

A Human Rights Based Approach to the Public Health Association of Australia's Policy Statements

**Brad Crammond
Bebe Loff**

I. SUMMARY OF THE PROJECT

VicHealth has provided funding for the Human Rights and Bioethics Unit of the Department of Epidemiology and Preventive Medicine at Monash University to undertake human rights capacity building programmes with the Victorian Public Health Research and Education Council and the Public Health Association of Australia (PHAA).

The PHAA facet of this project has been to conduct a human rights based review of several PHAA policy statements with a view to providing a guide by which the PHAA can take a rights-based approach to the revision of current policy statements and the formulation of new ones.

With this view in mind, the Human Rights and Bioethics Unit has devised a process by which the PHAA can include human rights in its discourse and has applied that process to four policy statements so far (those four statements are attached).

This work has been completed by Brad Crammond who is currently studying a Master of Laws (International and Comparative Law) under the guidance of the Human Rights and Bioethics Unit of the Department of Epidemiology and Preventive Medicine, Monash University.

II. A HUMAN RIGHTS APPROACH TO PUBLIC HEALTH POLICY

The starting point for our approach was the four step developed by the International Federation of Red Cross and Red Crescent Societies and François-Xavier Bagnoud Centre for Health and Human Rights in an attempt to bridge the gap between the disciplines of public health and human rights. The four elements of their analysis are:

1. To what extent does the proposed policy or program represent 'good public health?'
2. Is the proposed policy or program respectful and protective of human rights?
3. How can we achieve the best possible balance between protecting public health and protecting and promoting human rights and dignity?
4. Does the proposed policy or program (as revised) still appear to be the optimal approach to public health problem?'

The Unit worked from the position that PHAA policies form the basis for the response to the first question. We have, therefore, focused on step two of the process with occasional emphasis on step three when we have found that the human rights implications of a policy suggested that public health policy alternatives be reconsidered.

The Red Cross approach, while useful as an initial point of departure, provides limited guidance as to how a policy should be assessed as 'respectful and protective of human rights'. The Unit then

looked to the United Nations Development Programme and the Office of the High Commissioner for Human Rights material on human-rights-based approaches. Based on this material we have developed a framework for assessing PHAA policies. Each selected policy will be discussed in turn with an explanation about the analysis that has been required in each case.

A. What is the public health problem and who is affected?

When seeking to address a problem, it is first necessary to identify what the problem is, where it occurs and who is affected. For many PHAA policies this will be a simple process of looking at the subject matter of the policy statement. In some cases, however, this is not straightforward.

In this step it is important to clearly identify who is affected. For example, in assessing the Mental Health Disorders policy statement, the PHAA must decide who it categorises as having a ‘mental health disorder.’

Second it is necessary to characterise the group affected. In the Indigenous People’s policy statement the PHAA notes that most health policy is directed to those who live in remote areas yet only a small percentage of indigenous people do so. Similarly, there are many asylum seekers who are not in mandatory detention but who, nonetheless, may suffer from similar health consequences as those that are.

Finally it is necessary to identify the way in which current health policies fail the particular group and in what ways.

B. What human rights apply to this situation / these people?

The two seminal human rights documents are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both were drafted in 1966 and came into force in 1976. Although neither have the rhetorical ring of the Universal Declaration of Human Rights (UDHR) they are both legally binding in international law. The UDHR, by comparison, is a *declaration* and though some regard it as being customary international law, reference to the Covenants is to be preferred. It is inaccurate to state that a country has breached its obligations under the UDHR. The two Covenants contain almost all the human rights contained in the UDHR (with the one exception of the right to property) and so there is no substantive need to refer to the UDHR.

Of primary importance to the PHAA will be the right to ‘the enjoyment of the highest attainable standard of physical and mental health’ contained in Article 12 of ICESCR. The meaning of this right, as enunciated in the Convention, has been the subject of some debate.. The Committee on Economic, Social and Cultural Rights has therefore provided guidance on what the right entails in its General Comment 14 (2000) on the Right to Health.

The two Covenants do not encompass all relevant discussion by the organs of the United Nations nor the specialised agencies. After considering them, then, it will be necessary to also look at other treaties, declarations, UN General Assembly resolutions or the work of a relevant international institution. Additional references can often provide substantial guidance. For example the utility of the *UN General Assembly resolution: Principles for the protection of persons with mental illness and the improvement of mental health care* and the *Draft UN Declaration on the Rights of Indigenous Peoples*, in the attached analyses is self-evident.

