Assessing the First Year of the ACT Human Rights Act

The Human Rights Act 2004 and the Criminal Law

Richard Refshauge SC
Director of Public Prosecutions
Australian Capital Territory

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Exercising his right of reply in the ACT Legislative Assembly on 2 March 2004 in the debate on the Human Rights Bill 2003, the Chief Minister and Attorney-General, Jon Stanhope, said that the Bill “will promote human rights by making rights more transparent and requiring them to be taken into account in the development and interpretation of the law”.¹ That Bill became the Human Rights Act 2004. In a press statement welcoming the enactment of the law, he said “the Human Rights Act will help protect us from the erosion of our human rights and our way of life”.²

These are significant claims and it is not unreasonable to test the experience of the first twelve months since the enactment of this legislation to see whether it has lived up to the promise.

The criminal law is not a bad focus for that investigation.³ The criminal law is where the State interacts most significantly with the citizenry, exercising significant coercive powers which can very substantially interfere with those rights enshrined in the Act.⁴

Despite the Chief Minister’s comments, it needs to be said that before the enactment of the Human Rights Act 2004, the ACT was not a human rights free zone. Indeed, the ACT was, in fact, no stranger to human rights. For example, the Mental Health (Treatment and Care) Act 1994 set out amongst its objectives “to provide treatment, care, rehabilitation and protection … for mentally dysfunctional persons in a manner that is least restrictive of their human rights”.⁵ Amongst other things that Act regulated in a significant part the intersection between mental health and the criminal law. As another example, I refer to the Uniform Evidence legislation which applies in the Territory. Enacted (and amended in 1995, 1996, 1997, 1999, 2000, 2001 and 2002) by a Federal Government, which has put itself so strongly in opposition to a Bill

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¹ Legislative Assembly for the ACT Debates Weekly Hansard (Canberra: Legislative Assembly for the ACT, 2004) 2 March 2004 p530.
³ Indeed, some people are said to believe that the Human Rights Act 2004 only applies to the criminal law!
⁴ For a helpful discussion of the issues in this characterisation of the criminal law, see S Bronitt and B McSherry Principles of Criminal Law (Sydney: LBC Information Services, 2001) 7-9.
⁵ Section 7(a), Mental Health (Treatment and Care) Act 1994.
of Rights, the Evidence Act 1995 required a court when considering whether to exclude improperly or illegally obtained evidence to take into account, amongst other things, “whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights”. There are a number of decisions of the ACT Supreme Court which deal with precisely that provision. Similarly, between 1996 and 1998, four decisions in the Supreme Court specifically relied on Magna Carta and the rights it enshrined.

In three other cases prior to 2004, the Court relied on rights specified in the International Covenant on Civil and Political Rights quite outside the reference to that Covenant in the Evidence Act 1995.

Perhaps most importantly of all, one must refer to that central right in the criminal law provisions of the Human Rights Act 2004, the right to a fair trial. It has to be said that this right has long been recognised at common law. So far as I can discover, it was first mentioned in a criminal appeal in the High Court in Bridge v The Queen (1964). In the UK, it had been recognised as early as 1914 in Ibrahim v The King.  

Prime Minister John Howard is on record as opposing a Bill of rights: see, for example, his categorical statement to that effect in an interview with John Lawson 8 March 2004: accessed at www.pm.gov.au/news/interviews/Interview738.html (accessed on 25 June 2005). Of course, it was not Mr Howard’s government that introduced the Uniform Evidence legislation, but the then Prime Minister Mr Keating had apparently had no greater enthusiasm. Although in 1985 an Australian Bill of Rights Bill 1985 was introduced and passed by the Parliament it was never assented to and no further attempts were made to enact such a law while Mr Keating was Prime Minister. Additionally, the Uniform Act was made a law of NSW in 1995 by the Carr Government; Mr Carr is no fan of a Bill of Rights: Margo Kingston “What about a Bill of Rights” Sydney Morning Herald 4 December 2002; Bob Carr, “The Rights Trap” in Policy, Winter 2001, pp 19-21.

Section 138(3)(f), Evidence Act 1995 (Cth).

For example, R v Malloy [1999] ACTSC 118, The Queen v Haughbro (SC( ACT), Miles CJ, SCC 164 of 1996, unreported) and Truong (1996) 86 A Crim R 188. This provision has spawned decisions in other jurisdictions delving into the Covenant, even though human rights is not legislatively enshrined in the legislation of the jurisdiction. See, for example, Tasmania v Crane [2004] TASSC 80.


