

## **The ACT Human Rights Act 2004: Impact on Case Law, Legislation and Policy<sup>1</sup>**

Gabrielle McKinnon  
Regulatory Institutions Network, ANU

The ACT *Human Rights Act* 2004 is the first legislative bill of rights in Australia.<sup>2</sup> The Stanhope government in the ACT succeeded in passing this Act in a political context in which bills of rights have been firmly rejected both by the federal Liberal government and by New South Wales and Queensland Labor governments.

Predictably, the Act was the subject of significant controversy when it was introduced into the ACT legislative assembly, and strong views were expressed on both sides about its potential and scope. Chief Minister Jon Stanhope commended the bill to the Parliament as a groundbreaking initiative for the ACT:

There should be no mistake: this is a significant step forward for the whole community, whether you are a person living with a disability, a man or a woman, straight or gay, rich or poor, whatever your ethnic or national origin, political opinion or religious beliefs.<sup>3</sup>

The Opposition spoke at length against the bill. Shadow Attorney General Bill Stefaniak dramatically predicted that it was: “*the most important and potentially most dangerous legislation we have ever seen in this Territory.*”<sup>4</sup> Another critic warned that: “*We are opening Pandora’s box; we are opening a can of worms.*”<sup>5</sup>

A common criticism leveled at the Act was that it would become a ‘lawyers’ picnic’, and that the ACT courts would be overwhelmed with unmeritorious claims:

Such a bill and such an extra layer of law will be manipulated by lawyers pursuing political objectives. We will see the parliamentary process

---

<sup>1</sup> Based on a paper presented at the conference ‘*Assessing the First Year of the ACT Human Rights Act*’ 29 June 2005, Canberra.

<sup>2</sup> The Hume City Council in Victoria declared an inaugural bill of rights in its local government area in March 2004, but this is a policy document not having the force of a regulation or bylaw.

<sup>3</sup> ACT *Parliamentary Debates*, 18 November 2003, 4244 (Jon Stanhope, Chief Minister)

<sup>4</sup> ACT *Parliamentary Debates*, 25 November 2003, 4577 (Bill Stefaniak, Shadow Attorney General).

<sup>5</sup> ACT *Parliamentary Debates*, 2 March 2004, 511 (Jacqui Burke).

circumvented by political lobby groups and legal lobby groups with axes to grind. We'll see the Stephen Hoppers in Australia tying up valuable court time pursuing spurious issues and taking away from the courts the time needed to focus on fundamental rights issue. We'll see a litigation culture develop.<sup>6</sup>

Having reached the first anniversary of the *Human Rights Act*, we can now begin to draw some conclusions about its impact. Overall, it is fair to say that the Act has not yet lived up to the dire predictions of its detractors. Life in the Territory has proceeded largely without disruption.

In fact critics of the Act now seem to have changed tack, and have begun to deride the Act as ineffective. One suggested recently that:

since that day of liberation when we got the Bill there had been not one court case on it, not one executive action which could be said to have occurred because of it, nor one legislative Act in consequence of the new consciousness of human rights to which the Bill gave witness had happened as a result of the Act.<sup>7</sup>

However this is not quite the case. Although changes have been small and incremental, there are certainly signs that the courts, the legislature and the government are beginning to acknowledge, if not yet embrace, the *Human Rights Act*.

In this paper I will provide an overview of the impact of the Act in the courts, in parliament and in government policy. Although the area of policy may ultimately be where the Act has the greatest impact, at this stage the effects of the Act are easier to quantify in the more visible areas of case law and the scrutiny of legislation.

## **The Courts**

In the first year of the Act, it is apparent that there has not yet been a flood of litigation as a result of the Act. Nevertheless, it has not gone entirely unnoticed.

---

<sup>6</sup> ACT *Parliamentary Debates*, 2 March 2004, 456 (Steve Pratt). Stephen Hopper, referred to by Mr Pratt acted for Guantanamo bay detainee Mamdou Habib.

<sup>7</sup> Waterford J 'Bills that let judges make laws', *Canberra Times*, 11 June 2005.

As at 1 July 2005, the Act has been cited in ten reported judgments of the Supreme Court of the ACT<sup>8</sup>, one judgment of the Court of Appeal<sup>9</sup>, and one decision of the Administrative Appeals Tribunal of the ACT.<sup>10</sup> The subject matter of these cases is wide-ranging, from criminal law and protection orders, to child protection, mental health proceedings, public housing and defamation.