C. To what extent is the government policy consistent with human rights norms?

Having identified the human rights which apply to the affected individuals, the next step is to assess the extent to which the current policy fails to meet those standards. If the international documents are specific, like the *UN General Assembly resolution: Principles for the protection of persons with mental illness and the improvement of mental health care*, then this comparison is simple. Those principles, state that an individual with a mental illness should have a ‘right to a hearing before an impartial tribunal before being adjudged lacking legal capacity.’ If that right does not currently exist, then it is easy to identify current policy failings.

Where the right is expressed broadly it may be necessary to provide an argument as to why the current practice fails to meet the required standard. In all of the statements we have so far reviewed it may be argued that the affected individuals have not attained the highest standard of physical and mental health that might otherwise be achievable in this country.

Our analysis of this point has included an assessment of whether the PHAA policy is consistent with human rights standards and norms. There are two grounds on which we have assessed this, broadly classed as omissions and inconsistency. ‘Omissions’ refers to paragraphs where the PHAA has made a claim regarding an individual’s rights without linking it to the relevant international instruments. Such omissions weaken the normative and rhetorical force of the policy statement. ‘Inconsistency’ covers inappropriate references to international instruments i.e. where the instrument does not apply to that situation or where there is some ambiguity.

Practicalities

In its working guidelines the UNDP states that the rights of those who will benefit from the policy should be weighed against the rights of any individuals who may suffer. Unlike large-scale development projects, it is unlikely that any PHAA policy would cause harm as a necessary consequence of its implementation. It is, however, important to remember that all policies require some portion of the health budget for their implementation. Accepting that the health budget is not unlimited and that not all ideal policies can be implemented at once, it may be necessary to assess the recommended policies which emerge from stages B and C for their practicality and general affordability.

As rights in the ICESCR (including the right to health) are to be guaranteed ‘progressively’ and to the ‘maximum of available resources’ a government may not be in breach of its obligations if it can demonstrate it is genuinely unable to meet the budgetary requirements of a particular programme. However the government should then create benchmarks and indicators to demonstrate what it proposes to do in order to meet the obligation at some future point.

D. Periodic Review

The final stage is to ensure that, to the extent that PHAA recommendations are adopted by government, the PHAA regularly review the outcomes to ensure that both the public health and human rights benefits sought are actually realised.

CONCLUSION

Human rights and public health ultimately pursue the same goals. Each discipline has as its goal the improvement of the human condition and each is dependant on the other to achieve that goal. It is crucial that active advocate groups within civil society become conversant with the tools they have at their disposal so as to more effectively apply pressure government to ‘respect, protect and fulfil’ human rights and implement public health policies and programmes consistent with these rights.

Aboriginal and Torres Strait Islander Health Policy

Improving Aboriginal and Torres Strait Islander People's Access to the Food They Need for Health

Indigenous Health: The Continuing Consequences of Colonisation

I. CORE HUMAN RIGHTS CONCERN

The primary human rights concerns regarding indigenous people in Australia are those of self-determination and discrimination. The health status of indigenous Australians may be directly attributable to the failure to respect these rights.

II. RELEVANT DOCUMENTATION

A. International Instruments

International Covenant on Civil and Political Rights (ICCPR) – for example

- Article 26 – Prohibition on Discrimination

International Covenant on Economic, Social and Cultural Rights (ICESCR) – for example:

- Article 2(2) – obligation that all rights be guaranteed without discrimination
- Article 11 – right to an adequate standard of living, including right to adequate food
- Article 12 – right to the enjoyment of highest attainable standard of physical and mental health

International Covenant on the Elimination of Racial Discrimination (CERD) – for example

- Article 5(e)(iv) – guaranteeing right to health without discrimination

Draft UN Declaration on the Rights of Indigenous Peoples – for example

- Article 2 – freedom from discrimination
- Article 3 – right to self-determination, which means the right to freely determine their political status and freely pursue their economic, social and cultural development.
- Article 31 – as part of right to self-determination right to autonomy or self-government relating to, *inter alia*, health.

(Because this is only a Declaration (and a draft one at that) it creates no obligation under international law. Instead it is useful as a guide in interpreting how human rights apply to indigenous people.)