Section 21, Human Rights Act 2004. Significant other human rights in criminal proceedings are set out in section 22 also.

Bridge v The Queen (1964) 118 CLR 600 at 613. Strong statements had been made in earlier judgments, though not in criminal appeals. For example, Isaac J in R v Macfarlane; Ex parte O’Flanagan (1923) 23 CLR 518 (a deportation case) referred at 541 to “the elementary right of every accused person to a fair and impartial trial. That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it”.

[1914] AC 599 at 615. The concept of protecting a trial from unfairness has been mentioned by the courts well before this, though not always in these terms nor focussing on the issues now so much more...
As a fundamental common law right it was probably articulated most fully in *Jago v District Court (NSW)*\(^{14}\) and took on greater prominence when the High Court stayed criminal proceedings because the absence of legal representation would make the ensuing trial unfair in *Dietrich v The Queen*.\(^{15}\)

Thus, the *Human Rights Act 2004* did not introduce concepts that were unknown to the common law.\(^{16}\) In that sense, it did not and perhaps was not intended to make fundamental change in the ACT criminal justice system. We should not have expected a revolution and been surprised or disappointed when it failed to materialise.

Nevertheless, it has been argued that the common law’s record of enforcing human rights recognised in international law is poor.\(^{17}\) The reason for this is said to be that it is possible that there will be instances where an application to stay proceedings at common law will fail even if the result of the trial will be a breach of a provision of a convention.\(^{18}\) If that is so, then the enactment of the *Human Rights Act 2004* should

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\(^{14}\) Id. p16.


\(^{17}\) In this case, perhaps recognising a right more extensive than the right to a fair trial as set out in the *Human Rights Act 2004*, Mason CJ said at “There is no reason to confine the discretionary power of the courts by arbitrarily stipulating that a stay is the only proper remedy for delay. A second and related point may also be made. In appropriate cases, orders may be made to prevent injustice notwithstanding that there is no reason to suspect that the actual trial, when held, will not be fair. Thus orders may be directed to ensuring fairness in pre-trial procedures...”. The delay in that case may have breached section 22(2)(c) of the *Human Rights Act 2004*.

\(^{18}\) See, for example, *R v Tibbetts and Windust* (1989) 168 CLR 23. In this case, perhaps recognising a right more extensive than the right to a fair trial as set out in the *Human Rights Act 2004*, Mason CJ said at “There is no reason to confine the discretionary power of the courts by arbitrarily stipulating that a stay is the only proper remedy for delay. A second and related point may also be made. In appropriate cases, orders may be made to prevent injustice notwithstanding that there is no reason to suspect that the actual trial, when held, will not be fair. Thus orders may be directed to ensuring fairness in pre-trial procedures...”. The delay in that case may have breached section 22(2)(c) of the *Human Rights Act 2004*.
improve the position. It seems to me, however, that much of this depends on the content of the relevant right and the extent of its enforceability.

So how has the *Human Rights Act 2004* affected the operation of the criminal law?

In the courts there has been continuing reference to the *Human Rights Act 2004*. According to my researches, there have been nine judgments of the Supreme Court in which reference is made to the *Human Rights Act 2004*, one decision in the Magistrates Court and one decision in the Administrative Appeals Tribunal. Of the Supreme Court judgments, six were criminal law matters as was the Magistrates Court decision.

In addition, there have been a number of occasions when the *Human Rights Act 2004* is referred to in argument. My prosecutors reported initially that the Act was regularly referred to, especially in bail applications, and it is not infrequent for the court to enquire in the course of argument whether there is a human rights issue involved in the debate or whether it is being said that the *Human Rights Act 2004* is relevant to the argument.

Analysing the five criminal judgments, it has to be said that in none of them was the *Human Rights Act 2004* decisive. Indeed, in at least two of them one could be

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19 Supreme Court: *R v Trevitt* [2005] ACTSC 48; *Robertson v ACT* [2005] ACTSC 35; *Fletcher v Harris* [2005] ACTSC 27; *Buzzacott v R* [2005] ACTCA 7; *The Queen v Martiniello* [2005] ACTSC 9; *R v YL* [2004] ACTSC 115; *Firestone v ANU* [2004] ACTSC 76; *Scuty v Smyth* [2004] ACTSC 77 and *The Queen v O’Neill* [2004] ACTSC 64. In a bail application (not included above), *Application for bail by Le* (SC(ACT), Connolly J, SCC 181 of 2004, 13 August 2004, unreported) there was a reference to the *Human Rights Act 2004* in a preliminary point as to whether the application could be brought at all, but the application was ultimately dismissed.


