



# Justiciability of Economic, Social and Cultural Rights Prospects and Challenges in Australia

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# Overview of Presentation

## Human Rights Legal Protections in Australia

- International Law
- Australian Constitution
  - National Laws
- State and Territory Laws
- Local Government Laws

## Case Studies in Protection of ESC Rights

- Using Anti-Discrimination Laws
  - Using Administrative Laws
- Using Civil and Political Rights

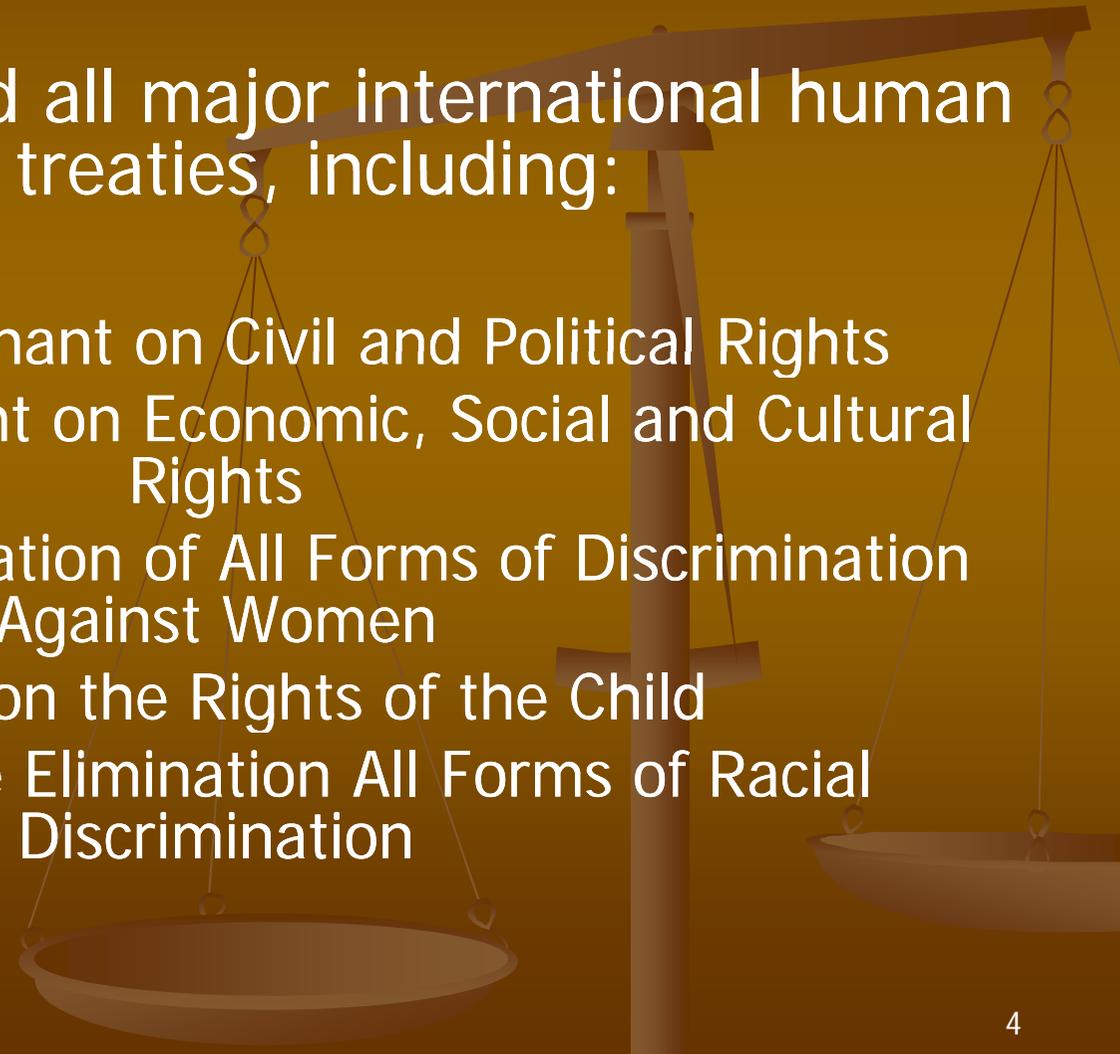
# Human Rights Legal Protections in Australia

## Federal System of Government

### Four layers of laws

- 1 International law
- 2 Australian Constitution (National supreme law)
- 3 National Laws (National ordinary laws)
- 4 State and Territory Laws (Eight jurisdictions)
- 5 Local Government laws (many)