Committee for Economic, Social and Cultural Rights Concluding Observations on Australia 2000

- Paragraph 15:

Despite the efforts and achievements of the State party, the indigenous populations of Australia continue to be at a comparative disadvantage in the enjoyment of economic, social and cultural rights, particularly in the field of employment, housing, health and education.

B. National Instruments

Racial Discrimination Act 1975 – for example

- Section 9(1):

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

III. A RIGHTS-BASED APPROACH TO THE STATEMENTS

A. The Human Rights Basis of Discrimination

Racial discrimination is defined in CERD as:

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The definition expressly incorporates enjoyment of human rights into the meaning of racial discrimination. The result is that to allege discrimination requires an assessment of a group's or individual's enjoyment of their human rights.

The concept of discrimination is particularly important to any advocacy in relation to economic, social and cultural rights like the right to health. This is because whereas economic, social and cultural rights are often indeterminate in scope and lack firm obligations in the international treaties, discrimination is a more developed area of law and which contains immediate obligations under international law.

For example, Article 2(1) of ICESCR sets out the obligations of states viz:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Terms like 'take steps', 'to the maximum of available resources' and 'achieving progressively' make it clear that a State is not required to immediately provide all the rights in ICESCR. Instead it is given scope to develop those rights over time. It is, therefore, very difficult to prove that a country has failed to comply with any of the rights in the Covenant.

Conversely, Article 2(2) of ICESCR sets out States' obligations regarding discrimination:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination* of any

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This is an immediate obligation – if a particular group within a country experiences substantially lower enjoyment of any right, then the State has breached its obligation to guarantee all rights without discrimination.

A prohibition on discrimination also exists in the ICCPR which includes an immediate obligation upon States. This is particularly important because the ICCPR has a complaints mechanism whereby any Australian can make a complaint to the Human Rights Committee claiming that the Australian Government has breached its obligations under the ICCPR. By this means, economic, social and cultural rights, which normally have no international complaints mechanism, can be brought within that of the ICCPR.

The consequence of this is that when the PHAA talks about discrimination in delivery of health care to indigenous people, it is able to say that Australia has breached its international obligations. .

B. Public Health

One facet of public health study is to examine the wider social determinants of good health. The PHAA has performed this in a positive way by looking both at the importance of good food to good health and the continuing consequences of colonisation.

The PHAA has strongly demonstrated the link between lack of access to nutritious food to the associated poor health outcomes. For obvious reasons the position statement on the continuing effects of colonisation, the link between colonial practices and poor health outcomes is drawn less clearly. For example, paragraph 10 of that statement provides:

The causes of the persisting poor state of Indigenous health are complicated but the continuing consequences of the colonial experience constitute an important dynamic in reproducing this poor health status.

C. Use of Statistics

The PHAA uses a broad range of statistics all of which point strongly towards various human rights problems. These statistics may be used to demonstrate breaches of human rights. For example, rather than simply illustrating the difference in health outcomes between indigenous and non-indigenous people, it may be useful to link this to human rights standards and norms.

Paragraph 11 of ‘Aboriginal and Torres Strait Islander Health Policy’ states:

Nationally Aboriginal and Torres Strait Islander health outcomes remain much worse than for other Australians (eg life expectancy at birth is 56 and 63 years for Aboriginal and Torres Strait Islander males and females compared with 77 and 82 years for all Australians, and Aboriginal and Torres Strait Islander infant mortality is 2.6 times the rate for all Australians) whilst the health outcomes of Indigenous peoples in comparable countries (USA, Canada and NZ) are much closer to those of other citizens.

D. The Individual Statements

1. Aboriginal and Torres Strait Islander Health Policy

Shared Responsibility Agreements (SRA)

The PHAA correctly observes that it appears unfair if indigenous communities are required to make SRAs for services which are offered without obligation to non-indigenous people. If this is the case then the SRAs may be discriminatory and a breach of human rights obligations..

The Right to Self Determination

This right is contained in Article 1 of both the ICCPR and the ICESCR but its content remains contested with some scholars maintaining that it does not apply to indigenous populations within a country but only targets states under colonial rule.

The right also appears in the Draft UN Declaration on the Rights of Indigenous Peoples and in that document it comes with a definition of what 'self-determination' means in the context of indigenous peoples. Article 3 of the Draft Declaration states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The content of their right to self-determination is further enunciated in Article 23:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

These two articles can productively inform paragraphs 21 and 22 which state that Aboriginal and Torres Strait Islander people have a right to self-determination and that health programmes will be more effective if Aboriginal and Torres Strait Islander people are involved in their development.

