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**The ACT Bill of Rights:
its relevance and potential effectiveness**

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A. Introduction

The commencement of the ACT Human Rights Act 2004 on 1 July 2004 was a significant legal and political event not only for the Australian Capital Territory and its inhabitants, but also for the broader Australian community. It is the first occasion on which a Bill of Rights of significant scope has been enacted in any Australian jurisdiction, confounding the previous history of unsuccessful attempts to enact constitutional and statutory bills of rights which go back to the time of Federation and which have had regular reappearances every decade or so for the past 40 years.

The ACT HRA was the result of an election commitment by Jon Stanhope, then leader of the Labor opposition, during the election campaign of October 2001. In April 2002, by then Chief Minister and Attorney General of the ACT, Stanhope appointed a Consultative Committee to inquire into a possible bill of rights for the ACT. That Committee reported in May 2003,¹ recommending the adoption of a bill of rights for the ACT and proposing a draft Act. A modified version of this proposal was enacted into law on 2 March 2004 and the Act commenced operation just four months later. In the Chief Minister's words:²

¹ *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (May 2003), available at www.jcs.act.gov.prd/rights/index/html

² Address to the conference *Australia's First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004. Selected papers from this conference will be available on the website of the Centre for International and Public Law, law.anu.edu.au/cipl

“As the very first ‘Bill of Rights’ legislation in Australia, the ACT Human Rights Act brings into Australian law for the very first time a coherent statement of human rights and introduces for the very first time a systematic and comprehensive scheme for the protection of rights and fundamental freedoms.”

My paper is divided into the following sections:

- The development of the ACT Human Rights Act
- An overview of the structure, content and intended operation of the ACT HRA
- The Act’s project of Incorporating human rights values and norms in the administrative and legislative process
- Reflections on the likely impact of the ACT HRA and its lessons for others.

One of the express hopes of the proponents of the ACT HRA is that it might provide a stimulus to and prototype for the development of bills of rights in other jurisdictions throughout Australia. The prospect of a statutory bill of rights at the federal level (let alone a constitutional one) seems remote in the immediate future,³ so it would seem that the opportunities for experimentation and diversity offered by the federal system might well allow the development of different bills of rights.

A number of States have recently expressed interest in exploring the possibility of a bill of rights; the ACT experience may provide useful insights for the politics and law of enacting and implementing such a mechanism of rights protection. However, if there is anything which emerges from the history of bills of rights, it is that the formal elements of a bill of rights are only one component of the extent to which it comes to life and enhances rights protection through the development of a strong community culture of rights and effective and generous interpretation of human rights by the institutions of the State. The local political and legal culture and the attitude of judges, lawyers, politicians and the broader community are the critical elements in determining the impact of a bill of rights.

B. The development of the ACT Human Rights Act

After its election in 2001, the ACT government chose to appoint an independent consultative committee to examine the question of a bill of rights, rather than to conduct a parliamentary inquiry into the question of the desirability of a bill of rights for the ACT. The recent experience of the NSW Parliament’s inquiry into the desirability of a bill of rights for NSW – which had recommenced against the adoption of a bill of rights for that State – was a signal lesson that elected legislators frequently placed greater faith in the capacity of elected legislators and the parliamentary system to protect rights than might be justified on more independent examination.

³ The federal government has declared itself opposed to such a measures. The federal opposition has also not been prepared to commit to a federal bill of rights, the Shadow Attorney-General, Nicola Roxon, having recently indicated a range of specific human rights measures the opposition would take if elected: Roxon, speech to *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

Nevertheless, some of the concerns which underlay the bill of rights reluctance in NSW were clearly legitimate ones, and they have been raised in nearly all the jurisdictions which have adopted bills of rights in the past 20 years or so. These included concerns about the usurpation of the power of democratically elected representatives to determine major issues of political and social importance, concerns about the overjudicialisation of rights and the creation of a litigation explosion, and concerns that the enactment of an individual rights-based model would do little to address systematic disadvantage or to guarantee effective enjoyment of economic and social rights.