In most of these cases, human rights issues have been raised by the judges, rather than by advocates for the parties, suggesting that the legal profession has some way to go to familiarise itself with the Act.<sup>11</sup> The Act has generally not been a decisive factor in these matters, and many judgments do not consider its provisions in any great depth. However the recent decision of Connolly J in *R v Upton*<sup>12</sup> is an exception, providing a detailed analysis of the right to be tried without unreasonable delay under section 22(2)(c) of the *Human Rights Act*, drawing on authorities from the United Kingdom and New Zealand.

In this matter the defendant had been charged with common assault in 2002. The first trial in 2003 had been terminated due to witness tampering, and the prosecution was seeking to vacate a second trial date in 2005 due to a witness being unavailable.

Connolly J considered that while breach of the right to be tried without unreasonable delay would not always be grounds for a stay of proceedings, this was one remedy available. In this case he considered it a proportionate remedy to stay the trial. He ordered that the stay become permanent (and thus no further action be taken against the defendant) unless the prosecution applies to the Court within a specified time and pays all of the legal costs incurred by the defendant.

---

8 *R v O'Neill* [2004] ACTSC 64 (30 July 2004); *Szuty v Smyth* [2004] ACTSC 77 (1 September 2004); *Firestone v Australian National University* [2004] ACTSC 76 (1 September 2004); *R v YL* [2004] ACTSC 115 (27 October 2004); *R v Martiniello* [2005] ACTSC 9 (31 January 2005); *Fletcher v Harris* [2005] ACTSC 27 (18 April 2005); *Robertson v ACT* [2005] ACTSC 35 (29 April 2005); *R v Trevitt* [2005] 125 (7 June 2005); *R v Upton* [2005] ACTSC 49 (1 July 2005); *Re Application for the Adoption of TL* [2005] ACTSC 49 (1 July 2005). (All of these cases are available at: [www.courts.act.gov.au/supreme/](http://www.courts.act.gov.au/supreme/))

9 *Buzzacott v R* [2005] ACTCA 7 (1 March 2005).

<sup>10</sup> *Merritt and Commissioner for Housing* [2004] ACTAAT 37 (29 September 2004).

<sup>11</sup> The case of *Merritt and Commissioner for Housing*, cited above, is one exception.

<sup>12</sup> [2005] ACTSC 49 (1 July 2005)

Connolly J also recently considered the right to protection of the child and family in the context of an application by a stepfather to adopt his fifteen year old stepdaughter. Although the child's natural mother and stepfather had a Family Court order for custody, Connolly J found that adoption would provide greater protection to the child as part of the family unit.<sup>13</sup>

The Act is regularly mentioned in bail applications before the Supreme Court, as the rights to liberty and security of person are clearly relevant to the interpretation of the *Bail Act* 1992.<sup>14</sup> The right to a fair trial was also raised recently by Higgins CJ in the context of a charge of negligent driving occasioning death, where the new *Criminal Code*, not yet in force, would impose a test of negligence which might be more favourable to the defendant.<sup>15</sup>

Less is known about the use of the Act in the Magistrates Court, the Children's Court, and tribunals other than the AAT. We are aware of only one Magistrate's Court decision in which the Act has been mentioned in passing.<sup>16</sup>

The lack of haste by the legal profession to adopt the *Human Rights Act* may reflect the omission of any new legal cause of action or remedy in the Act for parties aggrieved by a breach of their human rights. Instead a plaintiff must find another basis for bringing a case, and can then ask the court to interpret any relevant legislation consistently with rights protected under the Human Rights Act.

If a rights-consistent interpretation of legislation is not possible, the Supreme Court may issue a declaration of incompatibility. This does not invalidate the incompatible legislation, and provides no remedy for the plaintiff, but alerts Parliament to the breach, and invites it to reconsider the legislation.

---

<sup>13</sup> *Re Application for the Adoption of TL* [2005] ACTSC 49 (1 July 2005)

<sup>14</sup> see eg *Bail Application for Huy Le* (Unreported decision of Justice Connolly, ACTSC 13 August 2004)

<sup>15</sup> *R v Evans*, ACTSC unreported, transcript of proceedings of 20 June 2005, Higgins CJ at pp59-60

<sup>16</sup> *R v Carrington and Day* (Unreported decision of Magistrate Dingwall, ACTMC 23 March 2005)

There have been no declarations of incompatibility thus far, but it appears that there may soon be an application before the Supreme Court for such a declaration in relation to section 51A of the *Domestic Violence and Protection Orders Act 2001*. This section requires a respondent to an interim protection order to file a written objection in court within a specified time, or the protection order becomes final without hearing. The section arguably breaches the right to a fair trial in section 21 of the Act as it contains no mechanism for having this ‘default judgment’ set aside, where the respondent had a good reason for failing to lodge the objection.

