



Health, human rights and Australia's foreign policies

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HUMAN RIGHTS LAW CONSTITUTES a legal definition of what it is to be human and of what constitutes a life worth living as a human being. Thus, human rights law maps out the terrain of the struggle for human wellbeing and dignity. It provides an approach to conceptualising social and economic demands and platforms that differs from approaches based on national interest, cost-effectiveness, or commodification of a social good.

Human rights are considered to be guaranteed by human rights law, which protects individuals and groups against actions that interfere with their fundamental freedoms and human dignity.¹ These laws are contained in international human rights treaties, which are binding on states that ratify them. Governments of such states must not violate human rights and must ensure that others do not violate them. They must also work to ensure that everyone has full enjoyment of their human rights. Human rights are not a matter of state discretion — the domestic and foreign policies of a state need to reflect the human rights treaties it has ratified.

The human right to health

The right to health is not absolute. It has been variously defined as the “right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care”² or, more recently, “the right of everyone to the highest attainable standard of physical and mental health”.³ It is not a right to be healthy, nor does it require that governments put in place healthcare systems beyond their means. It is a right that is to be realised progressively.

The right to health is an inclusive right, extending beyond healthcare to the determinants of health, such as access to drinking water, adequate sanitation, essential drugs and food; freedom from violence, torture, slavery, discrimination and harmful customary practices; and access to health-related

ABSTRACT

- International human rights law affirms that everyone has a right to the enjoyment of the highest attainable standard of physical and mental health.
- States that are parties to human rights treaties are obliged under international law to observe these rights.
- Australia has ratified all international human rights law instruments in which the right to health is enshrined, and so is obliged to ensure that its foreign policy, including its development assistance program, contributes towards the progressive realisation of the right to health.
- International trade regulation should be consonant with the progressive realisation of the right to health globally.

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information and education, including on sexual and reproductive health. It contains both freedoms and entitlements. Freedoms include the right to control one's health, including the right to be free from non-consensual treatment and experimentation. Entitlements include the right to a system of healthcare that guarantees equity in access.

Specific health entitlements

The right to health is a broad concept and it is often broken down into more specific entitlements, such as rights to:

- maternal, child, sexual and reproductive health;
- healthy workplaces and natural environments;
- disease prevention and treatment, including access to essential medicines; and
- access to safe and drinkable water, sanitation, and nutrition.

The most recent example of a specific claim is the right to access to antiretroviral therapy for HIV infection in resource-poor settings. This right is contained in Resolution 2002/32 of the United Nations Commission on Human Rights (adopted 22 April 2002), which involves the right to access to medication in the context of pandemics such as HIV/AIDS. An estimated 6 million people would be eligible for antiretroviral treatment for HIV if it were available. In 2002, the World Health Organization (WHO) estimated that 230 000 people in developing countries were receiving antiretroviral treatment (half of them in Brazil).⁴

Non-discrimination, equal treatment and respect for a person's dignity are among the most critical components of the right to health,⁵ yet respect for the essential human dignity of each person in all aspects of his or her life is a principle that is consistently transgressed, in the daily lives of women, and in the lives of the disinherited and disadvantaged.⁶

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Australia and international human rights law

There is no legal right to health in Australia. We are the only liberal democracy and member of the Organisation for Economic Co-operation and Development (OECD) that does not have a constitutional guarantee of human rights. Nevertheless, observing human rights is obligatory under international law. This obligation derives from Australia's adherence to the Charter of the United Nations. Health, education, social security and other areas internationally considered as social, economic, civil, political or cultural rights are considered in Australia as matters of policy. Thus, for example, enactment of restrictive labour, immigration or national security legislation has been regarded as a policy issue, integral to Australia's sovereignty since Federation.

Australia has ratified all of the international human rights law instruments that enshrine the right to health and health-related rights. In particular, Australia is a party to the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR), reports on its fulfilment of its Covenant obligations, and has its performance reviewed by the Covenant Committee on Economic, Social and Cultural Rights.

Like other signatories, Australia has an obligation to respect the enjoyment of the right to health domestically and in other countries, and to prevent third parties from violating the right in other countries, if Australia is able to influence these parties by legal or political means. For example, Australia has an obligation to ensure that no international regulations or agreements adversely affect people's health, and to ensure that Australia's representatives in international meetings take the right to health into account.

Australia has become a recent critic of the UN mechanisms of collective enforcement of human rights.⁷ In 2000, Australia refused to sign the Optional Protocol of the Convention on the Elimination of All Forms of Discrimination Against Women, which allows a process of complaints to the Convention Committee from individuals within countries. Only the United States and Australia voted against Resolution 2002/31 of the UN Commission on Human Rights, which appointed a Special Rapporteur on the human right to health. Australia also voted against the Draft Optional Protocol to the Convention on Torture, which enshrined the right of a Convention Subcommittee to visit any site where people are or may be deprived of their liberty, with a view to the protection of these people against torture. This vote was, as Professor Hilary Charlesworth (Director, Centre for International and Public Law, Australian National University) pointed out, "the first time Australia has overtly opposed the strengthening of the international human rights system".⁸

Australia's foreign policy and development assistance program

Australia's approach to promoting and protecting human rights internationally is set out in the 1997 White Paper on foreign and trade policy, *In the National Interest*. Australia's approach is described as achieving the observance of internationally accepted standards through dialogue and cooperation, without compromising fundamental human rights

principles.⁹ The right to health is not discussed in any of the key documents on Australia's foreign policy.

