

## THE ACT HUMAN RIGHTS BILL 2003: A BRIEF SURVEY

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The ACT Human Rights Bill 2003 (the Bill) was presented to the ACT Legislative Assembly in late 2003. The Bill is expected to pass the Assembly in early March 2004.<sup>1</sup> Much has been made of the ACT being the first jurisdiction in Australia to introduce what is often described as a Bill of Rights<sup>2</sup> – as if being new is in itself a virtue.<sup>3</sup> Obviously, at this early stage we cannot be certain what, if any, impact the Bill, if passed, will have on the protection of human rights, as well as on broader issues such as democratic governance and accountability. Nevertheless, this paper offers some preliminary suggestions. It examines the Bill as presented to the Assembly, and considers whether it actually meets the objectives set by its proponents. The paper suggests that the Bill is a backward step in terms of rights protection, as well as in terms of maintaining respect for the Rule of Law, in the ACT.

### **The ACT Human Rights Bill 2003: An overview**

The Bill runs to 44 clauses covering a wide range of human rights issues. One could write a book on most, if not all, of the individual clauses of the Bill (and this is before anyone has even had an opportunity to run a case before the Courts on the Bill).

Clause 5 of the Bill defines 'human rights' as those 'civil and political rights in part 3' of the Bill. The 'human rights' in Part 3 include (to use the clumsy and imprecise shorthand language of the Bill) the right to life (clause 9), protection against torture (clause 10), privacy (clause 12), rights relating to voting and to appointment to the ACT public service (clause 17), the right to a fair trial (clause 21), and certain rights in relation to criminal proceedings (clause 22). In addition to these specific 'human rights', clause 7 provides that the Act is not exhaustive of an individual's 'rights'. Thus, the Bill leaves the way open for other rights that only a reader with keen imagination and intuition would be able to identify but about which any two readers are likely to disagree.

Clause 28 of the Bill provides that 'human rights' may be limited by laws that 'can be demonstrably justified in a free and democratic society.'

The remedy for a breach of a human right is to be found in clause 32 of the Bill. If there is a proceeding before the ACT Supreme Court, and an issue arises whether a Territory law is inconsistent with a human right, the Court may, if it finds that there is an inconsistency between the Territory law and the human right, issue a Declaration of Incompatibility. Significantly, the Bill itself cannot be said to offer any substantive protection for the human rights it identifies because a Declaration of Incompatibility does not affect the validity or operation of the law that it impugns.

The Bill also provides for an ACT Human Rights Commissioner (clause 40). The functions of the Commissioner include reviewing the effect of Territory laws, including the common law,

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on human rights, and providing education about human rights (clause 41). The Commissioner may also intervene, with leave of the Court, in a proceeding involving the Act (clause 36).

### **The Bill's definition of human rights and other rights**

As noted above the Bill defines 'human rights' as the 'civil and political rights in part 3.' However, by operation of clause 7, an individual's 'rights' are not limited to those 'human rights' as set out in Part 3 of the Bill. Clause 7 is important and has the potential to give rise to considerable litigation. It reads:

This Act is not exhaustive of the rights an individual may have under domestic or international law.

The rights recognised by clause 7, an individual's 'rights', seem to be in addition to, and different from an individual's 'human rights' as defined by clause 5 and as set out in Part 3 of the Bill.

For example, the list of civil and political rights in Part 3 does not include a wide range of what many in the community might regard as rights. The right to own and deal with private property is not listed in Part 3. Arguably, this right falls within clause 7. Further, social and economic rights included in the Consultative Committee's<sup>4</sup> draft Bill, but not included in the Bill as introduced into the Assembly, such as the right to education, the right to the enjoyment of just and favourable conditions of work, and the right to be free from hunger, to name just three such rights, would also seem to fall within clause 7.

Clause 7 is a cause of significant concern. It leaves to the Court to determine, on an ad hoc basis, what rights, in addition to those 'human rights' set out in Part 3, individuals in the ACT possess. It is difficult to see how this could not give rise to a significant degree of litigation and consequent diversion of valuable court time, as individuals first seek to test which rights the Court is prepared to acknowledge, and further, what remedy the Court might be persuaded to give for breach of those rights. This is to be regretted. If the Assembly is intent on the passage of a Human Rights Act it ought to have at the least specified what rights an individual may possess. Also, by leaving it to the Court to find an individual's rights, the Bill fails to meet one of its key functions as identified by its proponents – that is, overcoming what is said to be the piecemeal and partial recognition of rights in the common law and in various statutes.<sup>5</sup>

More importantly, perhaps, it is doubtful whether a court is best placed to resolve the policy issues raised in respect of broad social and economic rights. As Lord Slynn has said in respect of the 'call in' procedures in relation to planning applications in the United Kingdom:

The adoption of planning policy and its application to particular facts is quite different from the judicial function. It is for elected Members of Parliament and ministers to decide what are the objectives of planning policy, objectives which may be of national, environmental, social or political significance and for those objectives to be set out in legislation, primary and secondary, in ministerial directives and in planning policy guidelines.<sup>6</sup>

The extent to which clause 7 is used by the Courts to develop and expand rights depends entirely on whether the Court adopts an expansive or a conservative approach to its construction. Because this is beneficial legislation, it would be reasonable to expect the Court to adopt the former approach.