It is notable that the first case in which the *Human Rights Act* may be substantially considered reflects the complexities of competing human rights. The provision in question was in fact recently introduced to advance the rights of victims, by give greater certainty and security to women seeking protection from domestic violence.

## **Parliament and legislation**

### *Compatibility Statements and Explanatory Statements*

The *Human Rights Act* requires the Attorney General to include a statement with each bill the government presents to Parliament as to whether, in his opinion, the bill is compatible with the Act.<sup>17</sup>

In the first year of the operation of the Act the government presented 64 bills to the legislative assembly, together with 63 statements of compatibility.<sup>18</sup> A compatibility statement was omitted in relation to the Workers Compensation Amendment Bill 2005, but this appears to have been an administrative oversight due to the urgency of the amendment, required to extend a sunset clause for reinsurance, rather than to any human

---

<sup>17</sup> s37 of the *Human Rights Act* (2004) ACT.

<sup>18</sup> Based on ACT Legislation Register ([www.legislation.act.gov.au](http://www.legislation.act.gov.au)) as at 30 June 2005.

rights concern. The omission does not appear to have generated any comment in Parliament.<sup>19</sup>

The government has taken a minimalist approach to the content of the compatibility statements, which do not provide any indication of human rights issues considered in relation to the bill, in contrast to the more expansive advices on consistency which are made public in New Zealand.<sup>20</sup> However in some cases a more detailed commentary is contained in the explanatory statement to the bill.

For example the explanatory statement to the Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004 sets out a comprehensive justification under the *Human Rights Act* for amendments to offence provisions, in some cases introducing strict and absolute liability offences.

As noted above, Section 51A of the *Domestic Violence and Protection Orders Act 2001*, which may be the subject of the first declaration of incompatibility, was introduced by an amendment passed by Parliament in February 2005, after the *Human Rights Act* was in force. A statement of compatibility was issued by the Attorney General in relation to the amendment.

The explanatory statement noted the government's view that:

As the Bill increases the safety and protection of people from violence, harassment, and intimidation, while not unduly interfering with the civil liberties of the individual, the proposed amendments are covered by the “reasonable limits” exemption under section 28 of the HRA.

Section 28 of the Act provides that the human rights protected under the Act may be subject only to reasonable limits set by Territory laws that are demonstrably justified in a free and democratic society.

---

<sup>19</sup> although it was noted in the seventh report of the Scrutiny Committee

<sup>20</sup> the New Zealand advices are available at [www.justice.govt.nz/bill-of-rights/](http://www.justice.govt.nz/bill-of-rights/)

This wording is a recognised formula in international human rights law. It has been held to require an analysis firstly of whether the aims of the legislation are legitimate in fulfilling a pressing social need, and secondly whether the limits imposed on human rights are proportionate to achieving those aims. Limitations will not be proportionate if they infringe on rights to a greater degree than required to achieve the aims, or if they undermine the very essence of the protected human rights.

It will be interesting to see whether the Supreme Court endorses the government's analysis that the regime in section 51A does not unduly interfere with the human rights of respondents, in particular the right to a fair trial.

### *The Scrutiny Committee*

The *Human Rights Act* also requires the Standing Committee on Legal Affairs known as the Scrutiny Committee to report on human rights issues raised by bills, in addition to its other scrutiny functions.<sup>21</sup>

The Scrutiny Committee did not comment specifically on section 51A of the *Domestic Violence and Protection Orders Act* introduced by the 2005 amendment bill. It did consider that other provisions in the bill which sought to restrict publication of court proceedings might limit the right to a fair trial under the Act, but it did not reach a conclusion as to whether this limitation was justified under section 28.

From the Scrutiny Committee's reports, it is apparent that the Committee has taken a sophisticated approach to identifying potential inconsistencies with human rights, but has not considered in the same depth whether such limitations are demonstrably justified in a free and democratic society. It appears that the Committee views the application of section 28, and the assessment of proportionality as questions of policy, rather than technical analysis, and thus outside its terms of reference.

---

<sup>21</sup> *Human Rights Act* s38.

This approach can be contrasted with that of the United Kingdom Joint Committee on Human Rights, which has taken a more robust view of its scrutiny role. The Joint Committee specifically examines the justification for any limitations on rights, in order to reach a conclusion about the risk of incompatibility:

Significance [of the risk of incompatibility] is determined by applying various criteria, including how important is the right affected, how serious is the interference with it and, in the case of qualified rights, how strong is the justification for the interference, how many people are likely to be affected by it, and how vulnerable they are.<sup>22</sup>

It remains to be seen whether the ACT Scrutiny Committee will develop a more confident approach to the application of section 28, which would make the scrutiny process more meaningful, and play a useful educative role for the Parliament.

