality in a similar situation. Indirect discrimination is when a policy or rule that appears to be neutral actually has a more negative impact on people of a particular race,

colour, descent, or national or ethnic origin.

The RDA applies to everyone in Australia but only in the areas of:

- employment
- land use
- accommodation
- goods and services
- access to public places
- joining trade unions; and
- advertising.

In 1995 the *Racial Hatred Act (Cth)* amended the RDA and made offensive behaviour based on race illegal.

Rights not protected in Australia

While Australia has reasonably comprehensive laws prohibiting racial discrimination, some areas are still not covered by the legislation.

There is limited protection against discrimination on the basis of religion. If a religious group can



CASE STUDY

Indirect discrimination in accommodation

Mrs Martin was evicted from her public housing in 1997 when Homeswest, the Western Australian Department for Housing and Works, decided that she had failed to meet the tenancy requirement “to not cause or permit a nuisance”. Mrs Martin’s neighbours had complained about noise and obscene language. As an Aboriginal elder, Mrs Martin is obliged to provide shelter for her extended family. She was discriminated against because the apparent “nuisance” was the result of taking her family in on the basis of her cultural beliefs and obligations.⁵

In 2002, the Western Australian Commissioner for Equal Opportunity received 232 complaints from 91 Indigenous people about accommodation and services provided by Homeswest.⁶ The less favourable treatment of many Indigenous public housing tenants has become a habit, and the failure of the legal system to fix this has resulted in indirect or systemic discrimination.

Systemic racial discrimination happens when legislation, policies, practices, organisational structures or workplace cultures treat people from different racial or ethnic groups less favourably.

also be classified as an “ethnic” group, the RDA may protect them.⁷ This would make it unlawful to treat them less favourably or to make public statements that incite or provoke hatred against them because of their religion.

Courts have decided that discrimination against Jews and Sikhs is covered because they are considered to be ethnic groups. On the other hand, it has not yet been decided by a court that Muslims, Hindus, Buddhists and Christians are ethnic groups.

While most states and territories have legislation prohibiting religious discrimination, in New South Wales and South Australia religious discrimination is not unlawful. Australia’s largest Muslim community lives in New South Wales and is not protected from religious discrimination.⁸

Anti-discrimination bodies focus on individual complaints and cannot address systemic issues of racial or religious discrimination.

While the RDA incorporates most of the CERD into Australian law, it does not prohibit racial discrimination in the provision of education and training.

There is no guarantee that the protections of the RDA will not be wound back. This has already happened in relation to the rights of Indigenous people and native title laws. Parts of the *Native Title (Amendment) Act 1998* (Cth), which limited negotiation and consultation with native title-holders about activities on their traditional land, were exempted from the RDA. The *Native Title (Amendment Act) 1998* was criticised by the United Nations Committee on the Elimination of All Forms of Racial Discrimination for not balancing the rights of Indigenous and non-Indigenous title-holders.⁹

➡ For more information about native title see fact sheet N^o 9: **Indigenous Rights**

Improving racial and religious rights in Australia

Australia has a history of promoting a fair go for all, and has had national laws prohibiting racial discrimination since 1975. However, there are still noticeable gaps in the legislation, most significantly in protection against religious discrimination and acts of hatred.

The passing of the *Native Title (Amendment) Act 1998* shows that existing protections are no guarantee of future protection.

Protection against racial and religious discrimination and acts of hatred, in line with international standards, is required to ensure that everyone is treated equally and with dignity.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Based on Human Rights and Equal Opportunity Commission (HREOC), *Isma – Listen: National consultations on eliminating discrimination against Arab and Muslim Australians*, consultation hosted by Islamic Council of Victoria, Melbourne, 26 May 2003.
- ² CERD Article 1(1).
- ³ ICESCR Article 2(2) and ICCPR Article 2(1).
- ⁴ HREOC web site: www.humanrights.gov.au/racial_discrimination/guide_to_rda/index.html (accessed on 24/3/2004).
- ⁵ While Mrs Martin ultimately lost her case, Aboriginality and cultural practice were recognised in *Joan Margaret Martin & Ors v State Housing Commission & Anor* [1998] WASCA 58.
- ⁶ WA Equal Opportunity Commission, *Investigation into the Provision of Public Housing to Aboriginal People in Western Australia* (2003).
- ⁷ HREOC, “Freedom of Religion and Belief” (Human Rights Brief No. 3), www.hreoc.gov.au/human_rights/briefs/brief_3.html (accessed on 24/3/2004).
- ⁸ HREOC, “Isma Newsletter 2”, June 2003.
- ⁹ Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination, Australia, 9/4/2000, UN Doc CERD/C/304/Add, paras 8–10).

Refugees and Asylum Seekers

Who is an asylum seeker?