There is a worrying complication that the individual 'rights' recognised by clause 7 seem to be treated differently by the Bill to the 'human rights' defined by clause 5.

This is important, given clause 28 of the Bill which provides:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

Clause 28 clearly applies to 'human rights', that is, Part 3 rights. But it appears that clause 28 does not apply to those individual 'rights' which fall within the terms of clause 7. So, for example, if the right to education is acknowledged by the Court as a clause 7 right it would appear to be absolute, and not subject to limitation.

It would also seem that the declaration of incompatibility procedure as set out in clause 32 of the Bill would have no application to an individual's rights under clause 7. This is because clause 32, like clause 28, specifically refers only to 'human rights', and not to clause 7 rights.

But does this mean that those who say that their clause 7 rights have been violated are left without a remedy? Again, this will depend on the approach of the Court. However, it is not difficult to imagine a scenario, for example, whereby an individual, Michael, an ACT public servant, claims that his right to the enjoyment of just and favourable conditions of work has been infringed. If Michael persuades the Court that he has this right, and that it has been breached by his employer, it seems to me that Michael should also be able to persuade the Court that he has a remedy by way of declaration, injunction or compensation relying on, amongst other things, Article 2 of the International Covenant on Civil and Political Rights (ICCPR).<sup>7</sup> Again, whether this occurs depends entirely on whether the Court adopts an expansive or a conservative approach to the construction of clause 7.

### **Part 3: Civil and Political Rights**

Part 3 includes a selective list of civil and political rights. It is not by any means a comprehensive list of such rights. For example, and as noted above, Part 3 does not recognise the right to own and deal with private property. Nor, as is discussed further below, is there recognition of the right to a jury trial, even in criminal matters.

Clause 9 (1) provides in part that 'everyone has the right to life.' Clause 9(2), however, limits the application of clause 9(1) to 'a person from the time of birth.' Clearly, the drafters of the Bill did not wish to re-ignite the abortion debate by allowing anti-abortionists to run cases in the Court relying on clause 9(1). Whether the drafters have succeeded, though, is another matter, particularly if clause 9 is read with clause 10(2). Clause 10(2) provides:

No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

Clause 10(2), unlike, clause 9, is not expressed to apply only to 'a person from the time of birth.' If passed in its current form, it could be argued that the Assembly intended clause 10(2) to apply to a person before birth because clause 10 does not include the exclusion that appears in clause 9. Does this mean that a human foetus cannot be subject to medical treatment without his or her free consent?

Clause 12 (a) provides that everyone has the right 'not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.' Clause 12(a), while superficially attractive, does not provide simply for a right to have one's privacy, family life, home and correspondence respected.<sup>8</sup> Rather, the clause confirms the right of Government to legislate to interfere with privacy, family, home or correspondence. In other words, providing the ACT Assembly follows the procedures for passing a valid law, it is difficult to see how the very narrow right conferred by clause 12(a) could be breached.

Clause 17(c) provides in part that every 'citizen' has the right to 'have access, on general terms of equality, for appointment to the public service and public office.' Section 69(2)(b) of

the *Public Sector Management Act 1994* (ACT) provides that a person shall not be appointed to the ACT public service unless he or she is an Australian citizen or a permanent resident of Australia. Does clause 17(c) of the Bill allow the Assembly to narrow the qualifications for appointment to the ACT public service to Australian citizens only (in other words, to exclude permanent residents of Australia)?

While 'citizen' is not defined in the Bill, it can only be assumed that the term refers to an Australian citizen. But this in itself raises further problems. Clause 17(b), for example, provides that every citizen has the right, and is to have the opportunity, to vote and be elected at periodic elections. Does this right extend to Australian citizens resident in Queensland? Similarly, most children who live in the ACT are Australian citizens but is the Bill suggesting that the Electoral Act will infringe their human rights by preventing them from voting in Assembly elections before they are 18 years old?

The right of a person awaiting trial not to be detained in custody as a general rule is set out in clause 18(5). Clause 18(5) is likely to be the subject of early consideration by the Court given the amendments proposed to the *Bail Act 1992* (ACT) by the Bail Amendment Bill 2003 presented to the Assembly on 11 December 2003. If passed, the amendments would, amongst other things, provide for a presumption against the granting of bail in certain circumstances, including where the accused is charged with murder.