The Report of the Consultative Committee charted what it thought was an acceptable compromise through these political shoals. After a process of community consultations, public meetings, a deliberative poll, and consideration of submissions from a range of groups and individuals, the Committee recommended the adoption of a bill of rights – to be called the Human Rights Act -- with the following important features, drawing on the best practices in recent experience in Canada, New Zealand, and the United Kingdom:

- the bill of rights would be an ordinary statute that could be overridden by the Legislative Assembly – it would embody a “dialogue model” which would promote an exchange between the courts, executive and the legislature about the implementation of human rights
- the substantive rights in the bill of rights should include both civil and political and economic social and cultural rights, and these should be drawn from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (treaties by which Australia was bound)
- the statute should contain an interpretive provision requiring all ACT laws to be interpreted in accordance with the human rights set out in the HRA
- while the Supreme Court could not strike down or declare repealed a statute that was inconsistent with the HRA, it could issue a declaration of incompatibility; the Court would also have the power to declare inconsistent subordinate legislation invalid unless the primary legislation prevented this
- the Act would contain an explicit obligation on all public bodies to act in a way compatible with the HRA unless incompatible conduct was required by other legislation
- the Act would provide for effective remedies for violations of the HRA, including a limited right to damages.

The Committee also considered it important not only to focus on the implementation of the Human Rights Act through the courts, but also to ensure that a human rights approach pervaded the operations of the executive and the legislature. It accordingly made proposals for the pre-enactment scrutiny of legislation, for the Legislative Assembly itself to incorporate explicit human rights scrutiny into its consideration of legislation, a requirement that government departments report annually on the steps they had taken to implement the HRA, and the creation of an office of ACT Human

Rights Commissioner to provide an independent monitor of the operation of the HRA.

It can be seen from the foregoing description that the Committee had sought to respond to concerns about the problems of democratic legitimacy involved in an entrenched bill of rights by allowing the Legislative Assembly the final say in a case in which the courts disagreed with the executive and the legislature. In this respect the Committee adopted the models of the NZ Bill of Rights Act 1990, and even more closely the model and structure of the UK Human Rights Act 1998.

The major features of the Committee's proposed model survived the government's review of the proposal, though a number of important elements were excised during that process. I now turn to the Human Rights Act as finally enacted.

C. An overview of the structure, content and intended operation of the ACT HRA

The dialogue model and promoting a culture of human rights

The ACT Human Rights Act draws on various models: its content is largely drawn from international human rights standards (with one significant Canadian borrowing), its structure is primarily inspired by the UK HRA (and draws also on the NZ experience), and it is embedded in the ACT system of statutory construction and institutions, as well as containing a number of innovations. These diverse origins may give rise to interesting challenges for those who will have to interpret and apply its provisions.⁴

The Act as finally passed lost a number of key features of the Committee's proposals:

- (a) The human rights included were confined to civil and political rights (largely drawn from the ICCPR), with the question of the possible inclusion of economic, social and cultural rights being deferred for consideration as part of a review of the first year of operation of the HRA (section 43);⁵
- (b) There was no independent right of action created under the HRA;
- (c) There was no clause which explicitly bound public authorities and those performing public functions to act in accordance with the HRA;

⁴ For a review of recent experience in the UK, NZ, South Africa and Hong Kong, see the papers in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Bills of Rights* (NISSL and CIPL, 2004) 33-48, available at <http://law.anu.edu.au/nissl/borhk.pdf>, and also Philip Alston (ed.), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Clarendon Press, 1999)

⁵ For a discussion of the issue of economic, social and cultural rights, see Peter Bailey, "Limitations and Opportunities: Economic, Social and Cultural Rights", paper presented to *Australia's First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

- (d) the HRA was limited to the interpretation of legislation and rules of the common law were not explicitly included.

Given that the model proposed by the Consultative Committee was already a fairly moderate proposal in light of other models that might have been adopted, many proponents of a bill of rights have been critical of these (and other aspects) of the HRA (while welcoming it nevertheless).

The ACT HRA as conceived by its drafters and proponents is intended to promote a whole-of-government approach to the implementation of the human rights guaranteed by the HRA. It is not simply a charter of rights left primarily to the courts to enforce at the suit of interested parties, with some feedback into the executive and legislature which would wish to avoid having laws and policies declared inconsistent with the HRA. The courts are clearly a significant area of HRA implementation, but a number of formal provisions in the HRA make it clear that the goal is to build human right thinking at scrutiny into the policy-making and legislative process *before* matters ever need to go before the courts.

