

Finally, Australia's First Bill of Rights

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Australians have debated the merits of Bills of Rights on and off since before Federation. More recently, proposals were put forward by the Whitlam and Hawke governments for federal Bills of Rights. None of these proposals has succeeded. This has left Australia as the only western nation without such a law. Indeed, among all nations, only a few such as Brunei and Burma lack a Bill of Rights, with Afghanistan gaining a Bill of Rights when its new Constitution came into force earlier this year.

While Australia still lacks a national Bill of Rights, the ACT Legislative Assembly last week enacted the first Bill of Rights at the State and territory level. This historic new Act comes into force on 1 July 2004 and is called the Human Rights Act. While the Act only applies in the ACT, it may mark the beginning of wider change. If nothing else, it ends a long record of failure and provides a concrete model that others may follow.

In a nation with a history of unsuccessful attempts to bring about major legal reform, ranging from prior attempts at Bills of Rights to the 1999 republic referendum, much can be learnt from the achievement of the Stanhope ACT government. It did not pre-empt debate with its own preferred model, but engaged in a lengthy period of consultation that allowed for community engagement and education. This involved an appointed Committee that held town meetings and many consultations with community and expert groups. The Committee also sought submissions from the public and commissioned a deliberative poll of ACT residents. All up there were 49 public forums held on the issue. The results of this process mirrored others polls outside of the ACT in showing strong majority support for a Bill of Rights.

The law that emerged from this popular debate is not a United States-style Bill of Rights in which rights are entrenched, or effectively set in stone, in a constitution. Instead, based upon the Bill of Rights brought about in New Zealand in 1990 and the United Kingdom in 1998, it is an ordinary Act of parliament. In this form, the ACT Human Rights Act allows for more flexibility, as well as ongoing improvement, in the way that the community's rights are protected.

The Human Rights Act also differs from the United States Bill of Rights in its focus upon communities and the Legislative Assembly rather than upon the courts. Both the beginning and the end of the rights protection process lie within the Assembly. At the outset, a committee of the Assembly must report about the human rights issues raised by bills before they are enacted. Once enacted, a law cannot be struck down by the courts. The courts are instead directed to interpret ACT laws to be consistent with the protected rights “as far as possible”. If this cannot be achieved, the ACT Supreme Court can make a “declaration of incompatibility”. This directs the attention of the Attorney-General to the problem and he or she has six months to respond. Importantly, the Attorney-General does not respond to the court that made the decision, but to the Legislative Assembly. That body may then amend the offending law, or can decide to leave it as enacted.

The process set out by the ACT Human Rights Act will engage the courts, the Legislative Assembly and the community in a public dialogue about democratic rights. In this, the judges will have an important role, but will be limited to interpreting laws and identifying areas of incompatibility. The last word is left to the people’s representatives in the Legislative Assembly and ultimately, at the ballot box, to the people.

The primary purpose of the ACT Bill of Rights is to protect the rights of people as listed in the International Covenant on Civil and Political Rights, to which Australia has been a party for more than two decades. These rights have not just been copied from the international instrument, but have been adapted to the ACT in some important ways. For example, the Act states that the right to life only applies to a person from the time of birth. This steers the Bill of Rights clear of any debate about abortion.

The Act protects rights such as the freedoms of expression, movement and privacy, the right to a fair trial, equality before the law and the rights of families and children. On the other hand, it does not protect economic, social and cultural rights, such as the rights to adequate food, clothing and housing and to education, which are often found in modern Bills of Rights like that in South Africa. This limits the ability of the Act to protect the rights of some of the most vulnerable members of the community, such as people living in poverty or the mentally ill. While ACT government supports the inclusion of such rights “in principle”, it disappointed some by not including them in the Act because it saw them as raising difficult questions about the allocation of scarce government resources.

In this and other areas, such as the failure to provide for claims against government agencies and other public authorities for breach of the protected rights, the ACT Bill of Rights does not go as far as many proponents of change would like. However, it should only be seen as the first step to better rights protection. Over time, as understanding of and confidence in the Act grows through its use by politicians, judges and the community, there will be room for discussion about how it might be improved. This idea of ongoing debate is even built into the Human Rights Act, which requires reviews of its operation after one and five years. The Act states that in conducting the first review the Attorney-General must consider whether it should be extended to protect economic, social and cultural rights.

As Australia's first Bill of Rights, the ACT Human Rights Act has begun to spark debate elsewhere in Australia. It has already attracted sharp comment from Prime Minister John Howard, who has consistently opposed the idea of Bills of Rights. He has this week described the ACT Bill of Rights as "ridiculous" and instead supported the idea of a "Bill of Responsibilities" at both the federal and State level. Ironically, on the same day, which happened to be Commonwealth Day, he issued a statement on the need to reflect on the importance of the universal democratic principles that are the foundation of democracy and good government, such as "the rule of law, freedom of expression and the protection of human rights".

The Prime Minister has also hinted that he may seek to have the ACT Bill of Rights overridden, as occurred in 1997 in the case of territory euthanasia laws. However, this could prove difficult as it would require either new legislation passed by the federal Parliament or a decision to disallow the ACT law that could be overturned by the Senate. Either way, the Prime Minister could be prevented from overriding the ACT Human Rights Act by a Senate that he does not control.

The Prime Minister has said that "If you're going to have things like that, they should be done on a nationwide basis." However, this is not the experience of other nations with a federal system. For example, Canada and the United States have separate Bills of Rights at both the State and federal level of government. This makes sense there as in Australia because the two levels have different legal and political responsibilities. Hence, even if Australia had a national Bill of Rights, the States and territories should also still enact their

own. Indeed, in other areas such as anti-discrimination legislation it is common to find complementary laws in Australia at both levels of government.

The ACT Human Rights Act provides a promising start to debate over how each State and territory and the federal government could do more to ensure that fundamental liberties and democratic values are protected by law. Australia's first Bill of Rights is modest and incremental, but should make an important contribution to fostering the civil and political rights of the people of the ACT. Most importantly, it will give voice for the first time in Australian law to the need to recognise and protect basic democratic freedoms.

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For further on this issue, see the website of the Gilbert & Tobin Centre of Public Law at the University of New South Wales:

<http://www.gtcentre.unsw.edu.au/bills-of-rights-resources.html>