Clause 21 provides for a right to a fair trial, and clause 22 sets out certain additional rights in relation to criminal proceedings. However, the Bill does not expressly provide for a right to trial by jury: a right to a fair trial does not necessarily equate to a jury trial. This omission is somewhat surprising, and indeed odd, particularly given that the Chair of the Consultative Committee, Professor Charlesworth, in arguing for the need for the ACT to have a Bill of Rights, had specifically referred to the limited protection offered by the Commonwealth Constitution in relation to the right to a jury trial.<sup>9</sup> The level of protection offered by the Bill, however, does not even meet the limited protection offered by the Constitution. This is to be regretted.

### Remedies

On any view, the remedies provided in the Bill in relation to a breach of a 'human right' (that is, those rights listed in Part 3) are so weak as to be scarcely deserving to be characterised as remedies. Where a Territory law is inconsistent with a human right, the Court may, it would seem, only issue a Declaration of Incompatibility. Clause 32 provides:

- (1) This section applies if –
  - (a) a proceeding is being heard by the Supreme Court; and
  - (b) an issue arises in the proceeding about whether a Territory law is inconsistent with a human right.
- (2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the declaration of incompatibility).
- (3) The declaration of incompatibility does not affect –
  - (a) the validity, operation or enforcement of the law; or
  - (b) the rights or obligations of anyone.
- (4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

On receipt of the Declaration of Incompatibility, the Attorney-General must present a copy of the Declaration to the Assembly within 6 days of his or her receipt of the Declaration (clause 33(2)). The Attorney-General must prepare a written response to the Declaration and present this response to the Assembly within 6 months of presenting the Declaration to the Assembly (clause 33(3)). That is all that need happen. Human rights remain, therefore, 'subject to the political will of the day', one of the so-called 'problems' the Bill was intended to overcome.

It is noteworthy that clause 32 may be invoked only if a proceeding is before the Court. Second, even if the Court issues a Declaration of Incompatibility, the impugned law remains valid, operational and enforceable. The Court has no power to declare the impugned law invalid, or otherwise strike it down.

It is difficult to see in such circumstances who would put themselves to the not insignificant cost of running a hearing before the Supreme Court to obtain a Declaration of Incompatibility (and, if they are unsuccessful, facing the prospect of an adverse costs order). It must also be noted that proceedings to obtain a Declaration of Incompatibility are unlikely to be short, and that such proceedings may well be extended by virtue of the requirement to give notice to the Attorney-General, and to allow the Attorney-General a reasonable time in which to decide whether to intervene in the proceedings (clause 34). And, assuming a criminal trial, will the accused be held in custody while the Attorney-General considers whether or not to intervene? Even if a person successfully obtains a Declaration, he or she will still be subject to the law which the Court has found to be inconsistent with human rights. Would not most people ask: 'What is the point?'

It might be said that the Declaration of Incompatibility procedure ensures that human rights remain to be finally determined by the legislature, and not the Courts, and so democratic rule is preserved. But if the legislature was so intent on abrogating human rights in the first place, why would it feel the need to do anything different on receipt of a Declaration of Incompatibility?

This has been acknowledged by Professor Charlesworth: '[I]f we look at the one jurisdiction that now has three years history with Declarations of Incompatibility [ie the UK], ... the legislature certainly doesn't feel unduly pressured by such Declarations.'<sup>10</sup>

Further, the Bill is silent on what, if any remedies, are available to an individual whose 'human rights' have been breached by an ACT public agency or authority. Even the UK *Human Rights Act 1998* makes it unlawful for a public authority to act in a way incompatible with the rights incorporated in that Act.<sup>11</sup> Further, the UK Act expressly provides that, where a court finds that a public authority has acted or, proposes to act, unlawfully, the court may grant such relief 'within its powers as it considers just and appropriate',<sup>12</sup> and this includes the payment of damages.<sup>13</sup>

As Professor Creyke has recently commented:

It is difficult to see how this law [the ACT Human Rights Bill] is an advance on the present position. Currently ACT citizens are covered by the HREOC Act 1986 which, as already mentioned, provides for findings by the Commission that acts or practices are contrary to the ICCPR rights. For the ACT Human Rights Bill also to provide for this right does not appear to add anything. At present, the HREOC also has the function of examining Acts and subordinate laws of both the Commonwealth and the Territory to ensure compliance with the ICCPR. So for the ACT Human Rights Commissioner also to have this function in relation to Territory laws appears to be otiose. Further, unlike the position under the Bill, HREOC is able to recommend an award of compensation for breaches of the ICCPR. This must be an advantage over a Bill which simply provides for an unenforceable declaration of incompatibility. In addition, to obtain a declaration the individual or agency must go to the ACT Supreme Court. At least HREOC can, in effect, make a declaration of incompatibility without the

individual complainant facing any legal bills. The introduction of the ACT Human Rights Bill undoubtedly has symbolic significance. It is hard to see that it offers more than that.<sup>14</sup>