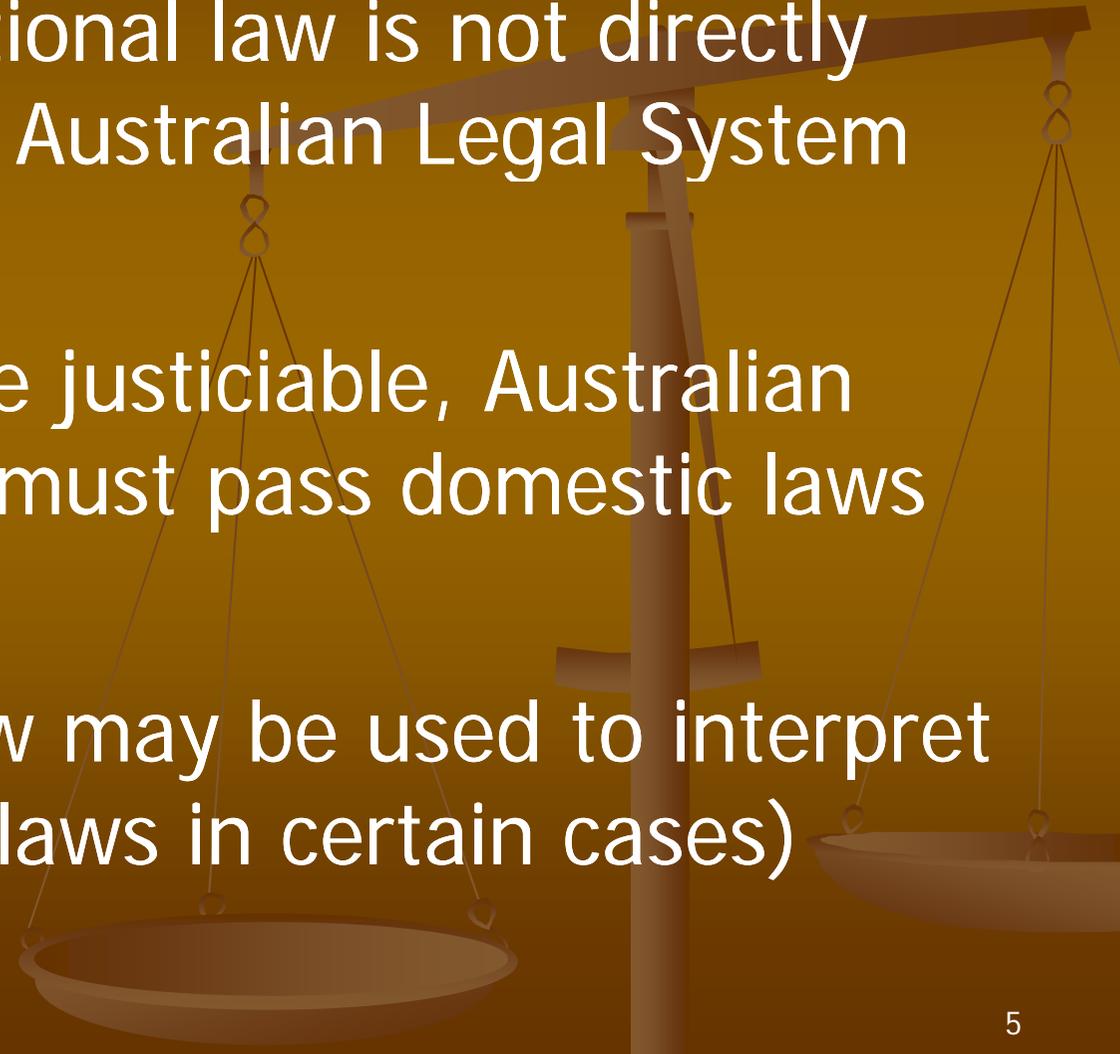
# International Law



Australia has ratified all major international human rights treaties, including:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Convention on Elimination of All Forms of Discrimination Against Women
- Convention on the Rights of the Child
- Convention on the Elimination All Forms of Racial Discrimination

# International Law



BUT International law is not directly justiciable in Australian Legal System

In order to be justiciable, Australian Government must pass domestic laws

(International law may be used to interpret domestic laws in certain cases)