An asylum seeker is someone who has fled their country and applies to the government of another country for protection. Anyone experiencing or fearing persecution has a fundamental human right to seek asylum in other countries. This right is recognised in the *United Nations' Universal Declaration on Human Rights*.

In 2002, there were 13 million refugees around the world.¹ Between July 2001 and June 2002, Germany received 83,836 applications for asylum, the UK received 99,000, and the US received 62,073, while Australia received 8,512.²

CASE STUDY

Indefinite detention

Kamar fled India on a false passport in 1997 because he feared political persecution. He sought asylum in Australia, but his application was rejected by the Department of Immigration and on appeal to the Refugee Review Tribunal (RRT) in January 1999. Since then, the Australian Government has been trying to send him back to India. However, the Indian Government will not provide Kamar with a passport or travel documents, as they have been unable to verify his identity and nationality.

Kamar has been in detention for over five years, since his arrival in Australia in 1998. There is no real prospect of him being sent to India. Kamar has committed no crime and is being detained indefinitely.³

Who is a refugee?

According to the United Nations' Refugee Convention, a refugee is someone who is outside their country and cannot return because of a well-founded fear of persecution on the basis of their race, religion, nationality, political opinion, or membership of a particular social group.

CASE STUDY

Detention

Zahra and her three children escaped from Iraq and came to Australia by boat in 2001. They were put in the Woomera Detention Centre. No schooling was available to Zahra's 15-year-old daughter Fadia. Facilities in Woomera were inadequate and the women had to join long queues to use the few available toilets, bathrooms and washing machines. Zahra's children witnessed other detainees harming themselves. The children developed problems like not eating, nightmares, not sleeping, and bed-wetting.

Despite being recognised as refugees by the Refugee Review Tribunal (RRT) in 2002, it took over six months before they were issued with protection visas and released from detention. Throughout this time they were not told when they would be released. The psychological problems for all family members increased and their recovery post-release has been problematic.⁴

Refugee and asylum seeker rights in international conventions

Countries that have signed the *United Nations Convention and Protocol relating to the Status of Refugees* (the Refugee Convention),

including Australia, are committed to providing refugees with the opportunity to apply for asylum and obtain legal advice.⁵

Under the Refugee Convention and other international conventions signed by Australia, refugees are entitled to protection and respect for their basic human rights while in Australia.

The International Covenant on Civil and Political Rights (ICCPR) and the *Convention on the Rights of the Child* (CRC) both prohibit arbitrary detention. The ICCPR provides for access to a lawyer, the right to appeal, and the right to be treated with dignity. The CRC protects the right to family reunion. The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) protects rights to education, health and family, all of which apply to anyone within Australia, including asylum seekers and refugees, in and out of detention.

Current Australian policy and asylum seekers' and refugees' rights

Refusing to accept asylum seekers

In September 2001, the Australian Government developed the "Pacific Solution" in response to the "Tampa crisis". This so-called solution involves turning asylum seekers away and removing or "excising" parts of Australian territory from our "migration zone" (e.g. Ashmore Reef and Christmas and Melville Islands). People landing in "excised territories" cannot make onshore Protection Visa applications without the permission of the Minister for Immigration. Instead they are transferred to a "declared country", such as Nauru or Papua New Guinea, while the United Nations High Commission for Refugees (UNHCR) and the Australian Government assess their refugee applications.

CASE STUDY

Temporary protection for refugees

Farid, a 23-year-old Afghan man, was granted a Temporary Protection Visa (TPV) in August 2000. He has a young wife and child in Afghanistan. In his home country he did not have access to schooling. After being released from detention he was not given English lessons. He wants to study in Australia, but he cannot afford the high overseas student fees TPV holders must pay. In late 2001 he received news that his wife and child had disappeared. If he had a Permanent Protection Visa (PPV), he would have been able to sponsor his family to come to Australia. Farid's original 3-year TPV has expired and he has an interim visa while he waits for a decision on his new TPV application. He is trying to find work but it is difficult because employers prefer staff to have long-term visas.⁶

"Unauthorised" asylum seekers who are accepted as refugees in Australia are only granted temporary visas with limited rights.

The "Pacific Solution" is the Government's attempt to avoid both international and Australian laws that oblige the Government to treat all asylum seekers arriving in Australia with dignity, respect their basic human rights, and process their refugee applications efficiently.

Detention

In 1994 Australia became the only western country to have a policy of mandatory non-reviewable detention for all "unauthorised" arrivals in Australia – both adults and children. This detention only ends when the person is recognised as a refugee and granted a TPV, or not recognised and removed from Australia.

Australia's migration laws provide that "unlawful non-citizens" must be detained until they are granted a visa or are removed to another country. An "unlawful non-citizen" is someone who:

- entered Australia without a valid visa ("unauthorised arrivals")
- entered Australia with a valid visa but stayed past the expiry date ("overstayers"); or
- has broken the conditions of their visa and had their visa cancelled (e.g. by working).