### **Other remedies**

While the remedy set out in clause 32 is likely to prove ineffectual, is it the only remedy available to the Court in relation to a breach of a human right? (As noted above it is arguable a range of remedies might be held to exist, including the payment of compensation, in respect of a breach of a clause 7 right.) Arguably, should the Court adopt an expansive approach to the Bill, it may well be that the remedies available for a breach of a 'human right' are not limited to the invocation of the Declaration of Incompatibility procedure.

For example, clause 19(1) provides that 'anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.' Does this permit a court to refuse to sentence a person to prison if it considers the person unlikely to be treated in accordance with this right? A magistrate has recently been reported as saying that 'ACT courts are being blackmailed into putting mental health patients in custody when they do not belong there.'<sup>15</sup> Would clause 19(1) apply in such circumstances to prevent a mental health patient being placed in custody?

Similarly, if the right to a fair trial (clause 21), or the minimum guarantees in relation to criminal proceedings (clause 22) are infringed, might not the Court stay the proceedings, consistent with the principles in *Dietrich v R*?<sup>16</sup> If not, is the Bill an attempt to erode the inherent jurisdiction of courts to stay proceedings which will result in an unfair trial?

### **Conclusion**

If the Bill becomes law it is unlikely to contribute in any meaningful way to the development of human rights in the ACT. More than likely it will have a negative impact on the protection of human rights, particularly as the Bill does not provide for proper means of enforcement.

As Lauterpacht said in 1948 of an International Bill of Rights, without proper enforcement and protection:

It would foster the spirit of disillusionment and, among many, of cynicism. The urgent need of mankind is not the recognition and declaration of fundamental human rights but their effective protection by international society.<sup>17</sup>

Over 50 years later, the ACT Bill serves neither to declare fundamental human rights, nor to offer those rights actually specified in the Bill, any effective measure of protection. How could the ACT Bill not 'foster the spirit of disillusionment and, among many, of cynicism'? And this, in turn, can only entail a breakdown in the Rule of Law.

### **Endnotes**

- 1 This paper was written before the Human Rights Act 2004 was passed on 3 March 2004. The Act passed with some amendments, and readers should consider the Act for themselves.
- 2 See for example: Dr T Faunce, 'Rights bill will remain neutral' *Canberra Times* 30 September 2003.
- 3 This fondness amongst Australian constitutional lawyers for things new reminds me of the consumerist values satirised in Aldous Huxley's *Brave New World*. See in particular A Huxley *Brave New World* 1977, p 51: "I love new clothes, I love new clothes, I love ...".
- 4 In April 2002, the Chief Minister appointed a Consultative Committee, chaired by Professor Hilary Charlesworth, to enquire into the question whether the ACT should adopt some form of bill of rights. The Consultative Committee's report, *Towards an ACT Human Rights Act*, was released in May 2003.

- 5 See, for example, the Chief Minister, Media Statement, 18 November 2003; The Law Report, 9 December 2003: 'They're (rights) scattered, they're disparate, they can't be found and they're not well understood, and that's what we're seeking to overcome.'
- 6 *Alconbury* [2001] 2 All ER 929 at [48].
- 7 Article 2(3)(a) of the International Covenant on Civil and Political Rights (ICCPR) states: 'Each State Party to the present Covenant undertakes to ensure that any person whose rights or freedoms have been violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.'
- 8 Compare Article 8 of the European Convention on Human Rights incorporated into the UK *Human Rights Act 1998*.
- 9 H Charlesworth, 'Maybe Human Rights are not so well protected' *Canberra Times* 29 April 2002.
- 10 H Charlesworth, The Law Report, 9 December 2003.
- 11 *Human Rights Act 1998* (UK), s 6.
- 12 *Ibid*, s 8.
- 13 And see *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406 (16 October 2003).
- 14 R Creyke, 'The performance of Administrative Law in Protecting Rights' unpublished paper presented at the Workshop, Protecting Human Rights in Australia: Past, Present and Future', St Kilda, 10-12 December 2003.
- 15 M Boogs, 'Mental Health Patient Outcry', *Canberra Times*, 17 February 2004, 2.
- 16 *Dietrich v R* (1992) 177 CLR 292.
- 17 Quoted in AW Brian Simpson 'Hersch Lauterpacht and the Genesis of the Age of Human Rights' (2004) 120 *Law Quarterly Review* 72.