Review of the first year of operation of the *Human Rights Act 2004*

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The *Human Rights Act 2004 (ACT)* (HR Act) was enacted by the ACT Legislative Assembly in March 2004 and commenced operation on 1 July 2004. It recognises civil and political rights and is based on relevant standards in the International Covenant on Civil and Political Rights. It is the first Bill of Rights that has been enacted in Australia, after several unsuccessful efforts at the national level. We are the last common law country in the world to have a Bill of Rights (albeit a Bill in one of Australia's smallest jurisdictions).

Critics of the ACT legislation predicted that it would be a litigious feast for lawyers, a rogue’s charter favouring the rights of criminals over victims, or would have no impact at all. Similar legislation in New Zealand was dubbed the ‘Claytons Bill of Rights’—the weak Bill of Rights you have when you’re not having a real Bill of Rights. Several human rights sceptics claimed the HR Act was undemocratic, as it might give judges the power to overturn laws. None of these criticisms have been proven in practice—there has been no avalanche of cases pursued by lawyers, or criminal cases failing. This has recently been confirmed by the Director of Public Prosecutions at the Legislative Assembly Legal Affairs Committee hearing on Annual Reports.

The HR Act has had only a small impact in a handful of cases where parties have specifically argued human rights issues. The HR Act has been cited in the Supreme Court in the five cases of *Firestone, O’Neil, YL, Szuty v Smyth* and *Robertson v ACT*. It was also referred to in an Administrative Appeals Tribunal case of *Merritt and Commissioner for Housing*. However, there is a case pending where the *Domestic Violence and Protection Order Act 2001* is being challenged on the grounds that it is incompatible with the rights of fair trial and liberty.
The HR Act uses a statutory interpretation model similar to the *Bill of Rights Act 1990* in New Zealand, rather than providing a direct right of action in the courts. This means that a party cannot sue under it, as is the case under the *Human Rights Act 1998* in the United Kingdom. The HR Act is also an ordinary piece of legislation, rather than being Constitutionally entrenched, as is the case in the USA and Canada.

Section 30 of the Act requires that interpretations of ACT laws that are consistent with the civil and political rights listed in the Act are ‘as far as possible to be preferred’. It requires any person or body interpreting an ACT law, whether a court, a community group, a private enterprise, or a public servant operating under a statutory scheme or mandate, to take an approach consistent with human rights.

Any existing litigation can use human rights arguments, whether in criminal trials, private torts cases or challenges to government decisions, such as under the *Administrative Decisions (Judicial Review) Act 1989*. The Legislative Assembly reserves the power to enact laws that are not consistent with human rights, but after informed debate. The Supreme Court has the power to issue a Declaration of Incompatibility when a law cannot be interpreted consistently with human rights. The Declaration is tabled in the Legislative Assembly and the Attorney-General must respond within six months. This model engages all three arms of the Westminster system in a dialogue about what is the content of and proportionate limits on human rights.

The biggest impact of the Act has been in influencing the formulation of government policy and new legislation. Under section 37 of the Act all government Bills are required to have a compatibility statement prepared by the Attorney-General—research for this function is undertaken by the Bill of Rights Unit in the Department of Justice and Community Safety. The Standing Committee on Legal Affairs also regularly comments on human rights impacts of all Bills, including Private Members’ Bills.

I have advised the Attorney-General on a number of matters, including detainees’ right to freedom of expression, delays in trials of detainees, and allowing appropriate changes in names of prisoners and their family. I have also made comments on
Cabinet Submissions and important Bills, such as ones concerning the new ACT prison, emergency ECT and the Gungahlin Drive Extension. The Attorney-General has also requested advice in relation to national matters, including the *Anti-Terrorism Bill 2004* and the Indigenous shared responsibilities agreements that have been the subject of interest to the Standing Committee of Attorney-Generals.

A very important goal in implementing the HR Act is creating a human rights culture, rather than merely focussing on litigation. Community education has been an important priority, with training available both for general members of the public and for people with legal backgrounds. I have spoken at many public forums on the HR Act, including specific ones on its impact in areas such as parliamentary scrutiny committees, mental health and corrections. A quarterly electronic newsletter has been published, *Humanity*, which describes initiatives of the Human Rights Office and summarises recent case-law (see the Human Rights Office’s website at www.hro.act.gov.au).