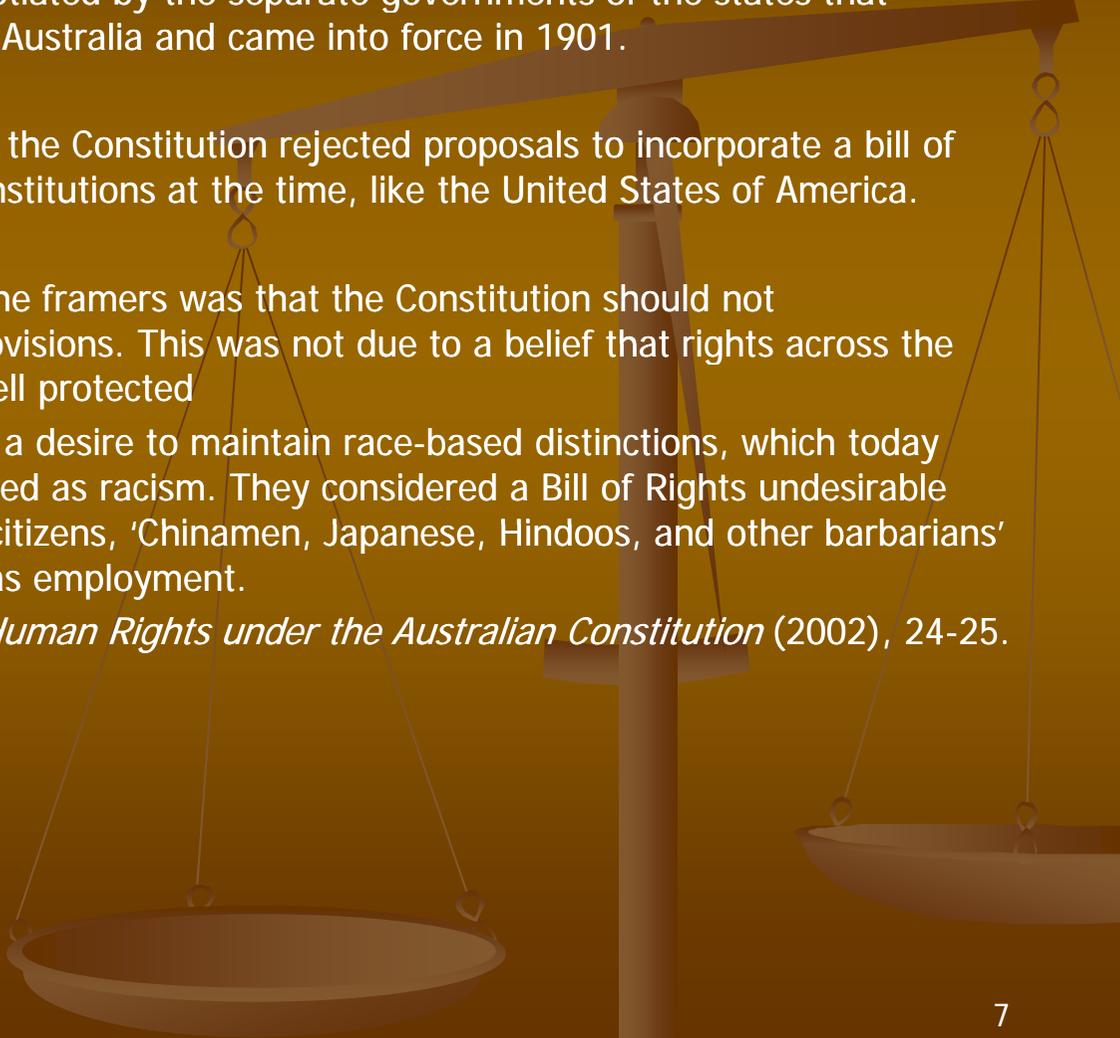
# The Australian Constitution

National 'Entrenched' Law that overrides all other laws

No human rights laws or 'bill of rights' protecting either civil and political or ESC rights (with a few exceptions; voting rights; property rights)

Why is this the case?

# The Australian Constitution



The Australian Constitution was negotiated by the separate governments of the states that existed at the time of 'Federation' in Australia and came into force in 1901.

At the time, the 'founding fathers' of the Constitution rejected proposals to incorporate a bill of rights such as those contained in constitutions at the time, like the United States of America.

The prevailing sentiment of the framers was that the Constitution should not incorporate right-oriented provisions. This was not due to a belief that rights across the community were generally well protected

...the framers were driven by a desire to maintain race-based distinctions, which today would undoubtedly be regarded as racism. They considered a Bill of Rights undesirable because it might protect, as citizens, 'Chinamen, Japanese, Hindoos, and other barbarians' in the context of such areas as employment.

George Williams, *Human Rights under the Australian Constitution* (2002), 24-25.

# Australian Constitution

Since 1901, two attempts to change  
Australian Constitution to incorporate  
human rights

1942, 1988

Very difficult to change

# National Laws

No general justiciable human rights law

## Justiciable

Racial Discrimination Act 1975  
Sex Discrimination Act 1984  
Disability Discrimination Act 1992  
Age Discrimination Act 2004