2. Improving Aboriginal and Torres Strait Islander People's Access to the Food They Need for Health

The Right to Food

Article 11 of the ICESCR contains the right to an adequate standard of living including adequate food. The Committee on Economic, Social and Cultural Rights has defined this right in General Comment 12. It explains that the right to food implies, 'The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture.'

The Committee further explains *dietary needs* to mean a 'diet which contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity'. The Committee also states there is a requirement that all people, especially those in disadvantaged groups, have effective access to food.

In paragraph 5 of this statement, the PHAA describes food security as a basic human right and states that according to the Universal Declaration of Human Rights (UDHR) and the ICESCR, the Australian government is obliged to provide all Australians with access to basic food.

As a matter of semantics, like the Draft Declaration on the Rights of Indigenous Peoples, the UDHR is merely a Declaration and creates no obligations under international law. Strictly speaking, therefore, it is incorrect to say that any government is obliged to do anything under the UDHR. It would be more correct to focus on the ICESCR and the Committee's explication of the right to food.

Apart from these suggestions, this is a strong policy statement that recognises and effectively deals with all of the major public health and human rights issues associated with health and access to food.

3. *Indigenous Health: The Continuing Consequences of Colonisation*

With respect to its human rights content, this policy statement is very strong. Again, apart from the the citing of the UDHR (almost all of its rights are contained in the internationally binding ICCPR and ICESCR) there is little that the human rights discourse can add. Most of the major points are covered by the Genocide Convention which is much more strongly worded than any human rights instrument and thus preferable. It is obviously stronger to state that the Stolen Generation constituted genocide than it is to say that it interfered with indigenous peoples' freedom of movement etc.

In their article 'Aboriginal Health: Why is Reconciliation Necessary?'¹ Lisa Jackson and Jeanette Ward argue that the practical implementation of the *terra nullius* doctrine resulted in indigenous people losing their tie to the land. They argue that the close spiritual relationship to the land is at the centre of indigenous health and well-being, making dispossession not merely imperialistic but also destructive to health.

The PHAA comprehensively describes the various consequences of the 'Stolen Generation' and concludes that dispossession has resulted in poor health outcomes. The statement might be strengthened by highlighting why dispossession has caused these poor outcomes, namely the strong ties to the land which resulted in dispossession having graver consequences than it might for other cultural groups.

IV. CONCLUSION

The human rights issues surrounding indigenous people are many . The policy statements are generally strong but can be made stronger by focusing on particular human rights issues like that of discrimination and self determination. Similarly international jurisprudence on the rights of indigenous people and the content of the right to food can beneficially inform the policy statements by directing the PHAA to particularly pertinent shortfalls in indigenous peoples' enjoyment of their human rights.

¹ *MJA* 1999; 170: 437-440

MENTAL HEALTH DISORDERS: EFFECTIVE TREATMENT AND COMMUNITY SUPPORT

I. CORE HUMAN RIGHTS CONCERN

Mental health disorders manifest themselves in many ways which may range from mild to severe. At the most severe an individual may be detained on the grounds that they may cause harm to themselves or others. In addition an individual's status will significantly influence society's responses to mental illness which might range from a police shooting, gaol, involuntary detention, lack of treatment, or access to appropriate treatment.

It is important that whenever decisions are made regarding the treatment of mental health disorders, all care is taken to ensure that any derogations from the human rights instruments are as limited as possible.

II. RELEVANT DOCUMENTATION

A. International Instruments

International Covenant on Civil and Political Rights – for example:

- Article 7 – freedom from medical experimentation without free consent.
- Article 9 – right to liberty

International Covenant on Economic, Social and Cultural Rights – for example:

- Article 6 – right to work
- Article 11 – right to an adequate standard of living
- Article 12 – right to the enjoyment of highest attainable standard of physical and mental health.
- Article 13 – right to education

UN General Assembly resolution 6/119 of 17 December 1991: Principles for the protection of persons with mental illness and the improvement of mental health care. (The Principles)

- right to a hearing before an impartial tribunal before being adjudged lacking legal capacity.
- protected against all exploitation
- right to whatever medical treatment is required to make their lives as close to that of persons without mental illness as possible.
- right to all the rights in the various human rights instruments.
- right to work
- right to be treated in the least restrictive environment possible.