Since delivering the paper, 2 more decisions of the Supreme Court have referred to the *Human Rights Act 2004*: *The Queen v Upton* [2005] ACTSC 52 and *In the Matter of An Application for Adoption of TL* [2005] ACTSC 49.

20 Those are *R v Trevitt; Fletcher v Harris; Buzzacott v R; The Queen v Martiniello; R v YL; and The Queen v O’Neill*.

21 I have not been able to keep anything like a complete track of them. A recent example where the court in argument raised the *Human Rights Act 2004* as a basis for suggesting that a future change in the law which would have altered the test for negligence in criminal proceedings might be required to be applied before commencement of the provision: *The Queen v Evans* (SC(ACT), Higgins CJ, SCC193 of 2004, 20 June 2005).
forgiven for considering that the reference to that Act was entirely gratuitous.\textsuperscript{22} The decisions were all decisions which were made on the basis of principles of law or the exercise of a discretion that were unexceptional applications of the common law and which were unaffected by or independent of the \textit{Human Rights Act 2004} though consistent with it. The same seems true of those decisions in the civil area also.

The references to the Act are, for the most part, simply that: references to the \textit{Human Rights Act 2004}.

For example, in \textit{The Queen v O’Neil}, the Learned Trial Judge said

“\textit{The principle of double jeopardy, described by the High Court in Pearce v The Queen … a (sic) deeply ingrained principle in Anglo-American, as well as Australian jurisprudence, finds specific statutory basis in s24 of the Human Rights Act 2004} …”\textsuperscript{23}

Nevertheless, the context of these references appear to suggest a more expansive approach to the law.

\textit{Whilst} it is obviously too early to tell and difficult to prove, my impression is that, if anything, the \textit{Human Rights Act 2004} has made judges a little more adventurous or, in that perhaps pejorative term, “activist”\textsuperscript{24} in their approach to the law and the exercise of discretion.

In the light of the substantial growth in the jurisprudence of the fair trial or the right to a fair trial since about 1994,\textsuperscript{25} it is not surprising that the ACT Supreme Court has not needed to deliver a decision in which the \textit{Human Rights Act 2004} has played a central or decisive part.

\textsuperscript{22} \textit{R v Trevitt, supra}, at [25]; \textit{Fletcher v Harris, supra}, at [37].

\textsuperscript{23} \textit{The Queen v O’Neill, supra}, at [13].

\textsuperscript{24} See, for example, the speech by Justice Heydon “How judicial activism results in the death of the rule of law in Australia” delivered at the Quadrant Dinner on 30 October 2002, subsequently published in the January/February 2003 issue of the magazine. See also, Jack Waterford “Bills that let Judges make laws “The Canberra Times (Panorama) 11 June 2005.

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Nevertheless, the time will come when new issues will need to be considered and the common law will provide no clear answer. For that time, I have to say that the present record of the Supreme Court is a little disappointing.

There is no evidence of any awareness and certainly no mining of the rich jurisprudence which courts in Europe, North America and New Zealand have created to identify and explain the rights enacted by the respective legislation. In two respects, I think the ACT courts, as yet, have failed to recognise this jurisprudence and develop it locally.

The first critical issue is the content of the rights. “The right to a fair trial” including the other rights in criminal proceedings, such as the presumption of innocence, is something to which most humans would subscribe and most countries would claim that their criminal justice systems already provide. What the content is, however, is neither completely specified in the Human Rights Act 2004 itself nor by any means universally agreed. There is much learning to be gained from those jurisdictions which have enacted bills of rights in one form or another, as well, indeed, from the High Court itself.

To take an example, section 22(2)(c) provides that an accused is entitled to be tried without unreasonable delay. Where there is delay this may breach that right, but only if we know what is unreasonable delay. In the UK, Canada and New Zealand, for example, at least 52 High Court decisions on criminal appeals since that time have addressed the question of a fair trial to a greater or lesser extent.

Archbold Criminal Pleading, Evidence and Practice (London: Sweet & Maxwell, 2005) devotes chapter 16 to human rights in the criminal context, with significant reference to decisions of the European Court of Human Rights as well as UK courts and, indeed, other jurisdictions such as New Zealand.