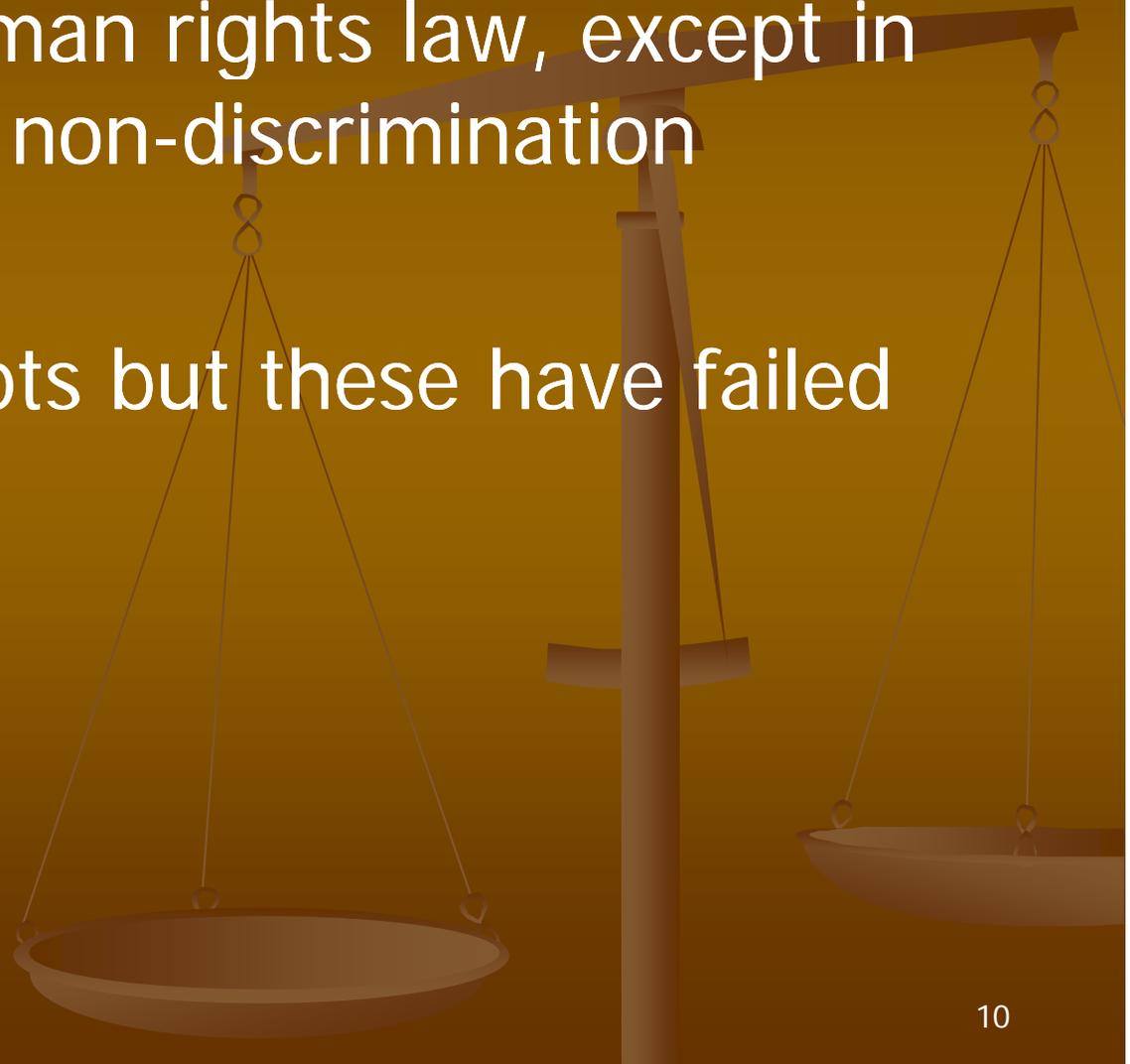
## Non-Justiciable

- Human Rights and Equal Opportunity Commission Act 1986
- Human Rights Commissioner (ICCPR, and some Declarations re Commonwealth action)
  - Aboriginal and Torres Strait Islander Social Justice Commissioner (all human rights instruments including ICESCR)

# National laws

No national human rights law, except in  
area of non-discrimination

Several attempts but these have failed



# State and Territory Laws



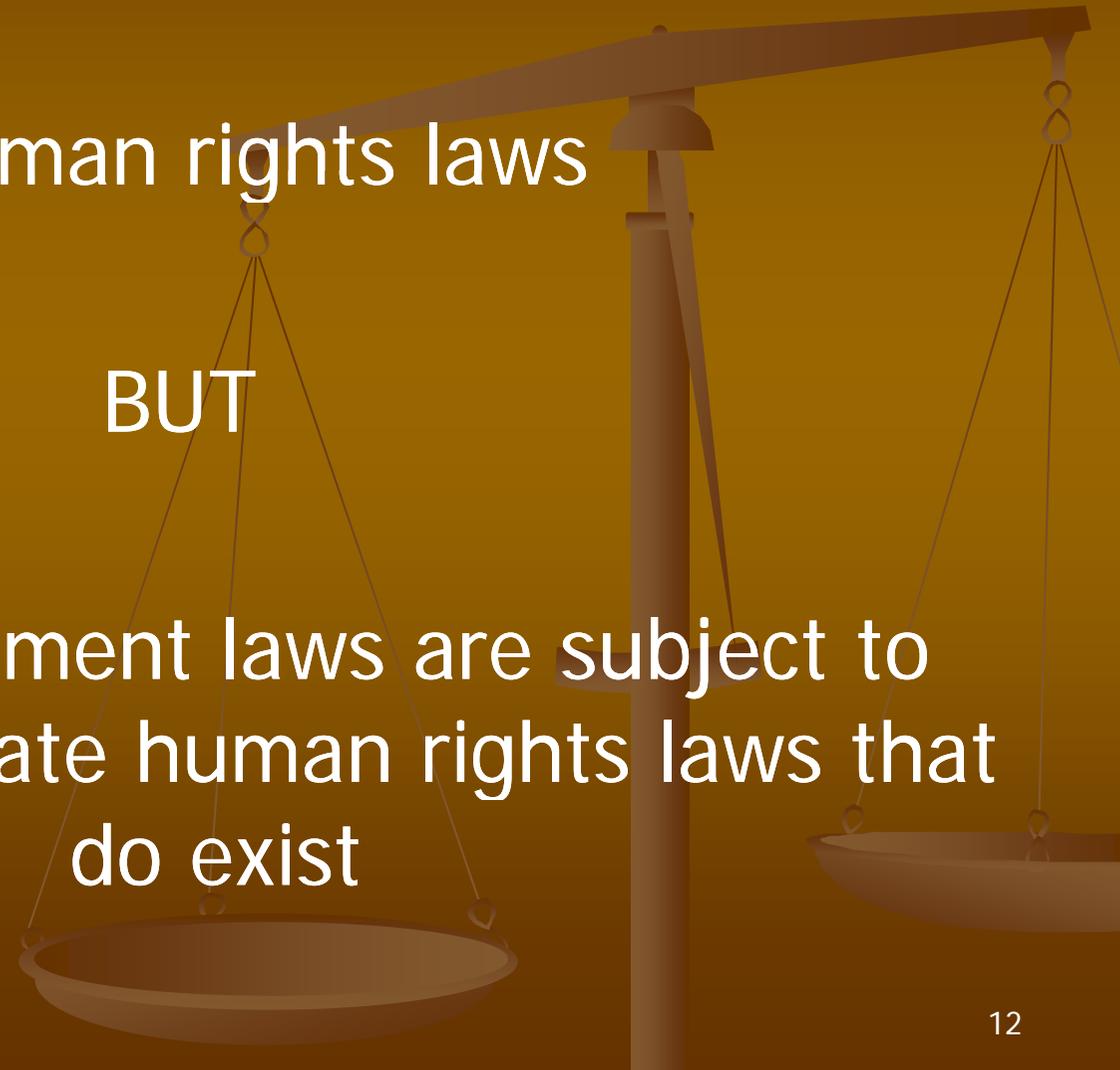
Anti-discrimination laws exist in all eight states and territories

