

Strengthening the ACT Human Rights Act 2004

The Human Rights Act 2004 has now been in force for exactly one year, and it is fair to say that its impact so far has been fairly modest. The predictions of critics that the Act would be “*potentially [the] most dangerous legislation we have ever seen in this Territory*” and that we would be “*opening Pandora’s box*”¹ do not appear to have been borne out.

In particular, there has been no sign of the flood of litigation which was predicted by many critics. The Act has been cited in nine judgments of the Supreme Court and Court of Appeal, and in one decision of the Administrative Appeals Tribunal. However the Act has not yet been considered in any great depth, nor could it be said to have affected the outcome of any of these matters.

While it is reassuring that the Act has not had a costly and divisive impact on the Territory in its early days, the lack of activity may suggest a need for some fine tuning to ensure that the Act is effective to achieve its aim of creating a culture of human rights in the ACT.

This paper will consider some arguments for the strengthening of the Act, drawing on the original recommendations of the Consultative Committee², and features of bills of rights in other jurisdictions.

Making it clear that public authorities must act consistently with the Act

Unlike its counterparts in the United Kingdom and New Zealand, the ACT Human Rights Act does not contain a specific clause identifying those who are bound by the Act, nor the scope of activities it covers. The Act begins by setting out the human rights which belong to all individuals. It then sets out a regime for legislative interpretation and for scrutiny of new laws.

If the Act is construed narrowly, the human rights it recognises might be considered as relevant only to the interpretation of legislation by courts and government officials, rather than to the actions of public authorities more generally.

The Consultative Committee had recommended that the Act impose an explicit obligation on public bodies to act consistently with these human rights unless inconsistent conduct is clearly required by legislation.

Such a provision would be useful in clarifying that the obligations of government and public servants extend beyond narrow issues of legislative interpretation. It would provide a stronger mandate for the Human Rights Office to require all public authorities to comply with human rights standards.

Those who read the Act more broadly might consider this change unnecessary. As government activity takes place within a statutory framework, most government actions could be considered

¹ Mr Bill Stefaniak, Legislative Assembly for the ACT: 2003 Week 13 Hansard (25 November 2003) . Page.. 4577 and Mrs Burke Legislative Assembly for the ACT: 2004 Week 2 Hansard (2 March 2004) Page 511

² The ACT Bill of Rights Consultative Committee appointed in April 2002. The conclusions of the committee are set out in its report: *Towards an ACT Human Rights Act* ACT, Canberra 2003

to involve a process of interpretation and application of legislation and thus within the reach of the Act.

However while it may regulate government actions, it is not clear that the Act would extend to failure of government or public agencies to develop legislation or policies to positively implement human rights. It may be difficult to classify such omissions as incorrect interpretation of legislation. In the United Kingdom, the government has been found to have a positive obligation to implement rights, such as the right to life³ and this has been important in improving standards in areas such as healthcare and police protection.

Some commentators argue that, as the Act does not contain specific limitations on its application, it covers all conduct of government and its agencies, and possibly also of private citizens, and requires that government uphold the protected human rights.⁴ However it is not clear that the courts would take such an expansive view of the legislation.

On balance, the inclusion of a specific provision binding public authorities appears desirable to clarify and give force to the obligations of government and its agencies under the Act.

Providing a cause of action and remedy for breach of human rights

While it may be appropriate to clarify the scope of the obligations of government authorities to act consistently with human rights, it is arguable that such obligations are of limited practical value without a mechanism for enforcement, to ensure that government can be held to account for its conduct.

The Act presently does not provide any cause of action or remedy for an individual whose human rights have been violated by public authorities, although such a mechanism was recommended by the Consultative Committee.

The Committee considered that the Supreme Court of the ACT should be given jurisdiction to hear proceedings alleging unlawful conduct by a public authority with respect to human rights. It recommended that the Court be given power to make a range of orders for a breach of human rights, including an order for damages where other remedies are not sufficient.

It seems that the decision not to include a remedy reflected the Government's fear of opening the floodgates of litigation and of exposure to costly damages awards. However the experience of other jurisdictions such as the United Kingdom and New Zealand, where a remedy has been provided or found to be implied in the legislation, suggests that courts have taken a cautious approach, and have not been unduly generous in awarding damages.

Some would again suggest that a specific amendment is unnecessary, as the ACT Courts might simply follow in the footsteps of the New Zealand Court of Appeal in implying a right of action and remedy for a breach of human rights where one has not otherwise been provided.⁵

In *Baigent's* case⁶ the plaintiff sought compensation for an unlawful entry and search of her property by the police, in contravention of the New Zealand Bill of Rights Act. Although the New

³ recognized in cases such as *D v UK* (1997) 24 EHRR 423 and *Osman v UK* (1998) 29 EHRR 245

⁴ Andrew S Butler, 'The ACT human rights Act: a New Zealander's view' (2004) 194 *Ethos* 16.

⁵ James Allan, 'Take heed Australia: a statutory Bill of Rights and its inflationary effect' (2001) 6 *Deakin Law Review*.

Zealand legislation contained no specific right of action or remedy, the Court determined that such rights created by parliament could not be empty and toothless, and that their breach must give rise to a remedy. It remains to be seen whether the issue will be tested in the ACT, and whether the Supreme Court would take a similar view.

It should be noted that although the Act does not create a new cause of action, it could be utilised as an adjunct to existing causes of action, for example a claim for review of an administrative decision based on an interpretation of legislation inconsistent with human rights, or, possibly, in a claim for breach of statutory duty by government. Nevertheless at this stage such possibilities have not been enthusiastically embraced by the ACT legal profession.

Providing a right to complain to the Human Rights Commissioner

One possibility which was not explored by the Consultative Committee is to provide a right of complaint to the Human Rights Commissioner where it is alleged that a government authority has breached a human right recognized under the Act.