D Stuart Charter Justice in Canadian Criminal Law (Scarborough, Ontario: Carswell, 2001)

P Rishworth and others The New Zealand Bill of Rights (South Melbourne: OUP, 2003).

Examples of where countries claim their system for trying alleged offenders provides a fair trial but others may disagree include: Turkey for the trial of Ocalan; Russia for the trial of Khodorkovsky; Colombia for the trial of three Irishman charged with training members of the FARC; Indonesia for the trial of Schapelle Corby.

In Dyer v Watson [2002] 3 WLR 1488, the Judicial Committee of the Privy Council gave general guidance as to the application of the reasonable time guarantee. There was held to be no requirement to demonstrate specific prejudice: Porter v Magill; Weeks v Magill [2002] AC 357. This is to be contrasted with the US, for example, where in Barker v Wingo 407 US 514 (1972), the US Supreme Court held that a relevant factor was whether the accused had been prejudiced.
extensive consideration of how this is to be approached have evolved, not necessarily all consistent, but with remarkable similarities. Thus, merely to state the right to be tried without unreasonable delay and then to point to delay is not sufficient to attract the operation of the *Human Rights Act 2004*.33

Recently, the right to a trial without unreasonable delay has been seen by the Court as indirectly enabling costs to be recovered by accused charged on indictment,34 though both common law and international jurisprudence are to the contrary.35 It is preferable if discussion of these views occurs before decisions are made.

What I would seek is a principled discussion addressing the issues. This discussion is an important element in the process of identifying what is the content of, for example, the right to a fair trial. Without it, one is led to generalisations.

Indeed, the way in which “human rights” has been used as a catchcry might lead some to think, as perhaps do the supporters of Schapelle Corby,36 that the only fair trial is one where the accused is acquitted.

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32 *Martin v Tauranga District Court* [1995] Z NZLR 419 sets out the principles. It would appear that where the Crown creates the unwarranted delay, prejudice will be less significant, though still relevant. See, however, *Holland v District Court of Auckland* (HC(Auck), Randerson J, M1107/00, 20 September 2000, unreported).

33 If the UK approach is taken, then the time elapsed must be considered, then if that is of concern, the detailed facts and circumstances must be considered. The delay must be explained, but issues such as the complexity of the case, the conduct of the accused and the manner in which the case has been dealt with by the administrative and judicial authorities is relevant: *Dyer v Watson* [2002] 3 WLR 1488 at 1509-10. If the Canadian and New Zealand approach is to be taken, then prejudice to the accused is also an important factor: *R v Palmer* (1996) 2 HRNZ 458.

34 See, for example, *The Queen v Martiniello* [2005] ACTSC 9; *The Queen v Upton* [2005] ACTSC 52. In *R v Upton*, the prosecution was, curiously, required to pay the costs of an earlier trial, aborted through no fault of the prosecution at all, as a condition of lifting the stay imposed.


36 She is a 27-year-old Australian woman, charged in Bali, Indonesia, with trafficking in cannabis and, despite considerable media attention in Australia, much of which suggested her innocence, was convicted and sentenced to 20 years imprisonment. On conviction, many of her supporters accused the Indonesian courts of being unfair. See, for example, messages on http://1au.messages.yahoo.com/news/top-stories/25588/ (accessed on 24 June 2005); www-quake-au.net/2005/05/schappelle-corby-precedent-why-you.aspx (accessed on 23 June 2005; posting under the name Gillian Mann on www26.abc.net.au/guestbook_central/list.asp?guestbookID=243 (accessed on 23 June 2005). Similar statements have been made on other fora, though the comments were by no means all one way and many
Of course, the court is not entirely responsible. Counsel appearing before it and for prosecution as well as the defence should be prepared with submissions on the issues and not merely refer to the Human Rights Act 2004 as if it held an answer. They have a duty to assist the Court to identify and apply the right legislation properly.

The other area of concern I have is related; it is the issue of proportionality. Human rights inevitably conflict with one another in the infinitely various circumstances in which humans interact. The way in which those clashes are to be resolved is a difficult but fundamentally important issue and one in which by virtue of the enactment of the Human Rights Act 2004 the courts play an important part. Again, there is international jurisprudence on this issue but the courts in this jurisdiction need to grapple with that in order to give leadership in the creation of human rights culture in the ACT which the Chief Minister and Attorney-General has urged.