Two jurisdictions recently passed human rights laws, but do not include ESC rights

Human Rights Act 2004 (Australian Capital Territory)

Charter of Rights and Responsibilities 2006 (Victoria)

# Local Government Laws



No human rights laws

BUT

All local government laws are subject to national and state human rights laws that do exist

# Summary so far...

Good legal protection of *discrimination* in the enjoyment of some human rights including some ESC rights (e.g. education and housing services)

No direct human rights legal protection in national, state or local laws, except...

Two states -ACT (2004) and Victoria (2006) – now incorporate civil and political rights but not ESC rights

Australia is the only democratic country in the world that does not have a national human rights law or bill of rights

# Case Studies in Legal Protection of ESC Rights

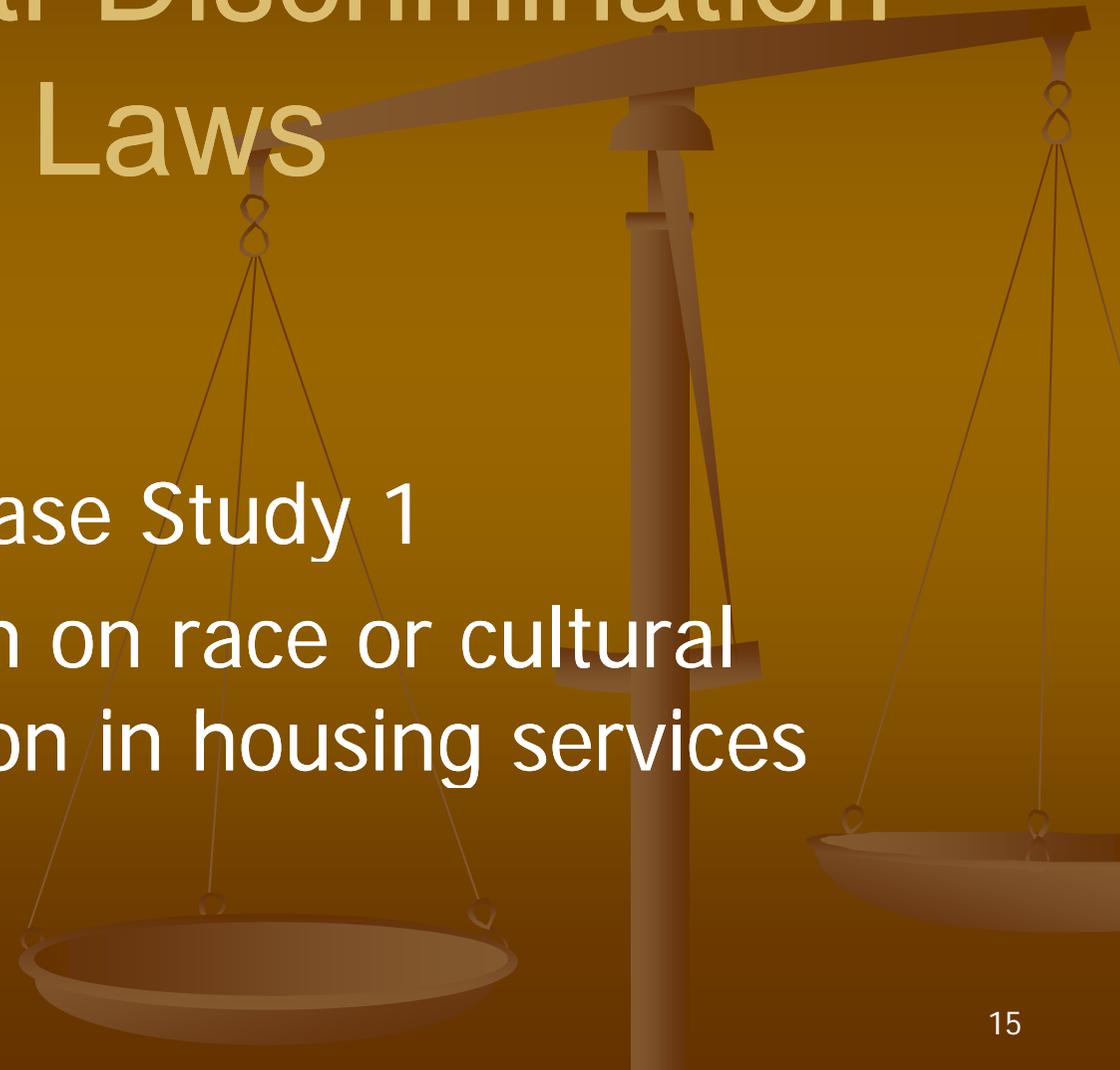


Using Anti-Discrimination Laws

Using Administrative Laws

Using Civil and Political Rights Laws in ACT and Victoria