When HRA issues do come before the courts, the courts do not have the final say, but their interpretations and judgments are viewed as part of a “dialogue” between the various branches of government⁶ – the executive and legislature may choose to agree with the courts and take corresponding steps to amend the law to bring it into conformity with human rights, or they may choose to differ and justify that stance in the full glare of the parliamentary process.

The interpretive approach

A central provision of the ACT HRA is section 30, which provides:

“30 Interpretation of laws and human rights

- (1) *In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.*

- (2) Subsection (1) is subject to the Legislation Act, section 139.

Note Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).

- (3) In this section:

working out the meaning of a Territory law means—

- (a) resolving an ambiguous or obscure provision of the law; or
- (b) confirming or displacing the apparent meaning of the law; or
- (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

⁶ For a critical discussion of the dialogue model, see Leighton McDonald, “New Directions in the Australian Bill of Rights Debate”, [2004] *Public Law* 22.

(d) finding the meaning of the law in any other case.”⁷

The starting-point is thus for the courts (and others engaged in the interpretation of legislation) to approach the task of interpretation with the goal of finding a human-rights consistent interpretation of a statutory provision that is reasonably open on the words of the statute, without unduly straining the language or frustrating the essential purpose of the legislation. If such an interpretation is open to the court, then it must interpret the statute in that way, even if there is binding pre-HRA precedent which interprets the statute differently.

If the court is not able to adopt such an interpretation, then it must apply the statutory provision as is. If the case is before the Supreme Court, section 32 of the HRA provides that the Court may issue a declaration of incompatibility, if it is satisfied that the Territory law is not consistent with the human rights in question. However, for the party directly concerned, this is something of a Pyrrhic victory, as section 32(3) explicitly provides that the declaration of incompatibility does not affect the validity, operation or enforcement of the law or the rights or obligations of any person. The declaration merely triggers a process of reporting the matter to the Legislative Assembly and the formulation by the Attorney-General of a response for the Assembly’s consideration.

The question of how far a court can go in re-interpreting language which has an established meaning is not one that can be answered in the abstract, but must be considered in a specific context. For example, some courts in the UK and Hong Kong have been prepared to hold that a requirement that a defendant in a criminal trial “prove” a particular fact may in certain circumstances be interpreted as imposing an evidential burden on the defendant, rather than the legal burden that has been historically been imposed – in order to ensure that such a provision does not violence the presumption of innocence. In another case, the Court of Appeal for England and Wales interpreted the words “as his or her husband or wife” to include same sex partners in the context of succession to protected tenancies.⁸

The proposal that the HRA contain a specific provision providing for a cause of action based on violation of the Act was rejected by the government, out of a concern that this would expose it to potential large awards of damages (though the overseas experience in comparable jurisdictions would not seem to justify this concern). While there may not be a cause of action that can be directly founded on the HRA, it seems clear that there will be new grounds on which use can be made of existing rights of action – in particular challenges could be brought under the ACT Administrative Decisions (Judicial Review) Act 1989 to challenge administrative decisions based on an interpretation of a statute that was not consistent with human rights – relying on this as an error of law, a failure to take into account a relevant consideration or as otherwise contrary to law. In other cases, the

⁷ Section 3 of the UK HRA provides: “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”.

⁸ *Mendoza v Ghaidan* [2002] EWCA Civ 1533

experience in New Zealand suggests that courts may be prepared to provide remedies in other contexts where there is a violation of the rights guaranteed.

The failure to include a specific clause binding public authorities (as appears in the Canadian Charter, the UK, NZ and HK bills of rights) would also seem to be no bar to holding public authorities (and indeed private parties bound by legislation) to the standards in the HRA. The mandate in section 30 to interpret legislation in accordance with the HRA applies to everyone involved in that process of interpretation and should apply to every circumstance covered by legislation, whether that involves relations between a citizen and the State, or between two private individuals..