Indefinite detention

Based on the common law principle of respect for fundamental rights (such as the right to liberty) the Full Federal Court found in the *Al Masri* case (April 2003), that the *Migration Act 1958* (Cth) did not authorise indefinite detention.⁷ The *Al Masri* case established that where there is "no real likelihood or prospect of an applicant's removal [from Australia] in the reasonably foreseeable future, an applicant's continued detention is unlawful". The *Al Masri* case is currently on appeal to the High Court.

This case demonstrates that the common law can provide limited protection for the right to liberty. However, the government could pass a law to over-rule this at any time.

Temporary Protection Visas

A Temporary Protection Visa (TPV) provides very limited access to government settlement assistance. TPV holders cannot sponsor family members to join them, so families may be separated for years while TPV holders apply for permanent protection. TPV holders also require special approval to re-enter Australia if

they leave. This means that if one member of a family is granted a TPV in Australia but the rest of the family is in another country, they can neither apply for their families to join them, nor easily leave Australia to visit them.

Improving asylum seeker and refugee rights in Australia

The UNHCR has stated that even though asylum seekers are "unauthorised" arrivals, this "does not deprive them of any rights regarding access to fair and effective protection and assistance measures."⁸

Australia's migration laws, policies and practices have been criticised by the international community. The United Nations Human Rights Committee concluded in 1997 that the arbitrary and prolonged detention of asylum seekers (especially children) and long visa processing periods were in breach of Australia's obligations under ICCPR.⁹

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**



Technical information contained in this fact sheet is based on the Human Rights and Equal Opportunity Commission's *Face the Facts – Some Questions and Answers about Refugees, Migrants and Indigenous People*, 2003.

REFERENCES

- ¹ United States Committee for Refugees, *World Refugee Survey 2003*.
- ² UNHCR, Asylum applications submitted in 28, mostly industrialised, countries January 2001–June 2002, 10 September 2003: www.unhcr.ch (accessed on 1/4/2004).
- ³ Case study provided by the Public Interest Advocacy Centre.
- ⁴ Case study provided by Refugee Advice and Casework Service, NSW.
- ⁵ Refugee Convention, Article 33.
- ⁶ Case study provided by Refugee Advice and Casework Service, NSW.
- ⁷ *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* [2003] FCAFC 70.
- ⁸ UNHCR Press Release, *UNHCR concerned about Australia's handling of boat people*, 11 Nov 2003, www.unhcr.ch (accessed on 24/3/2004).
- ⁹ *A v Australia*, Communication No. 560/1993: Australia, 30/4/1997, UN Doc CCPR/C/59/D/560/1993.

Sexuality Rights

CASE STUDY

Discrimination in federal pensions

Edward Young's partner of 38 years, Larry Cains, was a World War Two veteran. After Larry died, the Federal Government refused Edward the bereavement payment and pension, normally paid to a surviving spouse. Under Australian law, only heterosexual spouses or de facto partners of war veterans are entitled to these payments.

After taking his discrimination claim to the Veterans Review Board and the Human Rights and Equal Opportunity Commission, Edward took his claim to the United Nations. In August 2003 the United Nations Human Rights Committee found that the Federal Government had discriminated against Edward. In response, the Senate asked the Federal Government to introduce legislation to recognise same-sex relationships. The Federal Government is considering its response. Edward has still not received a bereavement payment or pension, five years after Larry's death.¹

The international conventions listed do not specifically refer to sexual orientation and transgender identity. However, these grounds are included in the requirement of governments to ensure respect for everyone's human rights "without discrimination of any kind" and to treat them equally before the law.

After an individual complaint made by Australian Nick Toonan, the United Nations Human Rights Committee found in 1994 that a Tasmanian law making gay sex a crime violated the privacy rights of gay people.² The Federal Government passed legislation to ensure that no state or territory could discriminate in this way.³ The Tasmanian Government was therefore forced to change its law.

The ILO *Convention 111* does not prohibit discrimination based on sexual orientation. However, Australia has decided to include sexual preference as a ground for discrimination for the purposes of this Convention.

➡ For more information about the ILO see fact sheet N° 14:
Womens Right's

Current Australian policy on sexuality

Responsibility for legal issues that affect everyone's lives is shared by federal, state and territory governments. This includes legal issues that affect gay, lesbian, bisexual and transgender people.

Over the past 10 years, states and territories have made many improvements to protecting the equal rights of gay, lesbian, bisexual and transgender people.

All states and territories now have legislation prohibiting unfair treatment on the basis of sexual orientation. However, there are some significant exemptions and no consistency in what they protect and in what situations.

Sexuality rights in international conventions

The *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and the International Labour Organisation's (ILO) *Discrimination (Employment and Occupation) Convention 111*, require Australia to prohibit all forms of discrimination and to provide effective penalties for discrimination.