# Using Anti-Discrimination Laws



## Case Study 1

Prohibition on race or cultural  
discrimination in housing services

# Using Anti-Discrimination Laws

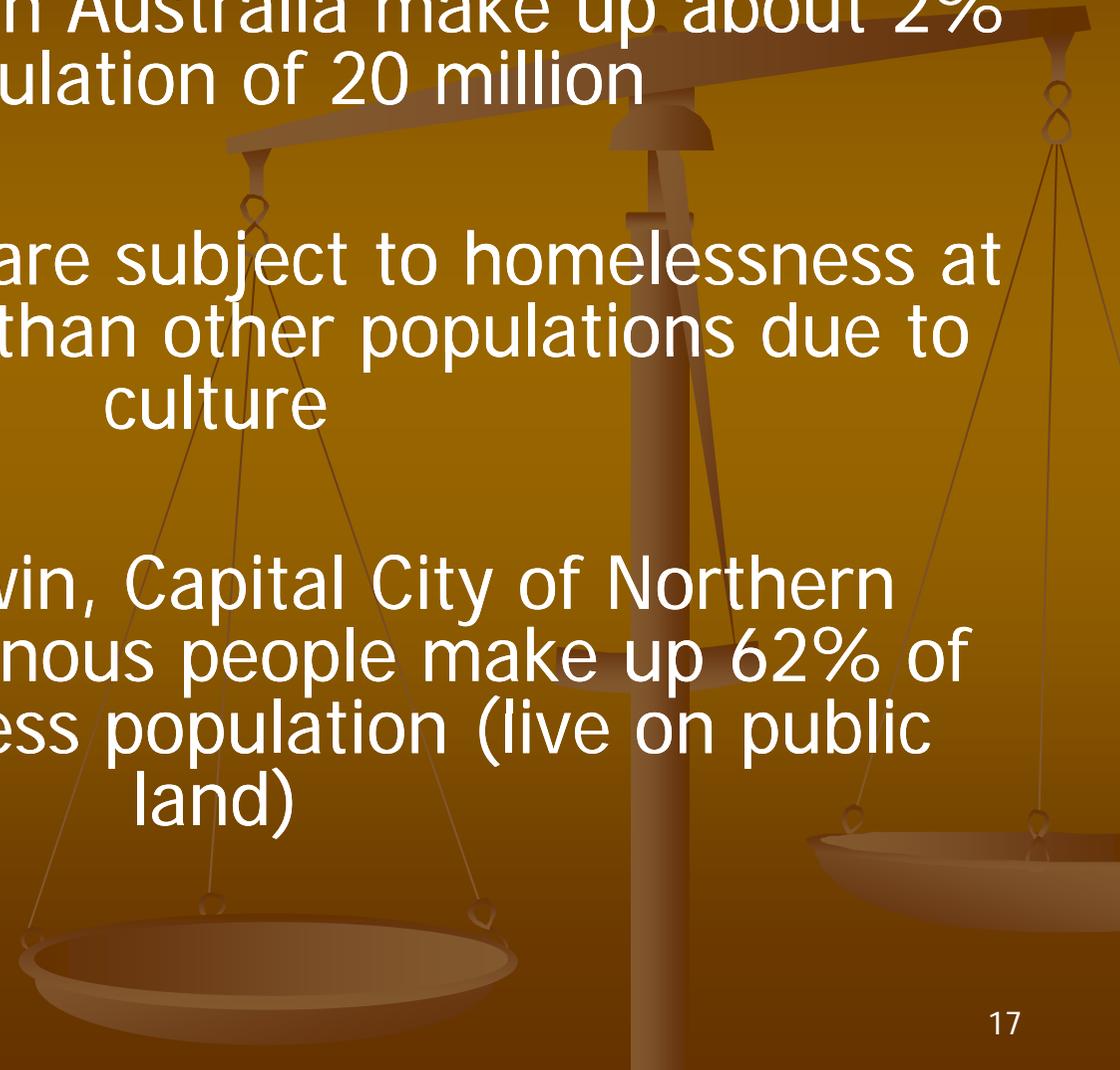
## The international Standard

ICESCR prohibits discrimination on grounds of race and culture in the enjoyment of ESC Rights including housing

Art 2(2) ...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.

Art 11(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

# Using Anti-Discrimination Laws



Indigenous people in Australia make up about 2% of population of 20 million

Indigenous people are subject to homelessness at rates *far higher* than other populations due to culture

For e.g., in Darwin, Capital City of Northern Territory, Indigenous people make up 62% of primary homeless population (live on public land)

# Balaiya v Northern Territory Government

(2002) Northern Territory Anti-Discrimination Commission,  
Settled

Indigenous elder, Johnny Balaiya, had camped in bushes of Darwin for many years with large family grouping, but faced constant forced eviction.