Other aspects of interest

There are a number of other aspects of the ACT HRA that may be of particular interest which I can only refer to briefly here. They include:

- The role that international jurisprudence and comparative jurisprudence will play in the interpretation of the HRA – the HRA specifically refers to the relevance of the international sources such as the general comments and case law of the United Nations Human Rights Committee (section 31(1)), which are not familiar to many in the profession. In some cases the international approach to interpretation required by the Act may lead to different results to those that would be obtained by the usual methods of statutory construction. Comparative case law from countries such as the UK, NZ, Canada, and HK is of course much more familiar to practitioners.⁹
- The catalogue of rights guaranteed – these are very closely based on the ICCPR, though there are some differences. In particular, the limitations clause (section 28) is very similar to section 1 of the Canadian Charter (and section 5 of the NZ Act), and applies theoretically to all the rights in the HRA in slightly different terms to the limitation clauses contained in some of the rights in the ICCPR¹⁰
- The limitation of the interpretive provision (section 30) to legislation and the effect or not that this might have on the development of the common law in line with the HRA – it may be that this exclusion will stifle the development of the common law in areas such as the right to privacy, one area in which there has been development in the UK (the Naomi Campbell case being a recent example¹¹).

⁹ For a general discussion, see Andrew Byrnes, “The Challenges of Interpretation: International and Comparative Sources”, paper presented to *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

¹⁰ Section 28 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.” For a discussion of the relationship between the Human Rights Act’s limitations clauses and the ICCPR’s limitation clause in the context of freedom of expression, see Sarah Joseph, “Freedom of Expression”, paper presented to *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

¹¹ *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004)

D. Incorporating human rights values and norms in the administrative and legislative process

An important provision so far as explicitly incorporating human rights analysis in the legislative process as a matter of course is the requirement in section 37 of the HRA that the Attorney-General must give a statement of compatibility on each bill that it is consistent with the human rights guaranteed or, if it is not consistent, how it is not consistent.¹² This has parallels in the UK and NZ legislation. It has already led to the establishment of procedures within the ACT government for the detailed vetting of policy and legislative proposals for compatibility with human rights, and it appears that some changes to initial proposals may already have been brought about internally as a result of this process.¹³ Linked to this mechanism to ensure that departments internalize human right scrutiny in their policy work is the requirement that government departments report annually on the measures “to respect, protect and promote human rights.”¹⁴

Also a critical part of the process of embedding human rights scrutiny as a matter of course is the requirement in section 38 of the HRA that the Legislative Assembly receive a report from the relevant standing committee of the Assembly on the human rights issues raised by bills presented to the Assembly. This has its parallels in the Human Rights Committee of the UK Parliament which has played an important role in moderating a range of legislative proposals which raised human rights issues. In addition, whenever the Supreme Court issues a declaration of incompatibility, the Attorney-General must present a copy of the declaration of incompatibility to the Legislative Assembly with 6 sitting days of receiving it from the Court, and must prepare a written response to the declaration and submit it to the Assembly no later than 6 months after presenting the declaration to the Assembly. This focuses the attention of the legislature on the inconsistency and in effect the government must come up with a considered response, either by accepting the court’s conclusion or by justifying adhering to the existing legislation notwithstanding the court’s views.

The ACT Human Rights Commissioner

The ACT Human Rights Commissioner (who is also the ACT Discrimination Commissioner) will also play an important role in making the ACT HRA an effective mechanism for guaranteeing the enjoyment of rights. The role of the Commissioner under the Act is to provide community education on human rights issues (including those guaranteed in the ACT HRA), to conduct reviews of Territory laws (including the common law) on human rights and to report to the Attorney-General on those matters, and to provide advice to the Attorney-General. The Commissioner also has the power to intervene in court cases in which HRA issues are raised, with the leave of the court.

¹² See the discussion of the UK experience in particular by Thomas Poole, “The Role of Parliament”, paper presented at *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

¹³ Elizabeth Kelly, “How does the Human Rights Act Protect Human Rights?”, paper presented at *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.

¹⁴ Annual Reports (Government Agencies) Act 1995, s 7(2A)

While the Commissioner does not have the power to receive and consider individual complaints (as she does under the Discrimination Act 1991), the current Commissioner has indicated that she is keen to make her role under the HRA an effective one, both by exercising the formal powers she has and also by convening a community human rights forum of organizations which may have particular information and advice to offer on the effectiveness of the HRA in promoting the enjoyment of human rights.¹⁵

