

## CHAPTER 3

### INTERNATIONAL STANDARDS

#### Equality and Discrimination under CERD

3.1 Article 1(1) of the CERD defines racial discrimination 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.<sup>1</sup>

3.2 Article 1(4) exempts special measures from the definition of discrimination by providing that:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they have been taken have been achieved.

3.3 The definition of discrimination in the CERD was adopted in the Commonwealth *Racial Discrimination Act 1975* which, as noted earlier, was passed in order to implement Australia's obligations under the CERD. Section 9 of that Act prohibited discrimination defined in similar terms to the definition contained in Article 1(1) of the CERD, while s.8 of the Act incorporated the special measures exception contained in Article 1(4).

3.4 In the case of *Gerhardy v Brown*<sup>2</sup> the High Court of Australia considered whether the term 'discrimination' in the CERD and in the Racial Discrimination Act, has the same meaning as it does ordinarily at international law. The High Court decided that the term discrimination in Article 1(1) of the CERD prohibited any distinction, unless the distinction was a special measure within the meaning of Article 1(4).

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1 Human rights in this article of the CERD Convention are understood to include, but not be limited to, all of the rights in the Universal Declaration of Human Rights. However, also note that some of the rights contained in Article 5 of the CERD are not in the Universal Declaration of Human Rights: D.J. Harris, *Cases and Materials on International Law*, London, 1991, p 675.

2 *Gerhardy v Brown* (1985) 159 CLR 70.

3.5 In reaching its decision the High Court specifically rejected the arguments of the Commonwealth Government in that case, that legitimate distinctions aimed at reaching substantive equality were outside the realm of prohibited discrimination.<sup>3</sup>

3.6 The adoption of this particular definition of discrimination in the CERD, and consequently in the Racial Discrimination Act, may have reflected the initial meaning of equality and discrimination under customary international law. The Attorney-General's submission to this inquiry states that:

At the time the CERD Convention was drafted, equality was conceptualised as sameness or identical treatment. Under this approach any distinctions in treatment are considered discriminatory...

The only exception to identical treatment provided under this scheme was for temporary positive discrimination taken in recognition of underlying disadvantage and in order to hasten equal enjoyment of the same rights as other groups. Such affirmative action the Convention terms 'special measures'.<sup>4</sup>

3.7 However, equality as the term is now understood under customary international law, incorporates the idea that differences in treatment are permissible, in order to achieve real or substantive equality. Thus, the term 'discrimination' is now understood in customary international law as meaning only unjustified or invidious distinctions.<sup>5</sup>

3.8 The meaning of discrimination and equality in customary international law influences the interpretation of these terms in the CERD. In its submission the Attorney-General's Department states that:

The Convention is now seen by many as incorporating principles that allow differences in treatment provided they are permissible in terms of substantive equality. The right to equal treatment of people of different race and the prohibition on discrimination on the basis of race is also a part of customary international law and other regional treaties. These sources of international law assist in interpreting what is meant by enjoyment of different rights 'on an equal footing'.<sup>6</sup>

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3 State of South Australia, Submission 15, p 3; Attorney-General's Department, Submission 24, Part I, p 17.

4 Attorney-General's Department, Submission 24, Part I, p 17.

5 State of South Australia, Submission 15, p 3; Attorney-General's Department, Submission 24, Part I, p 18. See also Tanaka and McKean 1970, p 177.

6 Attorney-General's Department, Submission 24, Part I, p 18. See also the view the expressed by the South Australian Government that the CERD incorporates only the formal equality standard and to this extent 'CERD can be seen as being "out of date"', Submission 15, pp 3-4.

3.9 This second approach to the principle of equality can be considered the substantive equality approach, in distinction from the formal equality approach endorsed by the High Court in *Gerhardy v Brown*.

3.10 In order to be permissible as a substantive equality measure, a distinction in the treatment of groups or individuals must meet two requirements:

First, the differences used to justify separate treatment must be genuine and relevant. Artificial and irrelevant differences between groups may not be used as justifications for separate treatment.

Second, where situations are different but analogous, any separate treatment must be appropriately adapted to the extent of the underlying difference. The State must be able to show that the separate treatment is not arbitrary, and can be reasonably and objectively justified by reference to the distinctive characteristics of the group or individual.<sup>7</sup>

3.11 The consent of affected groups to measures providing substantive equality is not a prerequisite to the adoption or amendment of such measures.<sup>8</sup> Rather, ‘it would be for the Parliament to decide whether substantive equality was to be provided and, if it was, what that encompassed’.<sup>9</sup>

3.12 In addition, international law allows States a ‘margin of appreciation’ – or a degree of latitude – in the implementation of international obligations. This margin of appreciation is accorded in recognition that national institutions are best placed to assess the need for substantive equality measures and to find a balance between a range of competing interests.<sup>10</sup> This issue is significant, and is discussed in relation to a range of matters considered in Chapter 6.