CASE STUDY

Discrimination in parenting rights

Bridget and Amanda have been living together in Sydney for nine years. Five years ago they decided to start a family. Bridget was the birth mother. When their son Joseph was born, Bridget was registered as the mother, but there was no place to register Amanda as Joseph's co-parent. They thought nothing of it at the time. Recently they went to register Joseph at his new school, but discovered that the school would not recognise Amanda as Joseph's parent because she was not on his birth certificate.⁴

The right of gay and lesbian people to adopt the children of their partners, so they can be formally recognised as guardians, has only recently become available in Tasmania, Western Australia, the Northern Territory, and the Australian Capital Territory.

CASE STUDY

Discrimination in superannuation

Robert Corvo died in 1993, leaving behind his partner of 10 years, Greg Brown. Robert worked for the Commonwealth Department of Defence and was a member of the Commonwealth Superannuation Scheme. Even though Robert had bequeathed his estate to Greg, the law does not require super funds to follow the deceased's will, and the fund refused to pay Greg the "spouse benefit". After an appeal to the Administrative Appeals Tribunal⁵ and the Human Rights and Equal Opportunity Commission, Greg still did not succeed, because he was not recognised as Robert's spouse.

Sexuality rights not protected in Australia

There are significant areas under federal law that do not recognise the de facto relationships of gay, lesbian, bisexual and transgender people. These include:

- access to pensions and superannuation
- taxation and social security; and
- the right to marriage.

There is no overriding federal legislation specifically prohibiting unfair treatment or harassment based on sexuality. Federal legislation would ensure better protection and more consistency across all states and territories.

The case studies show examples of discrimination against gay and lesbian partners and parents. Although discrimination on the basis of homosexuality is prohibited in all states and territories, discrimination against bisexuals and transgender people is not prohibited in all areas.

Vilification based on sexual preference or gender identity is not unlawful in all states and territories. For example, in Western Australia and Queensland it is not an offence to make public statements that incite or provoke hatred against people who are gay, lesbian, bisexual or transgender.

The anti-discrimination legislation of each state and territory contains certain exemptions. In many states there is an exemption for religious organisations, which effectively means that anyone working for a religious organisation can lawfully be discriminated against based on their sexuality.

The age of consent is the age at which someone can legally agree to have sex. While the age of consent is now consistent for homosexual sex and heterosexual sex in all states and territories, it is not consistent between states and territories. For example, in New South Wales and the Northern Territory, the age of consent is now 16 for both homosexual sex and heterosexual sex; in Tasmania it is 17.

Improving the rights of gay, lesbian, bisexual and transgender people in Australia

While Australia has slowly improved protection for sexuality rights, the protections that do exist are not consistent for all people, across all states and territories. In addition, our Constitution does not prevent a government from repealing equality laws that protect people regardless of their sexuality. For example, the Federal Government is currently attempting to amend the *Sex Discrimination Act 1984* (Cth) to allow states to discriminate against single women, including lesbian women, in providing reproductive technology services.

➡ For more information about access to reproductive technology services see fact sheet N^o 14: **Women's Rights**

Protection for the rights of gay, lesbian, bisexual and transgender people in line with international standards is required to ensure that all people are treated equally regardless of their sexual or gender preferences.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Patricia Karvelas, "UN backs gay man's war pension bid", *The Australian*, 5/9/2003, p 3.
- ² UN Human Rights Committee, Communication No. 488/1992, Australia, 4/4/1994, UN Doc CCPR/C/50/D/488/1992 (Jurisprudence).
- ³ *Human Rights (Sexual Conduct) Act 1994* (Cth).
- ⁴ Case study provided by the Gay and Lesbian Rights Lobby, NSW.
- ⁵ *Gregory Brown v Commissioner for Superannuation* (1995) 21 AAR 378.

Social Security Rights

CASE STUDY

Breaching and the right to social security income

Rachel was receiving an unemployment benefit of \$190 per week, while looking for work and studying part-time. Rachel missed an appointment at Centrelink because she did not receive the letter advising her of the appointment. As Rachel had missed 2 appointments before, her payment was cancelled for 8 weeks. Rachel appealed the cancellation and was successful in having her payment restored. However, the appeal took some weeks and she was unable to pay rent and lost her accommodation. As a result of being homeless she had to withdraw from her part-time studies.¹

Breaches are penalties imposed when people fail to meet conditions attached to social security payments. As of September 2003 this penalty regime was extended to include parents receiving a parenting payment and mature-age people on Newstart (unemployment benefit). Previously it applied only to people receiving an unemployment benefit.

From July 2002 to June 2003, 134,239 breaches were imposed. It is generally the most vulnerable people, homeless people, illiterate people, people from non-english speaking backgrounds, or people with physical or intellectual disability, who have their payments reduced or cancelled.