### **Impact on Policy Development**

The Department of Justice and Community Safety has established a Bill of Rights Unit to oversee the implementation of the Human Rights Act within the government. The Unit has published a number of documents to assist other departments to apply the Act, including a detailed manual of guidelines on using the Act in developing legislation and policy.<sup>23</sup> Although the Act itself is unclear as to whether it binds government in all of its activities, the Bill of Rights Unit clearly expects that departments will refer to and comply with the Act at all levels of decision making.

Human rights are highlighted in the Canberra Social Plan<sup>24</sup>, which sets a general framework of goals and priorities for government policy making for the next ten to fifteen years. The plan also provides some recognition of economic cultural and social rights, which were not included in the *Human Rights Act*.

---

<sup>22</sup> Nineteenth Report of the Joint Committee on Human Rights, 6 May 2004 at paragraph 47

<sup>23</sup> *The Human Rights Act 2004 - Guidelines for ACT Departments: Developing Legislation and Policy* available on the Bill of Rights Unit website: [www.jcs.gov.au/humanrightsact/publicationsbor.htm](http://www.jcs.gov.au/humanrightsact/publicationsbor.htm)

<sup>24</sup> *Building our Community – The Canberra Social Plan* Australian Capital Territory 2004

It is appropriate that those government agencies dealing with some of the most vulnerable individuals, such as prisoners and people with mental illness, have been the first to actively engage with the new Act.

ACT Corrective Services held a forum on 2 July 2004 to increase awareness of human rights within a correctional context.<sup>25</sup> The new prison being built in the ACT, the Alexander Maconochie Centre at Hume will have an ‘*Operating Philosophy.. founded on the ACT Human Rights Act*’.<sup>26</sup> The Human Rights Act is noted in the opening paragraph of the brief to the prison designers.<sup>27</sup>

The Human Rights Commissioner, Dr Helen Watchirs, has conducted a human rights audit of the Quamby juvenile detention centre, and has identified a number of practices, such as routine strip searching of detainees, which need to be reconsidered in light of the Act.<sup>28</sup>

ACT Health in partnership with the ACT Human Rights Office held a forum on 21 June this year to explore the impact of the Act on mental health service provision. This forum was well attended by mental health workers, consumers and carers, who explored some of the practice and resource implications of the Act. A review is underway of the *Mental Health Treatment and Care Act 1994*, to address potential inconsistencies with human rights.

It will be possible to make a more comprehensive assessment of the implementation strategies of government departments in the first round of annual reports to be published after the introduction of the Act. Under the new annual report legislation, each departmental unit or government agency will be required to include a statement

---

<sup>25</sup> Developing a Human Rights Framework for Corrective Services, 2 July 2004 Canberra,

<sup>26</sup> see the Corrective Services website: [www.cs.act.gov.au/amc/home](http://www.cs.act.gov.au/amc/home)

<sup>27</sup> *Alexander Machonachie Centre, A Functional Brief*, Department of Justice and Community Safety March 2005 (available on the above website).

<sup>28</sup> The audit report was presented to the Government on 30 June 2005, and is due to be tabled in Parliament within 6 sitting days. It is also discussed in more detail in Dr Watchirs’ paper available on the Democratic Audit website.

describing the measures taken to “*respect, protect and promote*” human rights during the financial year.<sup>29</sup>

### **Where to from here?**

Supporters of bills of rights, and other states or territories considering this option can take comfort in the fact that the ACT *Human Rights Act* has not had a divisive or costly impact on the Territory in its first year of operation.

It must be acknowledged that this is in part due to the deliberately limited nature of the Act, which does not give judges power to invalidate legislation, nor citizens a new platform for asserting legal rights against government.

Despite these limitations however, there are some signs that the government is becoming increasingly conscious of the Act in developing new bills, and that the courts are aware of the Act in interpreting legislation. We may also be witnessing the beginnings of a cultural change in the ACT government bureaucracy towards accepting the place of human rights in policy development.

Given this reassuring starting point, the ACT government may be on more secure ground when it comes to the review of the first year of the Act. The review provisions require the Parliament to consider the inclusion of rights from the *International Covenant on Economic Social and Cultural Rights*<sup>30</sup>, which would more fully realize the vision of the Consultative Committee for the Act.

Critics of the Act might perhaps appear less credible if they claim that recognizing these human rights would unleash the contents of ‘Pandora’s box’ upon an unsuspecting Territory.

---

<sup>29</sup> *Annual Reports (Government Agencies) Act 2004* ACT Part 6

<sup>30</sup> *Human Rights Act 2004* ACT s43