The most significant project of the Human Rights Office is a human rights audit that is being conducted of the Quamby Youth Detention Centre. I plan to provide a report to the Attorney-General reviewing the effect of the *Children and Young Persons Act 1999* in relation to Quamby by 30 June 2005, and this must be tabled in the Legislative Assembly within six sitting days. It will report on issues relevant to humane treatment including strip searches, surveillance, periods of lockdown, seclusion and conditions of detention. It will also deal with issues such as communication with the outside world, complaints systems, discipline resulting in loss of remission and privileges, mixing of young people who are of different ages, gender and status (convicted and remandees).

My Office has appeared before the Mental Health Tribunal after being invited by the President, but has not yet sought leave to intervene in a court hearing. Under section 34 the Supreme Court must notify the Commissioner and Attorney-General if it is considering making a Declaration of Incompatibility. This Declaration does not make the incompatible law invalid, but the Attorney-General is required to present the Declaration in the Legislative Assembly and prepare a written response within six months.
Section 43 requires that the Attorney-General, Chief Minister Jon Stanhope, review the first year of the operation of the Act and present a report to the Legislative Assembly by 1 July 2006. The review must include consideration of whether rights under the International Covenant on Economic, Social and Cultural Rights should be recognised by expanding the scope of the Act. Also the review must consider ‘whether environment-related human rights would be better protected if there were statutory oversight of their operation by someone with expertise in environment protection’.

In my role as Human Rights Commissioner I will play a central role in participating in the review of the first year of the HR Act’s operation. Under section 41 of the HR Act the Commissioner has three central roles: to report to the Attorney-General on reviews of the effect of ACT laws; provide community education; and advise the Attorney-General on anything relevant to the operation of the HR Act.

The process and content of the Attorney-General’s review will be the focus of the ACT Human Rights Community Forum, which will hold its second meeting on 1 July 2005 (its first meeting was held on 10 December 2004, International Human Rights Day). This Forum is convened by the Human Rights Office and is attended by representatives from a wide array of stake-holders, including non-governmental organisations. Issues papers will be circulated to stimulate discussion and to provide a framework for recommendations to be made on the review, in the areas not only of economic, social and cultural rights and environmental rights, but also in areas of high interest, such as indigenous issues and where there may be a need for strengthening the HR Act.

1 NGOs invited to participate include ACTCOSS, Shelter, ADACAS, Womens’ Legal Centre, Welfare Rights and Legal Centre, Youth Coalition, Unions ACT, Mental Health Community Coalition, Youth Coalition, Prisoners Aid, Migrant Resource Centre, Civil Liberties, National Committee on Human Rights Education ACT, Australian Lawyers for Human Rights, Amnesty International, Women Lawyers Association of the ACT Inc, the Council of the Ageing, International Commission of Jurists, the ACT Law Society, Legal Aid, Disability Discrimination Legal Service and the ACT Bar Association, legal experts and academics (for example Professor Hilary Charlesworth), as well as relevant statutory office-holders and agencies, including the Community and Health Services Complaints Commissioner, the Community Advocate, the Director of Public Prosecutions, the Victims of Crime Coordinator and the Aboriginal Justice Centre.
Some anomalies have also become apparent in the first year of the Act’s operation, such as the inability to use the HR Act in relation to powers under federal laws. This arises because there is no ACT Evidence Act, only the *Federal Evidence Act 1995*, and also because the Australian Federal Police can use federal rather than ACT powers when arresting and charging defendants. Several organisations have also suggested that the HRO be empowered and resourced to handle human rights complaints—this issue was not specifically considered by the ACT Bill of Rights Consultative Committee.

At the end of 12 months we can say with some certainty that none of the dramatic changes anticipated by either critics or supporters of Bills of Rights have come to pass. There has, however, been a marked increase in the awareness of human rights principles due to the kind of scrutiny now required of proposed legislation, as well as systems already operating under existing laws. The Act is not a magic bullet for creating a society based on full recognition of human rights, but it does at least represent progress in the right direction.