The right to social security in international conventions

Article 9 of the *International Covenant on Economic, Social and Cultural Rights* recognises “the right of everyone to social security, including social insurance.”

Australia made a commitment to comply with the Covenant in 1972.

CASE STUDY

Rights of migrants to social security

When Maria migrated from Russia she spoke little English. She was sponsored by relatives, but when she could not find a job, she had to work and cook for the family. Maria received no money, as her work was regarded by the family as payment for accommodation and food. She effectively became the household’s unpaid servant. Maria could not get financial support from the government for two years, and was forced to stay with her relatives. She was unable to establish herself in the community, since she was dependent on the family for food and shelter and thus under their control.²

Current Australian social security policy

Breaching

Under the *Social Security Act 1991*, payments can be reduced or cancelled when a person has “unreasonably” failed to meet the conditions for payments.³ There is also an administrative review process for people to appeal decisions.⁴ This appeal process is free, but people suffer the loss of benefits before they can appeal.

Two-year waiting period for migrants

Since March 1997 all newly arrived residents or those being granted permanent residency have to wait for two years before being able to get social security payments. This is especially difficult for people from non-English-speaking backgrounds, who often need language training before they can find work.

A permanent resident in severe financial hardship during the two-year waiting period may be able to access Centrelink’s Special Benefit. Special Benefit is the payment of last resort and can sometimes be paid where a person is not eligible for any other payment and is “unable to earn a sufficient livelihood”. In order for Special Benefit to be granted during the two-year waiting period, a person must demonstrate that they have “suffered a change in their circumstances beyond their control” and be in financial hardship.

Rights not protected in Australia

Breaching

Under the *Social Security Act 1991*, up to three penalties can be imposed within a two-year period. These can amount to a loss of over \$3,500. Penalties can be imposed for relatively trivial matters, such as not attending an appointment, or not answering a letter.

An Independent Review undertaken in 2002 found that the operation of the penalties system was often “arbitrary, unfair or excessively harsh”.⁵ It also found that “breaches were imposed too frequently [and] penalties for the breaches are often too severe, thereby causing unnecessary and unjustifiable hardship”.⁶

In 2000 the United Nations Committee on Economic, Social and Cultural Rights expressed concern

that the right to social security payments is not legally protected in Australia.⁷

There is no protection against the harsh and unfair reduction in social security payments.

Two-year waiting period for migrants

It is difficult for people to access the Special Benefit, as Centrelink takes a restrictive view of the provision of what constitutes “a change in circumstances”.

Special Benefit, unlike any other payments, is paid at a discretionary rate and is not available to full-time students over the age of 18.

In 2000 the Committee on Economic, Social and Cultural Rights called upon Australia to “ensure that the two-year waiting period for receipt of social security assistance by new immigrants does not infringe upon their right to an adequate standard of living”.⁸

The imposition of waiting periods for newly arrived permanent residents violates this fundamental right.

International example of protection of the right to social security

In 1991 three Czech brothers illegally re-entered Switzerland. It was impossible for Switzerland to expel them since the now Czech Republic had rescinded their citizenship.⁹ The brothers were denied social welfare support on the basis of their illegal status. In Switzerland there is a constitutional right to a basic minimum level of subsistence for a dignified human existence. Since it is a fundamental right, it can be invoked by both Swiss citizens and foreigners.

The Court found that this exclusion from social welfare support was in violation of the right.

Improving social security rights in Australia

While Australia has a history of providing a quality social security safety net, there are limited legal guarantees for its provision in the future.

Protection of the right to social security in line with international standards would ensure that those who are most disadvantaged are guaranteed a minimum level of income.

“What form should the protection of human rights take?”

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N^o 1: **Background to Human Rights**

REFERENCES

- ¹ Case study provided by the Welfare Rights Centre, NSW.
- ² Welfare Rights Centre, Sydney, *Waiting to Settle*, 1998, p 19.
- ³ Breach provisions contained in the *Social Security Act 1991* under each relevant payment type.
- ⁴ Review of Decisions is covered in the *Social Security (Administration) Act 1999* (Cth).
- ⁵ Pearce, D. et al (2002) *Making it Work*, Report of the Independent Review of Breaches and Penalties in the Social Security System, p 13.
- ⁶ As footnote 5.
- ⁷ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, 1/9/2000, UN Doc E/C.12/1/Add.50, p 2.
- ⁸ As footnote 7, p 4.
- ⁹ *Switzerland, V v Einwohnergemeine X und Regierungsrat des Kantons Bern*, BGE/ATF 121 I 367, Swiss Federal Court, 27 October 1995. English summary at www.escri-net.org (accessed on 24/3/2004).