World Health Organisation on mental health

- WHO's two objectives in this context are '(a) closing the gap between what is needed and what is currently available to reduce the burden of mental disorders worldwide, and (b) promoting mental health.'
- The WHO also recognises that across the world many people with mental health disorders suffer substantially reduced enjoyment of their human rights as a result of their disorder.

(For more information, see http://www.who.int/mental_health/en/)

III. A RIGHTS-BASED APPROACH TO THE POLICY STATEMENT

A. General Human Rights

From a human rights perspective a key consideration is that people with mental health disorders be able to exercise as many of the enumerated human rights as possible. A paragraph to this effect could be added into the policy statement:

All persons with a mental health disorder shall be treated with humanity and respect for the inherent dignity of the human person. Every such person therefore, should have the right to exercise all the rights contained in the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and any limitations to those rights should be the absolute minimum required by the situation.

B. General Public Health

Public health is concerned to identify the wider social determinants of health. Thus it is important to identify whether race, gender, socio-economic status contribute to inter alia:

- likelihood of suffering mental health disorder
- diagnosis of mental health disorder
- likelihood of seeking treatment
- likelihood of application of involuntary status, and the
- likelihood of rehabilitation

Thus PHAA could mention that a variety of social factors will affect public mental health and therefore, that clinical treatment must recognise this as a means to eliminating discrimination and that policy should not be solely focused on health care.

Paragraph 7 of the statement mentions many of the factors which affect access to treatment but does not make the broader point that the same factors may have a more general impact on health status.

C. Specific Rights

Many of the rights enunciated in the General Assembly Resolution are contained in the PHAA policy. For example, the right to work (from the Principles and Article 6 ICESCR) is mentioned in paragraph 17 as a statement that the Commonwealth Government should provide ‘pre-vocational programs and job placement support’.

Even in these cases, the policy statement could be strengthened by incorporation of rights based terminology and reference to the international instruments. For example, recognition that job placement support is a required in order to fulfil Australia’s obligations to provide adequate employment has greater rhetorical strength than a statement that Australia *should* provide such support.

Freedom from Exploitation

This freedom is obvious and probably taken for granted. Given the higher risk of exploitation of an individual with a mental health disorder, however, it is important to state this freedom strongly. It is particularly relevant in the context of the ICCPR Article 7 protection against medical experimentation without free consent.

Right to equal lives

The ‘right to whatever medical treatment is required to make their lives as close to that of persons without mental illness as possible’ underlies the PHAA statement – the purpose of the statement is to better the standard of treatment offered and people’s access to it, presumably in order to place them at as little disadvantage as possible.

This right could be used to draw together the many PHAA recommendations, for example:

The PHAA affirms that people with mental health disorders have a right to live lives as close as possible in standard to those without such illnesses. For this reason all treatment should be directed towards enhancing the patients’ self-reliance, independence and social integration.

IV. General Comments on the Policy Statement

The first section is replete with statistics which suggest various problems with human rights (for example discrimination on the basis of health funding) but do not make such problems explicit. Points are made more strongly, from a human rights perspective, if the statistics are strongly tied to the effects they demonstrate on the enjoyment of human rights.

ASYLUM SEEKERS – MANDATORY DETENTION

I. CORE HUMAN RIGHTS CONCERN

There are a number of serious human rights concerns in the context of mandatory detention. The two major ones, though, are the mandatory and prolonged natures of the detention.

II. RELEVANT DOCUMENTS

A. International Instruments

International Covenant on Civil and Political Rights – for example:

- Article 9 – right to liberty, including right to be free from arbitrary arrest or detention.

International Covenant on Economic, Social and Cultural Rights – for example:

- Article 12 – right to the enjoyment of highest attainable standard of physical and mental health.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

- Article 1 – torture includes any act where mental pain or suffering is intentionally inflicted as punishment for an act.
- Article 3 – cannot return someone to a country where they will be tortured

Convention Relating to the Status of Refugees

Convention on the Rights of the Child

- Article 22 – child seeking refugee status should receive ‘appropriate protection’.
- Article 37(b) – ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily.’