To date there is no evidence of a growing legal debate about this. Further, anecdotal evidence from my prosecutors causes me some pessimism. In the context of arguments about the right to a fair trial, suggestions by prosecutors that the rights of victims might be relevant and taken into account in determining the content of the right to a fair trial have generally been summarily dismissed by judicial officers. This may, of course, merely be an example of what Justice Richard Posner calls the availability heuristic.

considered her to be guilty and the trial to have been fair: see, for example, Paul Kelly “A fair trial but not in our media”, The Australian 1 June 2005; Crispin Hull, “Judicial process in Indonesia has flaws, like most systems” The Canberra Times 27 May 2005.

Section 28, Human Rights Act 2004. This permits limits to be imposed on human rights that can be “demonstrably justified in a free and democratic society”. Such a limit is said to be justified only if it is “proportionate … to the good it may produce”: R J R MacDonald Inc v AG of Canada [1995] 3 SCR 199 at 329-30.

For example, R v Director of Public Prosecutions; ex party Kebilene [2000] AC 326 at 381; R J R MacDonald Inc v AG of Canada, supra; Moonen v Film and Literature Board of Review [2000] 2 NZLR 9.

See, for example, interchange between prosecutor and the bench in The Queen v Evans, SCC No 193 of 2004, Transcript p63 on 20 June 2005. Of course, victims rights have not specifically been incorporated into the Human Rights Act 2004.
In summary, then, I can say that so far as the courts are concerned, it is crystal clear that both the Supreme Court and the Magistrates Court know that a *Human Rights Act 2004* has been enacted but there are no clear indications yet as to how the courts will contribute to the creation of a human rights culture.

The other area referred to by the Chief Minister and Attorney-General is in the development of legislation and I have to say that in this area, the Act has produced more of a result. Each cabinet submission proposing legislation is required to refer to the human rights implications of the legislation.\(^4\) Regrettably, because of resource constraints, that section in each submission is usually added after the circulation of the consultation draft submission.\(^5\) This is a pity for two reasons. Those to whom the submission is circulated for consultation are denied the benefit of the exposition of what are seen to be the human rights considerations and thus the opportunity to learn and be informed. It also means that debate about the human rights implications of such submissions are limited because the absence of exposition in the consultation draft deprives those consulted of the opportunity to comment on what are said to be those implications.\(^6\)

With the more significant items of legislation, often prepared with a greater lead-time and wider consultation, however, it is pleasing to note that both of those opportunities are given. For example, the recent sentencing legislation which is now before the Assembly\(^7\) with two or three other Acts yet to join it,\(^8\) was the subject of significant committee consultation and a representative of the Justice Department’s human rights expertise sat at the table. Robust discussions were had about whether some

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\(^5\) Although not currently in the *Cabinet Handbook*, which is still the 2002 edition, Cabinet has decided that each cabinet submission must include a section on the human rights implications of proposed legislation.

\(^6\) It has been suggested that this is a deliberate decision because the resource implications means that the human rights advice will not be so complete and carefully worded as to justify public exposure. This does not change my view that this is a pity: after all cabinet submissions are confidential and circulated to a relatively small group of people. These people are usually those most in need of an understanding of the human rights implications of what they do.

\(^7\) This also has the capacity of creating those who make these comments the final arbiters on what are and what breaches human rights, not an easy task at any time, but doubly difficult when proportionality is considered. That any internal group become a de facto final decision maker without argument and alternative views is undesirable.

\(^8\) Crimes (Sentencing) Bill 2005 presented on 7 April 2005.
of the proposals were human rights compliant or not. This did change the shape of the legislation in a number of ways and, to that extent, at a bureaucratic level, there is a growing and effective awareness of human rights and the implications of the Human Rights Act 2004 as well as a positive influence exerted by it.

That is an extremely important part of building a human rights culture, but I find I am unsure about what is actually meant by the creation of a human rights culture in the ACT. This is another area where, if we are not careful, an important concept will become a slogan unless given content. I am not at all clear what a culture of human rights is. What does a cultural respect for human rights look like? Are there any extant examples? Is the United Kingdom or, indeed, Europe, an example of the culture of human rights and, if so, what are the criteria by which we should compare ourselves and the progress we make towards achieving it?46