In December 1998, the Foreign Minister, Alexander Downer, gave his annual statement to Parliament on the Australian government's aid program. He argued that, because development and human rights are interdependent, the whole Australian aid program contributes to the realisation of human rights, directly or indirectly, by addressing the needs of the world's disadvantaged people.

Ill health does prevent people from fulfilling their potential as human beings, and causes poverty. However, whether addressing the needs of disadvantaged people promotes health depends on the nature of the aid program. Currently, the Australian aid program covers governance, globalisation, human capital, security and sustainable resource management. Neither human rights in general nor the right to health in particular is a key theme.

Downer's 1998 statement detailed six principles for supporting human rights through the aid program. One of these principles is that the aid program will continue to address economic, social and cultural rights, which it ranks equally with civil and political rights.¹⁰ Despite the respect for the right to health contained in this principle, Australia has introduced restrictive policies, especially with respect to reproductive health. For example, AusAID partner organisations are prohibited to use funds for "activities that involve abortion training or services, or research, trials or activities which directly involve abortion drugs". The government has also stopped funding WHO's Human Reproduction Programme and the Population Council (Ms D Proctor, CEO, Australian Reproductive Health Alliance, personal communication). These policies are more restrictive than domestic policies, and seek to influence practice and values in recipient countries in ways that contravene international human rights law.

Assessing the human rights effects of development assistance

In his 1998 statement, the Foreign Minister stated that, to support the implementation of the six key principles of the aid program, "AusAID would develop practical guidance for program managers, contractors and recipient government counterparts".

However, Australia has not adopted audit or assessment instruments to measure the respect for and realisation of human rights. Such an instrument would enable Australia to determine the extent to which overseas aid affects human rights in recipient countries, or the extent to which the multilateral institutions that Australia supports promote and respect human rights.

Such instruments exist. NORAD, the Norwegian Agency for Development Cooperation, has developed a human rights assessment tool that assesses both laws and policies. An approach to human rights impact assessment has been developed for health.¹¹ In Australia, a rights analysis instrument for the HIV epidemic has been developed for the National Council on AIDS, Hepatitis C and Related Diseases, based on the 1996 International Guidelines on HIV/AIDS and

Human Rights. A further developed model is being applied in Australian states and territories in 2002–2003.¹²

Intellectual property, international trade, and public health

Trade rules as they are now formulated and negotiated directly affect human rights. In particular, patent and similar intellectual property regulations pose a serious constraint on equitable global access to medicines and to public health.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), a multilateral agreement on intellectual property, and its subsequent Declarations, are to be interpreted and implemented in a way that protects public health and promotes access to medicines. Recent bilateral and regional agreements, however, contain stronger provisions than TRIPS on medicines and patents and provide less protection to public health. The proposed Australia–US Free Trade Agreement needs to be subjected to close scrutiny with respect to its implications for the health of Australians, and for global health. The Australian Pharmaceutical Benefits Scheme (particularly its drug-pricing procedures) is being considered as a model for several countries in the Asia-Pacific region. Any weakening of this scheme will have implications for equity in access to health care and treatment in Australia and elsewhere. The foreign policy powers in the Australian Constitution mean that, once signed, a Free Trade Agreement overrides constitutional protection for the powers of the states.

Democratic and transparent processes to resolve conflict, to negotiate vested interests and to maintain accountability are needed in both multilateral and bilateral forums.

Enforcing human rights law

The question critical to public health is whether human rights claims supersede the claims of recent trade and investment agreements. This issue seems to have received little attention from those involved in negotiation and oversight of such agreements, although various United Nations bodies have begun to confront it.

The UN Charter states that, in the event of a conflict between Charter obligations and obligations under any other international agreement, “obligations under the present Charter shall prevail”. The International Court of Justice recently reaffirmed this precedence in the *Lockerbie* case.¹³ The 1993 UN Vienna Declaration on human rights also states that the protection and promotion of human rights is the first responsibility of governments.

If human rights law supersedes other legal regimes, the treaties, rules and practices of international organisations, such as the World Trade Organization, need to be in compliance. However, as negotiations in trade regulation have taught, the rules and procedures for settling disputes are complex and costly and the onus of proof lies with those who bring the complaint. A strong argument can be made that such procedures themselves transgress human rights law and discriminate in favour of the powerful or of the status quo.

Conclusion

The language of human rights provides norms and standards of conduct guided by principles of equity and social justice. The human rights specified in international treaties are reached through extensive discussion and consensus building among all the members of the treaty bodies. The right to health has a central place in this array: it is considered indispensable to the exercise of other human rights.

Human rights violations are linked to pathologies of power, both local and global. Human rights treaties and conventions have not ended such inequities. Importantly, however, they have given us benchmarks by which we can measure the actions and words of governments and other actors.

Australians need a culture of awareness of human rights in public and political life, and need to be able to articulate the rights that they consider fundamental to a life of dignity and value. In this way, we will be able to better contribute to the formation of Australia’s domestic and foreign policies and to achieve greater equity in access to health and wellbeing within Australia, with our development partners, and globally.

Competing interests

EAR is a part-time technical adviser to a consortium of Australian pharmaceutical firms on their philanthropic initiatives in the health sector in Papua New Guinea. This work and the firms involved played no role in the preparation or publication of the article.

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