A v. Australia 1997 (Decision of the UN Human Rights Committee)

III. A RIGHTS-BASED APPROACH TO THE POLICY STATEMENT

A. Decisions of the UN Human Rights Committee

A v. Australia was the first case in which the Human Rights Committee (HRC) was asked to rule on the legality of Australia’s mandatory detention policy. The HRC along with the Committee Against Torture has since reviewed a number of detention cases and each time has come to a similar conclusion. These decisions have not prompted a change in immigration policy and, as a result, Australia has become a pariah in the international sphere in the context of human rights as they pertain to refugees.

In these complaints the HRC has decided that the mandatory nature of the detention makes it arbitrary. The Committee accepts that where an asylum seeker poses a serious flight risk it may be appropriate to detain the individual while their application is reviewed. However, DIMIA does not make such an evaluation before placing someone in detention – all people are detained irrespective of the risk of flight. On this basis the HRC has decided that Australia’s mandatory detention policy is inconsistent with Australia’s obligations under Article 9 ICCPR.

Therefore where the PHAA asserts that the detention ‘breaches human rights’ it could be more specific and say that the HRC has held the policy to violate Australia’s obligations under the ICCPR.

Further, in paragraph 7 the PHAA also states that the ICCPR prohibits arbitrary detention but does not show that mandatory immigration detention is arbitrary. The human rights decision would clarify this.

B. Convention on the Rights of the Child

The HRC decisions on mandatory detention are applicable to the CRC given the similar wording of the provisions. Like the ICCPR the CRC prohibits arbitrary deprivation of liberty, which mandatory detention is.

The CRC also requires that children in detention be given appropriate care. There may be a basis on which to argue that children in detention do not currently receive adequate care, perhaps by using the data in the HREOC report *A Last Resort*.

C. Health Issues

Given that this statement is ultimately one related to public health, rather than only cite the reports of public health researchers, it would be beneficial to include some of their findings, in a summary fashion, in the policy statement.

For example paragraph six could be expanded to provide more information on the way detention is detrimental to detainees mental health.

D. Semantic Points

‘Queue Jumping’.

In paragraph 4, the PHAA states that seeking asylum is not ‘queue jumping’ although this is not strictly true. In fact the very point of asylum seeking is to jump immigration queues (they need to because they are in danger). The point to be made instead is that queue jumping should not be used pejoratively.

IV. CONCLUSION

Mandatory detention causes serious health problems and is a confirmed violation of international human rights law. As such, the PHAA is right to include a recommendation that the entire policy be abolished. To improve the statement the PHAA can increase the specificity with which it alleges human rights violations and in so doing increase the force of the statement.

HIV/AIDS

I. MAJOR HUMAN RIGHTS CONCERNS

Human rights and HIV/AIDS are related in three main ways according to the OHCHR.

- Certain groups are more vulnerable to contracting the HIV virus because they are unable to realize their civil, political, economic, social and cultural rights.
- Discrimination and stigma
- Strategies to combat the HIV/AIDS epidemic are hampered in an environment where human rights are not respected.

Thus any statement on HIV/AIDS, its impact and the strategies necessary to combat it should take into account all three levels of human rights importance.

II. RELEVANT DOCUMENTATION

A. International Instruments

International Covenant on Civil and Political Rights (ICCPR) – for example

- Article 26 – Prohibition on Discrimination

International Covenant on Economic, Social and Cultural Rights (ICESCR) – for example:

- Article 2(2) – obligation that all rights be guaranteed without discrimination
- Article 12 – right to the enjoyment of highest attainable standard of physical and mental health

International Guidelines on HIV/AIDS and Human Rights (attached)

- sets out 12 guidelines on which countries should base their responses to HIV/AIDS.
- available at <http://www1.umn.edu/humanrts/instreet/t4igha.html>

Introduction to HIV/AIDS and Human Rights

- Provides a summary of the way in which human rights and HIV/AIDS are related.
- available at <http://www.ohchr.org/english/issues/hiv/introhiv.htm>

B. Journal Article

Helen Watchirs, 'A Human Rights Approach to HIV/AIDS: Transforming International Obligations into National Laws' (2002) 22 [Australian Yearbook Of International Law](#) 77

- Explores the connection between human rights and HIV/AIDS and recommends a human rights based approach to combating the virus.
- Also recommends human rights audits based on the International Guidelines to measure the quality of countries' responses to the epidemic.