CASE STUDY

Marital status discrimination

Leesa Meldrum, a single woman living in Victoria, wanted to have a baby, but she required infertility treatment. In Victoria the Infertility Treatment Act 1995 required that to be eligible for infertility treatment a woman must either be married or living in a de facto relationship.

Until the Federal Court declared in 2000 that the Victorian Act was inconsistent with the Sex Discrimination Act 1984, it was illegal for a doctor to give a single woman or lesbian infertility treatment.⁸ In 2001, with support from the Federal Government, the Australian Catholic Bishops Conference appealed this case in the High Court. However, the appeal was rejected.

In late 2000,⁹ and again in 2002,¹⁰ the Federal Government proposed an amendment to the Sex Discrimination Act 1984, which would enable states to discriminate on the grounds of marital status in relation to reproductive technologies. Neither of these bills has been passed in the Senate. However, access to reproductive technologies varies between states and territories. For example, in Victoria it continues to be extremely difficult for single women and lesbians to access reproductive technologies.

The *Sex Discrimination Act 1984* and state anti-discrimination legislation make it unlawful to sexually harass a person or to treat someone less fairly than another person because of their sex, marital status, pregnancy or potential pregnancy in various situations. These include:

- at work
- in educational institutions
- in the provision of goods, services and accommodation
- in the administration of Federal Government programs; and
- dismissal from work because of family responsibilities.

Women's rights not protected in Australia

Current sex discrimination laws and government policies do not protect all women in all situations.

The case studies show that Australian laws and policies do not provide paid maternity leave, protection against discrimination based on marital status, or discrimination based on a combination of sex and other factors, like race.

Discrimination on the grounds of "marital status" is prohibited in the federal *Sex Discrimination Act 1984* but only includes living in a de facto relationship with someone of the opposite sex. It does not include living in a de facto relationship with someone of the same sex.

Australia's failure to sign the ILO Convention on paid maternity leave and its refusal to sign the Optional Protocol to the Women's Convention shows the Federal Government's lack of commitment to the protection of women's rights in Australia.

CASE STUDY

Sex and race discrimination

Anh and Thanh are Vietnamese women, both of whom were employed on a temporary basis by Australia Post. When they applied for permanent positions they were both denied employment for failing to meet minimum body-weight requirements, despite the fact that they were able to do the work. Anh and Thanh claimed their body weight was considered "too low" because they were Asian women of slight build. An Asian man or Caucasian woman may not have been excluded by this rule. They believed they had been treated less favourably because of their race and sex.¹¹

Anh and Thanh were eventually offered permanent positions with Australia Post. However, current discrimination law may still not be able to deal with discrimination that is based on both race and sex.¹²

Improving women's rights in Australia

While Australia has a good history of promoting equality between women and men, there are no guarantees that the protections that do exist are accessible to all women or that they will continue to be protected in the future.

The proposed amendments to exclude reproductive technologies from the *Sex Discrimination Act 1984* (see Marital status discrimination case study) illustrate how easy it is for a government to reduce human rights protections.

Protection of women's rights in line with international standards is required to ensure equality regardless of sex.

"What form should the protection of human rights take?"

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N° 1: **Background to Human Rights**

REFERENCES

- ¹ Case study based on Australian Industrial Relations Commission, HPM/AMWU C.No.23933, 1995.
- ² Based on Verlaine Bell's Submission 19 to the Human Rights and Equal Opportunity Commission (HREOC) Maternity Leave Inquiry, p 1.
- ³ Under the *Workplace Relations Act 1996* (Cth) permanent full-time and part-time employees who have worked with their employer for at least 12 continuous months have a minimum entitlement to 52 weeks of unpaid parental leave following the birth or adoption of a child.
- ⁴ ABS 6361.0 Survey of Employment Arrangements and Superannuation, April-June 2000, unpublished data cited in HREOC Inquiry.
- ⁵ HREOC, *A Time to Value: Proposal for a national paid maternity leave scheme*, (2002) Section 3.3.6.
- ⁶ ILO *Equal Remuneration Convention 100*, 1951, and *Discrimination (Employment and Occupation) Convention 111*, 1958; Women's Convention Article 11(1)(d); ICESCR Article 7(a)(i).
- ⁷ Women's Convention Article 11(2)(b) and ILO *Maternity Protection Convention 2000* (No. 183) Articles 4 and 6.
- ⁸ *McBain v State of Victoria* [2000] FCA 1009.
- ⁹ Sex Discrimination Amendment Bill (No. 1) 2000.
- ¹⁰ Sex Discrimination Amendment Bill 2002.
- ¹¹ *Dao v Australian Postal Commission* (1987) 162 CLR 317.
- ¹² HREOC, *Gender and Race Intersectionality*, 2001, p 6.