At present the Act requires the Human Rights Commissioner to review the operation of legislation and common law for consistency with human rights, and to advise the Attorney General on human rights issues, as well as providing education on human rights. However it does not give the Human Rights Commissioner a role in investigating individual complaints.

It appears that the Consultative Committee did not consider this option because it had recommended that the Supreme Court have jurisdiction to hear such proceedings.

There could be advantages in giving the Human Rights Commissioner such a role under the Act, particularly if, as at present, no other formal remedy is provided within the Act. The complaints could be handled in a similar way to those dealt with by the Commissioner under anti-discrimination legislation.

Such a change would provide a mechanism for people with genuine human rights grievances to have their complaints heard by an independent body and to seek a conciliated outcome with government. This process would provide some content to the rights guaranteed, albeit limited.

The role of investigating complaints would also allow the Human Rights Commissioner to more closely monitor the compliance of government agencies with the Act. She would then be in a better position to provide feedback to the government about the interpretation and application of human rights, and systemic issues of concern.

However it would be necessary to ensure that the Human Rights Office not become overwhelmed with individual complaints handling, to the detriment of the Commissioner's broader advocacy and education roles. The office has only a small number of staff, and already devotes a large proportion of its time to handling discrimination complaints. Such a change would require a significant increase in staff and resources. The Human Rights Commissioner would arguably also need to have discretion not to investigate trivial or vexatious complaints, to ensure that she is able to continue her critical role in monitoring and promoting human rights compliance across the community.

⁶ *Baigent's case, Simpson v Attorney-General* [1994] 3 NZLR 667 (CA).

It might also be argued that this option would not go far enough in protecting human rights, as, unlike discrimination complaints, there would be no further avenues for redress through a tribunal or court for human rights complaints which could not be successfully conciliated by the Human Rights Commissioner.

Nevertheless it appears that some remedy might be better than none, and it could only be hoped that government agencies, as respondents to complaints, would have significant regard to the views of the Human Rights Commissioner in resolving these matters.

Inclusion of Economic Social and Cultural Rights

The Human Rights Act presently protects only certain human rights drawn from the International Covenant on Civil and Political Rights. The Act provides that after its first year of operation, the Act should be reviewed, and the Attorney General should report back to parliament by 1 July 2006. The review is explicitly required to consider whether rights from the International Covenant on Economic, Social and Cultural Rights (ICESCR) should be incorporated as human rights under the Act.

The Consultative Committee emphasized the indivisible nature of human rights, and recommended that the Act include rights found in the ICESCR. These include the right to an adequate standard of living, the right to the highest attainable standard of health, the right to housing, clothing and food, the right to education, and the right to work in just and favourable conditions.

It appears that ICESCR rights were not included at the outset because of concern about the cost of fulfilling these substantive rights, and of giving the Courts a role in considering resource allocation in these areas where there are often competing policy concerns.

In parliamentary debate, the Opposition warned that the inclusion of such rights would be an “*unmitigated economic disaster*”. In particular it was considered that the right to the highest obtainable standard of health could “*bankrupt the territory*”⁷.

The Committee had recognized that such rights would be more challenging to implement, and recommended the inclusion of a provision acknowledging that such rights are subject to progressive implementation. They suggested that Courts should be required to consider the financial circumstances of the public authority and the cost of acting in a manner compatible with human rights, in reaching any decision in relation to these rights.⁸

The incorporation of ICESCR rights in bills of rights in other jurisdictions tends to be the exception rather than the rule. This issue has recently been considered by the Joint Committee on Human Rights in the United Kingdom, which suggested that:

“ Incorporating economic and social rights in UK law could extend the culture of accountability which the Human Rights Act established in respect of civil and political

⁷ Mr Bill Stefaniak *Legislative Assembly for the ACT: Week 13 Hansard (25 November 2003) Page4577*

⁸*Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, ACT 2003, Appendix 4 draft bill at p23

rights. It could extend this culture of justification and accountability to cover matters that are fundamental to the lives of most citizens; and it would have most practical effect in protecting the rights of the people who are most marginalised and deprived in an unequal society.”

The Committee went on to note that although some models for incorporation of rights would have the potential to inappropriately interfere with economic and social policy development by government and parliament, such concerns might be remedied by appropriate safeguards.⁹

In South Africa, which has an extremely robust constitutional bill of rights, which includes ICESCR rights and gives the Constitutional Court jurisdiction over enforcement, the impact of these rights has not been as dramatic as might be expected. The Court has been careful not to overstep its role by second guessing policy decisions taken in good faith. It rejected, for example, a claim by a patient to the right to dialysis where resources were scarce and had to be allocated to patients with the strongest prospects of survival.¹⁰ The Court was prepared to intervene where a decision to restrict access to an HIV/AIDS medication could not be reasonably justified, as the manufacturer had agreed to provide the drug free of charge¹¹.

Under the ACT Act, which does not provide a specific cause of action against government, and does not allow courts to override the intentions of parliament in interpreting legislation, it is possible that the incorporation of new rights from the ICESCR would not have a very significant impact.

Nevertheless such a step would be important in keeping these rights on the agenda in the development of policy and new legislation. The recognition and implementation of economic social and cultural rights could also be argued as critical to achieving a true human rights culture, by addressing substantive social inequities so that all individuals are able to participate in civil and political life.

⁹ Twenty First report of the Joint Committee on Human Rights, United Kingdom Parliament, November 2004 at paragraphs 69-70. The report is available at www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm

¹⁰ *Subramooney v Minister of Health, Kwa-Zulu Natal* 1997 (12)BCLP 1696 (CC)

¹¹ *Minister of Health v Treatment Action Campaign*[2002]5 SA 271