He applied for public housing but was offered single bedroom small flat. He refused as culturally inappropriate and knew that he would overcrowd the flat and be evicted, if he moved to live there.

Mr Balaiya sued the Northern Territory Government under the *Anti-Discrimination Act 1996 (Northern Territory)* for failing to provide culturally appropriate housing on an equal basis with non-Indigenous people and for failing to accommodate his cultural needs.

The Northern Territory Government settled the claim.

# Using Administrative Laws

## Case Study 2

Administrative Decision to Evict Families  
from Public Housing into Homelessness

# Using Administrative Laws

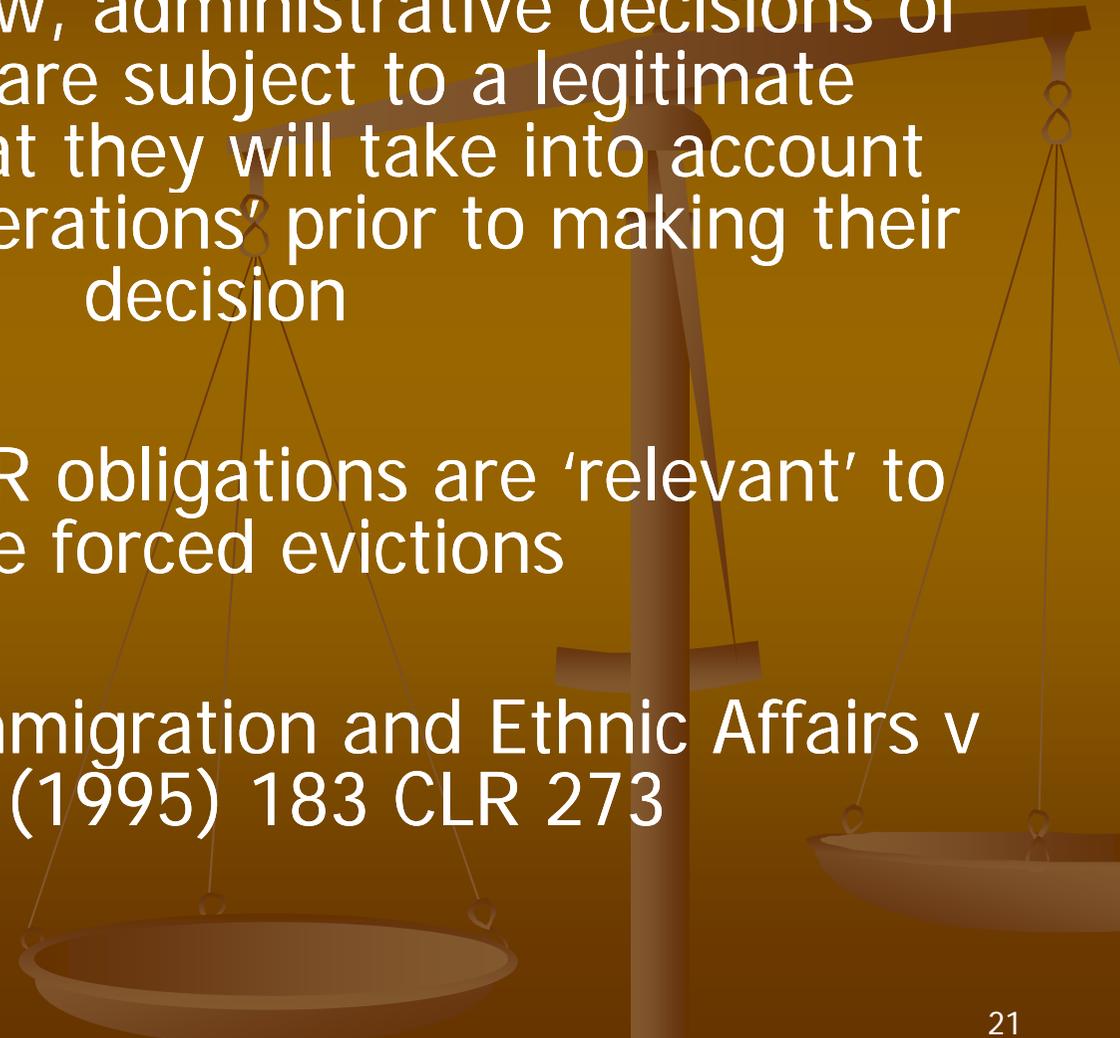
## The international Standard

ICESCR prohibits forced evictions without procedural fairness nor into homelessness

Art 11(1) The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

General Comment No 7 'forced evictions are prima facie inconsistent with the Covenant...where justified...must be in accordance with principles of reasonableness and proportionality...Appropriate procedural protection and due process are essential aspects...and should not result in individuals being rendered homeless or vulnerable to the violation of other human rights...