III. A RIGHTS-BASED APPROACH TO THE STATEMENT

A. Link between human rights and HIV/AIDS

According to Watchirs the link between human rights and HIV/AIDS is threefold:

1. Discrimination increases the impact of the epidemic on people living with HIV/AIDS and those presumed to be infected, as well as their family and associates

2. People are more vulnerable to infection when their economic, social and cultural rights (e.g. rights to health and work) and/or civil and political rights (e.g. right to privacy) are not respected, protected or fulfilled
3. Where civil and political rights (e.g. freedom of expression and association) and economic, social and cultural rights (e.g. information is not available in an accessible language) are not satisfied, it is difficult for civil society to respond effectively to the epidemic.

Therefore government needs to ensure that there is sufficiently strong legislative protection of people with HIV/AIDS in these areas. Of particular importance are clear rules prohibiting discrimination on the basis of HIV/AIDS infection.

B. Social determinants of health

Already contained in the policy statement is the recognition of the relationship between HIV/AIDS infection and the wider social determinants of health. Many human rights commentators argue that 'social determinants of health' is largely synonymous with 'enjoyment of human rights.' For example discrimination on the basis of race, gender or sexual preference, low socio-economic status, poor access to health and other services, poor education and restriction on access to relevant information are all factors encompassed both by public health concerns and human rights ones.

The reason this definitional point is important is because recognition of the tie between poor human rights enjoyment and poor health can strengthen both the human rights regime (by making clear that lack of human rights results in identifiable and concrete consequences) and public health discourse (by co-opting the legal framework and rhetorical strength of human rights). In no other area is the relationship between these two discourses been more emphasised than in the context of HIV/AIDS. It is for civil society to stress this convergence and therefore paragraph seven of the policy statement could be amended to include lack of enjoyment of human rights.

C. The International Guidelines

Although this document does not create binding legal obligations, each of the guidelines provide clear and direct recommendations (as opposed to the norm in international law of vague and aspirational wording), each of which would be a positive addition to the PHAA policy statement. Indeed this international document is essentially an international version of a PHAA-style policy statement.

For example Guideline seven provides:

States should implement and support legal support services that will educate people affected by HIV/AIDS about their rights, provide free legal services to enforce those rights, develop expertise on HIV-related legal issues and utilize means of protection in addition to the courts, such as offices of ministries of justice, ombudsmen, health complaint units and human rights commissions.

There is no comparable statement in the PHAA policy but the guideline provides useful policies which it would be useful to lobby on behalf of.

IV. CONCLUSION

Although this policy has used some international documents (like the Ottawa Health Promotion charter) there is now more specific international guidance on the measures necessary to adequately

protect those infected with HIV/AIDS. The International Guidelines provide particularly useful and concrete recommendations on how best to deal with the epidemic.

Trafficking In Women And Children For Prostitution

I. CORE HUMAN RIGHTS CONCERN

That slavery and forced labour are absolutely prohibited under international law.
That prostitution is an employment choice.

II. RELEVANT DOCUMENTATION

A. International Instruments

International Covenant on Civil and Political Rights (ICCPR) – for example

- Article 8(1) – prohibition on slavery
- Article 8(3) – prohibition on forced labour

Doctrine of *jus cogens* (compelling law)

III. A RIGHTS-BASED APPROACH TO THE STATEMENT

A. Reconsidering Prostitution

This policy statement correctly mirrors the approach of international law to prostitution generally and trafficking more specifically. The PHAA's use of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children is accurate.

International law is itself, however, currently inadequate as a guide to policy in this area. The UN Protocol as reproduced in the policy states:

that all victims of trafficking should be protected, not just those who can prove force, including those who may have consented to trafficking

This statement makes a number of assumptions about prostitution and why people become prostitutes. It is primarily important that prostitution be recognised as an employment choice, perhaps the best of available options, rather than as an awful situation into which otherwise vulnerable women fall. Recognition of prostitutes as members of the workforce and thus entitled to occupational health and safety protection is potentially more transformative of their health outcomes than continued emphasis on their victimisation can be.

If prostitution is recognised as employment, then the claim that those who consent to trafficking are nevertheless victims cannot be sustained. It is entirely possible that a woman in a developing nation, faced with no other desirable options, could choose to come to Australia and work as a prostitute.

The focus should therefore be shifted away from viewing prostitutes as victims to be protected and instead viewing them as workers (be they domestic or migrant) who require employment rights and the empowerment which comes with them. In both cases violence against women is condemned but when prostitution is considered a legitimate choice, the violence is condemned in the same terms as it would be if the woman worked in any other industry.

