Human rights standards in Australia [1]

Two rights standards – health and housing – were recognised by the Australian National Human Rights Consultation Committee (along with the right to education) as ‘the primary economic and social rights...that are of the greatest concern to those who participated in all aspects of the [2009] Consultation’, and the Committee recommended that they be included by the Federal Government in an interim list of rights to be protected and promoted immediately, as the question of how Australia should best recognise human rights at law is resolved. (See the National Human Rights Consultation Committee Report [2], 30 September 2009, at pages 356-57.) This recommendation has not been implemented to date.

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

Rights-based approaches

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

A human rights based approach seeks to realise human rights in practice. It frames poverty or disadvantage as an injustice, and is concerned with the interaction between a rights-holder and a duty-bearer. It transforms consumers/clients/constituents from a person deserving of charity (charity approach) or who has an unmet need (needs approach), to a person who holds or should be helped (empowered) to hold a right (rights-holder). Understood this way, the provision of services; the creation of policy; and the shaping of priorities are informed by the objective of duty-bearers fulfilling the rights of rights-holders. Who are the duty-bearers and how can they be enabled to meet their obligations to rights-holders? (For more detailed discussion see, for example, Applying a rights-based approach: an inspirational guide for civil society [3] by Boesen & Martin, and From principle to practice: implementing the human rights based approach in community organisations [4], Victorian Equal Opportunity and Human Rights Commission

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

Common understanding of human rights principles

United Nations agencies, in 2003, committed to a set of principles [5] to use in coordinating their work in development cooperation and developing programming. They provide a neat statement of the principles that inform human rights practice and can be drawn upon in framing rights-based arguments and initiatives.

Human rights principles

Universality and Inalienability

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

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

Interdependence and Interrelatedness

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

Equality and non-discrimination

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

Participation and inclusion

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

Accountability and Rule of Law

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

State obligation – respect, protect, promote, fulfil

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

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

Progressive implementation
The rights to health, housing and education are set out in the International Covenant on Economic, Social & Cultural Rights (ICESCR). Article 2(1) of ICESCR is understood to impose two different types of obligations. The first is a core minimum obligation to ensure a minimum standard of protected rights; and that those rights are enjoyed without discrimination. This obligation is coupled with an obligation to progressively improve performance as the state’s capacity grows – for example, how much money, staff, material resources it can reasonably harness. So, the obligation upon Australian governments is to take reasonable measures, within available resources, to progressively achieve the full realisation of the rights recognised in ICESCR.

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

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

Hot Tip: Performance indicators

The Australian Bureau of Statistics produces a number of useful statistical profiles, including: Australian Economic Indicators, Census data, Measures of Australia’s Progress, National Accounts, and Population products, which are available on their website [6].


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

Political context

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

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

- the economic implications of recognising ESCR
- whether courts (rather than Parliament) are the right forum for social and fiscal policy to be scrutinised; and
- the lack of analogous case law by which Australian judges could be guided in interpreting ESCR if they were legally recognised (For example, some argue that the economic differences between South Africa and Australia mean that the judicial reasoning in South African case law, where the Constitution protects ESCR, are not applicable here).

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

The Victorian Human Rights Consultation Committee followed the Victorian Government’s Statement of Intenet which excluded ESCR. However, it recommended that ESCR be considered for inclusion when the Charter for Human Rights and Responsibilities Act 2006 (Vic) was reviewed.

There has been a greater willingness by governments to consider ESCR in the context of policy-making and resource allocation. However, as the respected members of the ACT Economic, Social & Cultural Rights Research...
Project write in their Report [8]:

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

**Effective remedies**

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

The UN Economic, Social and Cultural Committee has said (see General Comment No 9 [9]) that while legal or judicial remedies are not always called for, and ‘accessible, affordable, timely and effective’ administrative remedies could suffice, all Covenant rights contain significant justiciable dimensions (meaning they can be heard and decided by a court). It said that to adopt a:

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

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


**Links**