# Using Administrative Laws



Under domestic law, administrative decisions of government are subject to a legitimate expectation that they will take into account 'relevant considerations' prior to making their decision

Argue that ICESCR obligations are 'relevant' to state forced evictions

See Minister for Immigration and Ethnic Affairs v Teoh ( (1995) 183 CLR 273

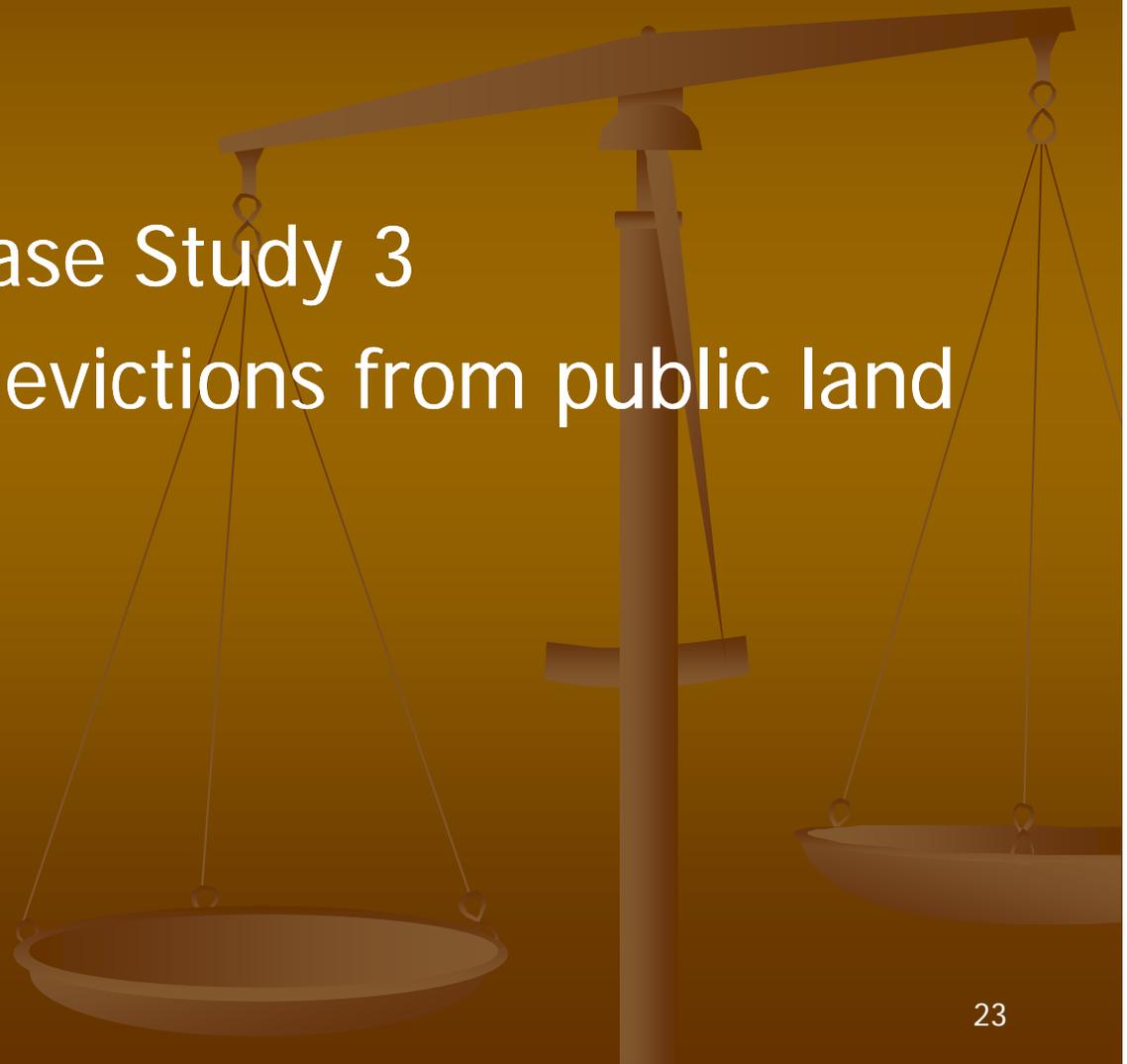
# Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

[R]atification of a convention is a positive statement by the executive government of this country to the world and to the Australian peoples that the executive government and its agencies will act in accordance with the convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention [on the Rights of the Child] and treat the best interests of the child as a 'primary consideration.'

# Using Civil and Political Rights Laws

## Case Study 3

Stopping forced evictions from public land



# Using Civil and Political Rights Laws

Many places in Australia have laws that ban essential human activity in public space. These laws criminalise and are used to forcibly evict homeless people.

For e.g., in Darwin, Northern Territory, law bans sleeping in public between sunset and sunrise.

Darwin has the highest rate of homelessness in Australian capital cities.

# Using Civil and Political Rights Laws

Argue that enforcement of anti-sleeping law used against homeless people violates freedom from cruel, inhuman and degrading treatment or punishment

*Jones v City of Los Angeles* (Unreported, US Court of Appeal, 14 April 2006)

# *Jones v City of Los Angeles*

(Unreported, US Court of Appeal, 14 April 2006)

Skid Row in Los Angeles, California, had law banning sleeping on the streets. Highest rates of homelessness in USA (11-12000 people).

Court held that enforcement of anti-sleeping laws violated Eighth Amendment of US Constitution (cruel and unusual punishment) and banned the police from enforcing the law at night time until housing was made available.

# Conclusion

Without direct ESC rights laws, need to be creative....

By bringing cases of injustice before the Court, finding the 'hook' in other laws, continue to pressure the courts, (and the government) to find innovative ways to protect human rights

# Terima Kasih