Workers' Rights

CASE STUDY

Outworkers

Mai is a migrant from China with limited English who has been working at home sewing shirts for five years. She is paid per item and earns between \$2 and \$3 per hour. On average Mai works 12 hours per day, up to seven days a week. This means she earns \$170 to \$250 per week. In order to meet deadlines, Mai often needs the help of her 10- and 12-year-old daughters. Sometimes her children work 3–4 hours at night and up to 10 hours on the weekends. Mai has not been paid for the work that she did three months ago and is struggling to pay the bills.¹

CASE STUDY

Freedom of association and collective bargaining

Sam has worked for a company for 20 years. His employment conditions are in a collective agreement negotiated through his union. The company wants workers to leave the union and is offering better pay if they sign individual contracts which will not allow them to be represented by a union. Sam needs a pay rise but wants the union to be able to represent him and others in the future.²

Julie went to a job interview and was told that there were no unions in the workplace and that she had to sign an individual contract if she wanted the job.³

Workers' rights in international conventions

The *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognise the rights to:

- work
- just and safe conditions of work
- non-discrimination at work
- equal pay for equal work; and
- form and join trade unions.⁴

The International Labour Organisation (ILO) is a United Nations body consisting of government, employer and union representatives. It has developed many conventions on workers' human rights, which many governments, including the Australian Government, have signed. These cover:

- prevention of forced labour⁵
- safe working conditions
- non-discrimination at work
- equal pay for equal work⁶
- minimum age of employment to prevent child labour;⁷ and
- the right to organise trade unions and to negotiate working conditions collectively.⁸

However, the rights in the signed Conventions have never been fully implemented into Australian law. We are left with scattered protections in some state and Commonwealth legislation.

Current Australian policy on workers' rights

Australia has federal and state industrial laws, which set minimum standards for employment.

The *Workplace Relations Act 1996* is the main federal law covering workplaces in Australia. It includes maternity and parental leave,⁹ equal pay for equal work,¹⁰ and recognition of the role of unions.¹¹

➔ For more information on equal pay see fact sheet N^o 14: **Women's Rights** and fact sheet N^o 2: **Age Discrimination**

State industrial laws generally provide for minimum wages, and annual and sick leave. However, for Victorian workers these areas are covered in the *Workplace Relations Act 1996*.¹²

This Act also enables employers to implement individual workplace agreements (Australian Workplace Agreements), which can deny the right to collectively negotiate through unions.

Anti-discrimination laws make it illegal to discriminate in the workplace on the grounds of sex, race or disability. Occupational health and safety laws promote a safe working environment.

Rights not protected in Australia

While Australia has signed many important international Conventions, these standards have not always been put into practice and have sometimes been breached.

Outworkers

Over the last ten years, the number of outworkers has increased. There is some legislation that attempts to protect them. But outworkers are easily exploited because they work on an individual basis, often have limited English, and don't know about their rights.

In Australia many are paid on a per-item basis and often do not receive the minimum hourly wage. Sometimes they receive no payment for their work. They receive no sick leave or annual leave, have limited or no occupational health and safety

CASE STUDY

Unreasonable hours and family responsibilities

Sarah has been working as a telesales operator for several years. The company recently rescheduled the roster. Sarah's rostered start time is now 6.30 am rather than 8 am. This change is incompatible with caring for her three children. The company has refused to allow Sarah to swap her shift with a colleague who has been rostered to start at 7.30 am.¹³

protection, and receive no workers compensation if injured at work. These conditions breach many national and international human rights standards.¹⁴

Right to collective bargaining

The ILO has concluded that, in practice, Australia's *Workplace Relations Act 1996* allows employers to deny the right to collective agreements. The ILO has consistently requested that the Australian Government amend the legislation to bring it into line with the *Convention on the Right to Organise and Collective Bargaining*. In a case about the 1998 waterfront strikes, the ILO again found that the *Workplace Relations Act 1996* was in breach of the right to negotiate work conditions collectively. To date the Federal Government has not taken the necessary steps to address this fundamental breach of human rights in the legislation.¹⁵

International example of workers' rights protection

Overseas examples demonstrate the extent to which the protection of workers' rights can be improved. For example, in Finland the Constitution and legislation guarantee everyone adequate social, health and medical services, including child-care for working parents. In a recent case one parent in a couple could not work for several weeks because of the municipality's delay in arranging child-care services for their two children. The Helsinki Court of Appeals held that parents have a right to have their child in municipal day-care until the child begins school.¹⁶ In this case the local authority was held responsible for the financial loss it caused to the parent as a result of its delay in arranging day-care places.

Improving workers' rights in Australia

Workers' organisations have improved working conditions through organising workers and by influencing law and policy makers. Unions have also taken test cases through industrial tribunals.