E. Will the ACT HRA have an impact and what lessons can be learnt for other jurisdictions?

One question which was asked during the process of consideration and adoption of the ACT HRA was why the ACT needed a bill of rights at all, given the relatively high level of prosperity of the community and the extensive protections under existing statutory and common law for human rights in the Territory. Furthermore, there did not appear to be an overriding community perception that a bill of rights was a matter of urgency. The responses to that question were various. Although existing levels of enjoyment of human rights in the ACT are high, there are areas of disadvantage in the ACT community, with problems of poverty and homelessness present in the community. Indigenous groups, victims of crime groups and those advocating environmental rights among others argued for the need for a bill of rights to provide clearer, more secure protection for rights which had been historically overlooked. Ironically, it was these groups whose claims for explicit inclusion received little or no explicit recognition in the final form of the legislation.¹⁶

The major justifications for the HRA offered by both the Consultative Committee and the government were the symbolic importance of a coherent statement of rights, the need to provide an overall guarantee of rights to supplement the existing patchwork of rights protection, and the importance of having these guarantees against encroachments in the present or future, in particular in times of perceived crisis or emergency.

It is far too early to tell what impact the ACT HRA will have in the courts, the legislature and the administration. Experience elsewhere suggests that, while we can predict some likely areas of impact – in particularly criminal law, and mental health legislation – there will often be surprises. Often what a bill of rights brings about is a fine-tuning of existing law and practice and improved consideration of human rights values in policy-making and the legislative process, with major changes in only a few areas.

¹⁵ Helen Watchirs, “Limitations and Opportunities: Looking Forward”, paper presented at *Australia’s First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004

¹⁶ The right to self-determination, which appears in article 1 of both the International Covenants on Human Rights, is not included in the ACT Human Rights Act, although paragraph 7 of the Preamble to the Act states that “[a]lthough human rights belong to all individuals, they have special significance for indigenous people – the first owners of this land, members of the most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.” There is no specific reference to the rights of victims of crime in the HRA, and environmental rights are included only to the extent that the first review of the HRA (after one year of operation) is required to consider how environmental rights might be better protected (section 43(2)(b)).

The ACT is a small jurisdiction, in which the legal profession seems so far to have taken relatively little interest in using the HRA in cases before the courts. This is so even in criminal cases in which one would have expected HRA arguments to have been raised on a number of occasions already. By comparison with some other jurisdictions where there was a longer lead time between enactment and commencement, there has been relatively little time for ACT lawyers to familiarise themselves with the Act. Yet at the same time, they do not seem particularly interested in doing so at this stage. In other jurisdictions there has often been a small core of practitioners with a particular interest in bill of rights issues that has stimulated important developments, and this group has yet to emerge in the ACT. Judges, however, have been interested, and took part in a seminar on the HRA organized by the National Judicial College of Australia in June 2004. It may be that the real action in the ACT will be in the less visible reaches of the public service and in the legislative process, rather than in a profusion of cases addressing a wide variety of issues (as has happened elsewhere).

One particular feature of the ACT which limits the extent to which human rights challenges can be brought against the exercise of official power is the dominant role of federal law in a number of areas – substantive criminal law and evidence law in particular¹⁷ -- which have been the target of many bill of rights challenges in overseas jurisdictions. This limitation may also exist in some areas throughout Australia – a State bill of rights will not be able to limit directly the exercise of powers under Commonwealth legislation, though one might hope that the same ICCPR standards might be used to interpret federal statutory powers as well.

It is hard to predict how the ACT experiment will go, or how well it will go. It is difficult to see that it will bring about major social change and address patterns of disadvantage in the community (not only because of the omission of economic, social and cultural rights), though it may contribute to a greater sensitivity to some of those issues. Nevertheless, It is an important experiment which may bring some useful lessons to the ongoing inquiry about whether we should have a national bill of rights, and will, I hope, encourage other States to undertake similar controlled experiments themselves by enacting bills of rights following the ACT's lead.

The dangers of complacency are clear for us all to see in today's Australia. A bill of Rights gives us a stimulus to test our governments' laws and policies – and our own practices – against a statement of fundamental values to which we all subscribe. I hope that the ACT experiment provides encouragement other jurisdictions to follow suit, now that the prospect of an Australian bill of rights has moved from hypothetical discussion to a juridical and political fact.

¹⁷ See Simon Bronitt, "Two Visions of the *Human Rights Act 2004* (ACT): A Clayton's' Bill of Rights or the New Magna Carta?", paper presented at *Australia's First Bill of Rights- A Forum on the National Implications of the ACT Human Rights Act*, Canberra, 1 July 2004.