

# The ACT Human Rights Act 2004 – The First Year<sup>1</sup>

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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 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>

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<sup>1</sup> 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).

<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.*

Coming up to 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 ventured that this conference would be of

small circumference... given 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>

Thankfully (for this conference at least), 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 a brief overview of the impact of the Act in the courts, in parliament and in government policy. These themes will be explored in greater depth by following speakers.

## **The Courts**

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

The Act has now been cited in eight 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.

The Act could not be said to have been a decisive factor in any of these matters, and the judgments do not consider its provisions in any great depth. At most, the Act has been used to lend support to a conclusion already reached by other reasoning.

The Act has been mentioned in at least one bail application before the Supreme Court, where rights to liberty and security of person were acknowledged as relevant in

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

<sup>8</sup> *R v O'Neil* [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).

<sup>9</sup> *Buzzacott v R* [2005]ACTCA 7 (1 March 2005).

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

construing provisions of the *Bail Act* 1992, but did not lead to a grant of bail in that instance.<sup>11</sup> The Act has also been considered very recently in the context of a charge of negligent driving occasioning death, where the new *Criminal Code*, not yet in force would impose a different test of negligence.<sup>12</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, but the Magistrate went on to cite the *International Covenant on Civil and Political Rights* itself, as the matter related to the interpretation of the *Commonwealth Evidence Act*, rather than ACT legislation.<sup>13</sup>

In some ways the lack of litigation is not surprising, as the Act does not provide a new cause of action for parties aggrieved by a breach of their human rights. Instead the courts are required to interpret legislation consistently with the rights protected under the Act unless this would be contrary to the objects of the legislation.

If a rights-consistent interpretation is not possible, the Supreme Court may issue a declaration of incompatibility. This does not invalidate the incompatible legislation, but alerts Parliament to the breach, and invites it to reconsider the issues.

Interestingly, it appears that there may soon be an application before the Supreme Court for a declaration of incompatibility in relation to section 51A of the *Domestic Violence and Protection Orders Act* 2001. This section requires a respondent who was absent when an interim protection order was made to file a written objection within a certain time, or the 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 within time.

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>14</sup>

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<sup>11</sup> *Bail Application for Huy Le* (Unreported decision of Justice Connolly, ACTSC 13 August 2004)

<sup>12</sup> *R v Evans*, ACTSC unreported, transcript of proceedings of 20 June 2005, Higgins CJ at pp59-60

<sup>13</sup> *R v Carrington and Day* (Unreported decision of Magistrate Dingwall, ACTMC 23 March 2005)

<sup>14</sup> s37 of the *Human Rights Act* (2004) ACT

Since the Act came into force on 1 July 2004, the government has presented 57 bills to the legislative assembly, together with 56 statements of compatibility.<sup>15</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 rights concern. The omission does not appear to have generated any comment in Parliament.<sup>16</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>17</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.”

It will be interesting to see whether the Supreme Court endorses the government's analysis of proportionality in this case.

### *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>18</sup>. The work of the Scrutiny Committee will be considered in detail in the paper of Professor Peter Bayne, the legal adviser to Committee.

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<sup>15</sup> based on ACT Legislation Register ([www.legislation.act.gov.au](http://www.legislation.act.gov.au)) at 29 June 2005

<sup>16</sup> although it was noted in the seventh report of the Scrutiny Committee

<sup>17</sup> the New Zealand advices are available at [www.justice.govt.nz/bill-of-rights/](http://www.justice.govt.nz/bill-of-rights/)

<sup>18</sup> *Human Rights Act* s38

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 about incompatibility.

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 sanctioned by section 28 of the Human Rights Act as being "*demonstrably justified in a free and democratic society*".

The Committee's analysis of the domestic violence amendments is indicative of this approach. Similarly, in its consideration of provisions of the *Crimes (Child Sex Offenders) Bill 2005*, the Committee determined that the bill did impinge upon the protected right of freedom of movement (amongst other matters). However the Committee left it to the Parliament to determine whether such limitations fell within the scope of s28, concluding that:

It is apparent that the Bill regulates and burdens the right of a registrable offender to enter and leave the ACT. The general issue is whether these restrictions are a proportionate means of putting into effect the purpose of the Bill.<sup>19</sup>

It appears that the Committee views the application of section 28 as involving questions of policy, rather than technical analysis, and thus falling outside its terms of reference.

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>20</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

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<sup>19</sup> Scrutiny Report No 10, 2 May 2005, at p10

<sup>20</sup> Nineteenth Report of the Joint Committee on Human Rights, 6 May 2004 at paragraph 47

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>21</sup> These documents make it clear that departments are expected to refer to and comply with the Act at all levels of decision making.

In the first year of the Act, it appears that the prime focus of the Government has been to put in place a pre-scrutiny process, to ensure that proposals for new legislation are compliant with the Act<sup>22</sup>.

It is more difficult to assess the extent to which the Act is being adopted at a policy level. However, there are some encouraging signs that the Act is being acknowledged, in educational and policy initiatives.

ACT Corrective Services was one of the first authorities to actively engage with the new Act, holding a forum on 2 July 2004 to increase awareness of human rights within a correctional context.<sup>23</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>24</sup> The Human Rights Act is noted in the opening paragraph of the brief to the prison designers.<sup>25</sup>

The Human Rights Commissioner, Dr Helen Watchirs, is currently conducting a human rights audit of the Quamby juvenile detention centre, and has identified practices such as routine strip searching of detainees, which may need to be reconsidered in light of the Act.<sup>26</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. Chief Psychiatrist Dr Peggy Brown noted that 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

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<sup>21</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>22</sup> Stanhope, J, “The Human Rights Act 2004 (ACT) Making a stand in the ACT” (2005) 30 *Alternative Law Journal*, 54.

<sup>23</sup> Developing a Human Rights Framework for Corrective Services, 2 July 2004 Canberra,

<sup>24</sup> see the Corrective Services website: [www.cs.act.gov.au/amc/home](http://www.cs.act.gov.au/amc/home)

<sup>25</sup> *Alexander Machonachie Centre, A Functional Brief*, Department of Justice and Community Safety March 2005 (available on the above website).

<sup>26</sup> Watchirs, H, paper presented to Forum on the Human Rights Act and its Impact on Mental Health Treatment and Care, 21 June 2005, Canberra.

describing the measures taken to “*respect, protect and promote*” human rights during the financial year.<sup>27</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.

Perhaps 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>28</sup> which would more fully realize the vision of the Consultative Committee for the Act.

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

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<sup>27</sup> *Annual Reports (Government Agencies) Act 2004* ACT Part 6

<sup>28</sup> *Human Rights Act 2004* ACT s43