The Australian Council of Trade Unions' (ACTU) reasonable hours test case in the Australian Industrial Relations Commission is a positive example. This case established the right of workers to refuse to work overtime when doing so would result in the employee working unreasonable hours. In recognition of the adverse effects on employee health and their

families, the Commission ruled that workers may refuse to work overtime if there is a risk to the worker's health and safety or on the basis of family responsibility. However, such improvements are not guaranteed and can be reversed.

Protection of workers' rights in line with international standards is required to prevent unfair treatment at work.

➡ For options about protecting human rights through a Charter or Bill of Rights see fact sheet N° 1: **Background to Human Rights**

REFERENCES

- ¹ Based on "Mai" case study from the Fairwear web site: www.fairwear.org.au (accessed on 1/4/2004) and *The Law Report* on Radio National: www.abc.net.au/rn/talks/8.30/lawrpt/stories/s831469.htm (accessed on 1/4/2004).
- ² Case study based on Australian Industrial Relations Commission, Decision 054/96 S Print M8600, 26/1/1996.
- ³ Case study reported to the Public Interest Advocacy Centre.
- ⁴ ICESCR, Articles 6, 8 and 7 respectively.
- ⁵ ILO Conventions 29 and 105.
- ⁶ ILO Conventions 111 and 100.
- ⁷ ILO Conventions 138 and 182.
- ⁸ ILO Conventions 87 and 98.
- ⁹ *Workplace Relations Act 1996* (Cth) Part VIA Division 5 and Schedule 14 give effect to the ILO 1981 *Workers with Family Responsibility Convention 156*.
- ¹⁰ *Workplace Relations Act 1996* (Cth) Part VIA Division 2 gives effect to ILO 1951 *Equal Remuneration Recommendation 90* and the 1958 *Discrimination (Employment and Occupation) Recommendation 111*.
- ¹¹ *Workplace Relations Act 1996* (Cth) Part XA.
- ¹² *Workplace Relations Act 1996* (Cth) sections 500, 501 and Schedule 1A give effect to minimum terms and conditions, including annual, sick and maternity leave for Victorian workers and give powers to the Australian Industrial Relations Commission to set and adjust minimum wages for employees within a work classification.
- ¹³ Based on a case cited on the NSW Department of Commerce, Office of Industrial Relations web site, www.dir.nsw.gov.au/action/policy/w&f/2001/general.html (accessed on 7/11/2003).
- ¹⁴ Senate Economics Reference Committee, *Outworkers in the Garment Industry*, Canberra, 1996, pp xi-xii.
- ¹⁵ *Complaint against the Government of Australia presented by the International Confederation of Free Trade Unions (ICFTU), the International Transport Workers' Federation (ITF), the Australian Council of Trade Unions (ACTU) and the Maritime Union of Australia (MUA)*, Report No. 320, Case No. 1963.
- ¹⁶ Helsinki Court of Appeals, 28 October 1999, Case No. S 98/225.





PIAC would like to acknowledge the support of the following organisations for this project:

AUSTRALIAN COUNCIL OF SOCIAL SERVICE
 AUSTRALIAN EDUCATION UNION
 AUSTRALIAN FEDERATION OF ISLAMIC COUNCILS
 AUSTRALIAN LAWYERS FOR HUMAN RIGHTS
 AUSTRALIAN YOUTH AFFAIRS COALITION
 COMMUNITY AND PUBLIC SECTOR UNION – STATE PUBLIC SECTOR FEDERATION
 ENVIRONMENTAL DEFENDERS OFFICE, NSW
 GILBERT AND TOBIN PUBLIC LAW CENTRE, UNSW
 HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION
 JUMBUNNA INDIGENOUS HOUSE OF LEARNING, UTS
 NATIONAL ASSOCIATION OF COMMUNITY LEGAL CENTRES
 PEOPLE WITH DISABILITY AUSTRALIA INCORPORATED
 UNITING CHURCH OF AUSTRALIA
 WELFARE RIGHTS CENTRE, NSW
 WOMEN'S ELECTORAL LOBBY
 YOUNG WOMEN'S CHRISTIAN ASSOCIATION

This education kit has been researched and written by Annie Pettitt and Dr Patricia Randal, Public Interest Advocacy Centre (PIAC), with support from The Myer Foundation.

PIAC is an independent, non-profit legal and policy centre. PIAC seeks to promote a just and democratic society and to empower individuals and groups, particularly those who are disadvantaged and marginalised.

PIAC
 PUBLIC INTEREST
 ADVOCACY CENTRE



THE MYER
 FOUNDATION

Public Interest Advocacy Centre Limited

Level 1, 46-48 York Street,
 Sydney NSW 2000 Australia
 DX 643 Sydney

Tel: (02) 9299 7833

Fax: (02) 9299 7855

Email: piac@piac.asn.au

Web site: www.piac.asn.au

A.C.N. 002 773 524

A.B.N. 77 002 773 524

ISBN: 0-9586694-6-5