Of course it remains necessary to ensure that women have truly consented to coming to Australia and working as a prostitute and forced prostitution should be condemned in the strongest terms. The difficulty of this position, however, is that as the law currently stands, a prostitute found in

Australia without the requisite visa is likely to claim that she has been brought against her will rather than admit that she has voluntarily entered Australia illegally. It is therefore important that the approach of the immigration department be moderated (perhaps deportation should not be an automatic response) so as to ensure that the women are able to fully exercise their rights.

B. Slavery

In circumstances, however, when women have been brought into Australia in circumstances akin to slavery, international law has more to say on trafficking than only the UN Protocol. Slavery and slave-related practices, of which trafficking and forced prostitution are two, are prohibited as 'peremptory norms' of international law or *jus cogens* rules.

The importance of *jus cogens* rules is that a State does not have to sign a treaty or agree to anything in order to be bound by these rules. As a result, *jus cogens* status is restricted to the most serious offences in international law and includes, aggression, genocide, crimes against humanity, war crimes, piracy, slavery and torture.

Since slavery is given such strong condemnation in international law, at relevant points the PHAA could substantially strengthen this policy statement by referring to *jus cogens* rules and the accompanying obligation on the Australian government to prosecute anyone who breaches this norm.

IV. CONCLUSION

International law is currently poorly placed to provide guidance regarding sex workers and associated issues like slavery and trafficking. It is essential that we do not perpetuate sex workers' vulnerability by accepting it as an inevitable consequence of their occupation.

Environmental Health Justice

I. CORE HUMAN RIGHTS CONCERN

There is no separate human right for a clean environment, however the quality of the surrounding environment will have a strong and direct impact on the ability of people to enjoy a variety of different human rights.

II. RELEVANT DOCUMENTATION

A. International Instruments

International Covenant on Economic, Social and Cultural Rights (ICESCR) – for example

- Article 11 – right to an adequate standard of living, including rights to adequate food, water and shelter
- Article 12 – right to the enjoyment of highest attainable standard of physical and mental health

International Covenant on Civil and Political Rights (ICCPR) – for example

- Article 6 – right to life

Declaration on the Right to Development

Agenda 21 adopted at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro, Brazil, 3 to 14 June 1992.

- Section I.6 – link between environment and health

III. A RIGHTS-BASED APPROACH TO THE STATEMENT

A. Health, Development and Human rights

One of the core concerns of Agenda 21 is the relationship between development and health. In chapter 6 it identifies that both ‘insufficient development leading to poverty and inappropriate development resulting in over-consumption...can result in severe environmental health problems in both developing and developed nations.’

Although there is no human right to a clean environment, following the adoption of the Declaration on the Right to Development, there is embryonic recognition of a right to a mode of development which is consistent with human rights standards. This means that development should not occur in an environmentally unsustainable way which benefits the few members of industry at the expense of the wider population, particularly groups living near environmentally damaging development projects.

Although the right to development was conceived as applying most relevantly to poor nations who wish to pursue economic development, the rights basis of equality in the fruits of development is relevant to Australia. It is obviously relevant to indigenous people forced from their land to make way for mining projects but it also applies to urban areas where pollution from industry can have a variety of negative health effects.

The Declaration is non-binding but it provides a useful targeting device when thinking about environmental justice by identifying all areas, be they urban, rural or remote, as potentially affected by environmental pollution from industry or exhaust fumes from automotive forms of transport. To

the extent that such pollution affects individuals' health or prevents access to clean water and food, it will be a violation of human rights.

B. Discrimination

As discussed in other policy statement comments, all the rights contained in the ICCPR and ICESCR must be guaranteed without discrimination on the basis of race, social class etc.² This obligation can be used to protect indigenous people whose health status and environmental health conditions remain below those of non-indigenous Australians. It can also be used, however, to seek protection for individuals living in particularly polluted urban areas, if those areas are identified by, for example, lower socioeconomic status.

IV. CONCLUSION

The PHAA's use of Agenda 21 provides a useful starting point for considering the scope of environmental health and justice. Again, although human rights is slightly limited in this area, the PHAA can use the rights to health and adequate living conditions for added rhetorical strength when claiming that a particular development contravenes public health standards.

² see particularly the discussion in relation to Aboriginal and Torres Strait Islander health.