3.13 The submission from the Attorney-General’s Department points out that:

Novel areas of law attract a wider margin of appreciation, such that a greater range of treatment will be regarded as meeting the treaty obligations.<sup>11</sup>

and that:

A further consideration in terms of attracting a wider margin of appreciation is whether the overall effect of a scheme of law can be said to be reasonable.<sup>12</sup>

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7 Attorney-General’s Department, Submission 24, Part I, p 18.

8 Attorney-General’s Department, Submission 24, Part I, p 18.

9 Mr Robert Orr giving evidence on behalf of the Commonwealth Government to the Parliamentary Joint Committee, Inquiry into the Native Title Amendment Bill 1996, *Official Hansard Report*, 27 November 1996, p 3600.

10 Dr Sarah Pritchard, *Official Committee Hansard*, 22 February 2000, p 71. Attorney-General’s Department, Submission 24, Part I, pp 18-19; note also the sources cited at footnote 78 on p 19.

11 Attorney-General’s Department, Submission 24, Part I, p 19; note also the sources cited at footnote 79 on that page.

3.14 The substantive equality approach does not preclude special measures. According to the Attorney-General's Department:

A measure will be characterised as a special measure when it is provided over and above what is required to fulfil substantive equality. Similar to the approach under formal equality, a special measure should be temporary, positive discrimination taken in response to the underlying disadvantage of a particular racial group and to hasten the full enjoyment of its rights.<sup>13</sup>

3.15 Moreover, special measures, either in a formal or substantive equality sense, do not require the consent of the beneficiaries of those measures in order to be characterised as such under the CERD. The submission of the South Australian Government pointed out that the 'CERD does not itself require informed consent before a matter can be considered as a special measure'.<sup>14</sup>

### *Summary*

3.16 In summary, the following points can be noted about formal equality:

- Formal equality requires equal treatment so that any distinction is considered discriminatory.
- It allows an exception to the requirement of formal equality in the form of discriminatory special measures which are temporary and aimed at addressing the disadvantage suffered by the individual or the group.
- The consent of the beneficiaries of such measures is not a prerequisite to the adoption of special measures.

3.17 The following can be noted in summary about the concept of substantive equality:

- Substantive equality involves different treatment where this is required to address relevant differences between groups and individuals.
- To be justified as a substantive equality measure, the different treatment must be based on relevant or justifiable distinctions, and must be appropriately adapted to the distinctive characteristics of the group or individual.
- The consent of affected groups to measures providing substantive equality is not a prerequisite to the adoption or amendment of such measures.
- States have a 'margin of appreciation' in determining the implementation of international standards, as they are best placed to determine the measures that would be appropriate, and to balance competing interests.

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12 Attorney-General's Department, Submission 24, Part I, p 19; note also the sources cited at footnote 80 on that page.

13 Attorney-General's Department, Submission 24, Part I, p 19.

14 State of South Australia, Submission 15, p 7; note also footnote 23 on the problems of obtaining the 'informed consent' of Australia's Indigenous community to special measures enacted on their behalf.

- In addition to substantive equality measures, temporary special measures are also possible.
- The consent of the beneficiaries of special measures is not a prerequisite to their adoption.

### **The Obligations of State Parties under the CERD**

3.18 Articles 2 to 7 of the CERD set out the obligations of State parties. The obligations arising under Articles 2 and 5 are those most relevant to this inquiry.

3.19 Under Article 2(1) State parties to the Convention undertake to condemn racial discrimination, and to pursue a policy of eliminating racial discrimination in all of its forms. This provision imposes obligations on State parties which include:

Not to engage in acts or practices of racial discrimination against individuals, groups or institutions and to ensure all local and national public authorities and institutions meet this obligation.

Not to sponsor, defend or support racial discrimination by any persons or organisations.

To take effective measures to review government policies (national and local) and to amend, rescind or nullify any laws or regulations which have the effect of creating or perpetuating racial discrimination.

To prohibit racial discrimination by all persons, group or organisation and to bring it to an end by all appropriate means (including legislation if required).<sup>15</sup>

3.20 Article 2(2) requires State parties to take special and concrete measures where the situation warrants, to ensure the development and protection of certain racial groups for the purposes of guaranteeing them ‘the full and equal enjoyment of human rights and fundamental freedoms’.<sup>16</sup>

3.21 In compliance with the obligations set out in Article 2, Article 5 of the CERD commits the State parties to eliminating and prohibiting all forms of racial discrimination, and guaranteeing equality before the law, ‘without distinction as to race, colour, national or ethnic origin’. Article 5(1) provides a list of rights to which this principle applies, including notably for the purposes of this inquiry:

- political rights including the right to take part in, and stand for, elections, and to take part in government and in the conduct of public affairs;
- the right to own property; and
- the right to inherit.

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15 Article 2(1), Convention on the Elimination of All Forms of Racial Discrimination.

16 Article 2(2), Convention on the Elimination of All Forms of Racial Discrimination.

3.22 The meaning ascribed to the terms 'equality' and 'discrimination' determine the nature of the obligations imposed by Articles 2 and 5 of the CERD.