Undoubtedly, the United States has one of the strongest human rights regimes.47 One would be troubled however, were one to look at that country at the moment for a paradigm of a human rights culture. The constitutionally entrenched Bill of Rights, which America enacted about the same time as Australia was invaded by Europeans, has not prevented gross breaches of human rights such as are being perpetrated at Guantanamo Bay.48 Recently events have also shown that legislators in that country regard the rule of law so lightly that they are now intent on developing a programme to remove judges who apply the law if the decisions are not ones the legislators like.49 This looks remarkably like the rule of persons rather than the rule of law. Indeed, a more insidious attack on human rights is hard to imagine. It is more

45 The Crimes (Sentence Administration) Bill 2005 was presented on 30 June 2005 and a Bill to deal with custodial issues is to be presented later.
46 I have been told that the wider discussion of human rights is part of that culture. This means that in the bureaucracy it is clearly growing, and also to some extent in the non-government community sector (especially through effective fora convened by the Human Rights and Discrimination Commissioner) but it is not clear how widely this has to permeate the community at large and whether more is needed, such as action consistent with human rights rather than just talk about them.
47 It is entrenched in the Constitution and, as part of the Constitution can be, and is, used to invalidate Federal and State legislation: Marbury v Madison 5 US 137 (1803). A famous example is, of course, Brown v Board of Education 347 US 483 (1954).
48 See, for example: report of Lex Lasry QC, observer appointed by the Law Council of Australia, released 15 September 2004; Amnesty International Annual Report 2005.
troubling that it comes not from a country with no history of democratic traditions or experience of the rule of law, but one intent on imposing democracy on others.

Human rights are an important foundation for a civilised society. So it would be a pity if the culture of human rights became simply an adversarial tool with which to beat the government or its agencies. It is true that the criminal justice system risks interfering with the human rights to life (fortunately not in our community), liberty and the freedom from cruel and unusual punishments but such interference is, in fact, legitimate in a democratic society if, after a fair trial, it is found that social norms or, perhaps more importantly, the human rights to life, liberty and security of others have been infringed.\footnote{Whilst the thrust of the protection of human rights is directed to state action, it has been held to go wider in the sense of permitting private actions, the restraint of which by the State would infringe human rights: \textit{R v Morgentaler} [1988] 1 SCR 30 (procedural restrictions on abortion limit a woman’s right to security of person); \textit{Rodriguez v British Columbia (Attorney-General} [1993] 3 SCR 519 (prohibition on assisted suicide impairs security of the person). On the other hand, a state is not under a positive obligation to give personal protection to an individual by providing him or her with the continued protection of personal bodyguards: \textit{X v Ireland} (1973) 44 \textit{Collected Decisions} (European Commission) 121, (Application 6040/73).
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It is not correct to say that the citizen adverse to the State is the only legitimate asserter of human rights. The State, too, asserts them and the citizen may well be the one to breach them. The Civil Rights movement in the United States fought to recognise the rights of black people not just from the denial of their rights by southern states but also by southern private cinema operators, private café proprietors and private property owners.\footnote{See, for example, section 201 \textit{Civil Rights Act 1964} Title II.}

This recognition, to me, is an important part of having a human rights culture, which respects the rights of humans. In this sense, I believe prosecutors are important guardians of human rights, though this makes the depressing breach of rights by prosecutors in an alarming, though still small, number of countries the more deplorable.
What I have noticed about the influence of the Human Rights Act 2004 is the growing awareness amongst prosecutors of the values that lie behind the work that we do.\textsuperscript{52}

Prosecutors should think about what they do. I believe that with the publicity and attention given to the enactment of the Human Rights Act 2004 they are thinking more about what they are doing in terms of the influence or impact their work will have on the rights of citizens. The prosecutor’s task is, of course, fundamentally to interfere with the human rights of some citizens and to vindicate the rights of other citizens or the community as a whole (though I do not want to get into the debate over communitarian rights versus human rights). Without a clear understanding of the contents of the agreed human rights such as the right to a fair trial, the right to liberty and the right to freedom from cruel and unusual punishment, as well as a keen awareness of proportionality, which in the criminal area includes the right to life, liberty and security of the victims of crime as something that must be weighed in the balance, I do not believe they can carry out their tasks adequately.

In summary, I have to say that the last twelve months have shown a significant increased awareness of the Human Rights Act 2004 and what the rights are that are specified in it, but has made limited progress in defining the content of those rights and how they may be exercised or constrained in the ACT democracy. The danger is that without greater attention to these issues the Act will be used to produce merely a catchcry for the predilection of those asserting its protection instead of a real jurisprudence and, more importantly, the desired culture of human rights for the ACT.