

Human Rights Bill 2003

Mr Stanhope, by leave, presented the bill and its explanatory statement.

Title read by clerk.

MR STANHOPE (Chief Minister, Attorney-General, Minister for Environment and Minister for Community Affairs) (5.42): I move: That this bill be agreed to in principle. Mr Speaker, today is an historic day for the chamber, because today I fulfil my commitment to present to this Assembly a bill for a Human Rights Act that gives recognition to the fundamental rights and freedoms of the people of 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

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or poor, whatever your ethnic or national origin, political opinion or religious beliefs. I should also start by saying that this bill gives right and proper recognition to the special significance of human rights to the indigenous people of the territory, who were the first owners of this land.

Over 50 years ago, when the world was shocked by the horror of the holocaust and the devastation of the Second World War, the United Nations adopted the Universal Declaration of Human Rights. The declaration is a statement of a common commitment to the fundamental values shared by all the peoples of the world. Australia played a significant role in the creation of the United Nations and the drafting of the declaration. That is a history that we can be proud of. We acceded to the declaration and played a significant role in the development of human rights treaties that followed.

In the post-war period, migration and the policy of multiculturalism brought diversity and greater tolerance. In the 1970s and 1980s equal pay for women, anti-discrimination laws and better income support reflected our egalitarian spirit and desire for a more inclusive society. It was not until the 1960s that indigenous people were given the vote in federal elections and not until the 1990s that native title was recognised, and inquiries into Aboriginal deaths in custody and the removal of indigenous children made us aware of the devastating impact of racism and ignorance on indigenous families.

Our ratification of the International Covenant on Civil and Political Rights in 1980 was one of the numerous examples of Australia's commitment to the principles that underpin the United Nations Charter. The UN was built on the understanding that respect for human rights is necessary for peace and stability. That principle applies just as much at home as it does in the larger world.

Members, this isn't a party political issue. Australia's signature of the International Covenant on Civil and Political Rights was one of the first acts of the Whitlam government in 1972. But it was the Liberal government of Malcolm Fraser in 1980 that ratified the treaty and made it binding on Australia.

Over 10 years ago the Federal Labor government recognised the competence of the United Nations Human Rights Committee to receive communications from Australians who believed their rights, under the International Covenant on Civil and Political Rights, had been breached. During the past 10 years there have been over 80 communications through the various United Nations procedures. The sky hasn't fallen in on us and Australia has remained a party to those procedures despite some criticism from the current federal government.

But our participation goes beyond signing human rights treaties. Eminent Australian and Challis Professor of International Law at Sydney University, Ivan Shearer, was elected to the UN Human Rights Committee in January 2001. This highly coveted position was previously held by another eminent Australian and former justice of the Family Court, the Hon. Elizabeth Evatt AO. Professor Philip Alston, formerly of the Australian National University, was chair of the United Nations Economic, Social and Cultural Rights Committee for many years.

Members, it is time to recognise that we are part of a system that promotes respect for and protection of fundamental human rights. We contributed to the development of these

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principles. They are a part of our history and our culture and we have chosen to adopt them freely as a free exercise of Australian sovereignty. No country can claim the perfect human rights record and Australia does do better than most, but we can't afford to be complacent. We can't take our fundamental rights and freedom for granted in the 21st century any more than our forebears and ancestors could in the centuries that went before.

In recent years, the basic values of tolerance and respect we took for granted have been put in doubt, and the assumption that our fundamental rights are protected have been shown to be false. It is true that we enjoy high standards of representative government, an independent judiciary and respect for the rule of law. But, in truth, Australia is a human rights backwater. In the common law world, Australia is the only country that has neither a constitutional nor statutory bill of rights. The piecemeal and partial recognition of rights in the common law and in various statutes is no longer a satisfactory basis on which to address rights issues. Without a yardstick against which to measure rights, we risk the whittling away of rights protection.

In 1973 when Senator Lionel Murphy introduced the first Human Rights Bill into the federal parliament he observed:

Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia. What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights. The common law is powerless to protect them against the written laws and regulations made by Parliament, by Executive Government under delegated legislative authority, and by local government and other local authorities. The common law exists only in the interstices of statutory legislation.

Members, the issue of human rights protection affects us all in our every day lives—at home, at work, at school and in our neighbourhood. In 1948 Eleanor Roosevelt, speaking about the Universal Declaration of Human Rights, said:

Where, after all, do universal human rights begin? In small places, close to home—so close and small that they cannot be seen on any map of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.

As elected representatives, Mr Speaker, we have a responsibility to serve and protect the interests of the whole community, recognising that while we have the diverse origins and different views we share one destiny. The mark of our progress and our humanity is the extent to which we respect and protect fundamental human rights. This is not simply the concern of the few or the vulnerable. Human rights belong to everyone, and we are all diminished by breaches of human rights. The object of this bill is to give recognition in legislation to basic rights and freedoms. It is a clear and unequivocal commitment by this government and by this community about

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those values that bind us together as a democratic, multicultural and rights-respecting people. By passing this bill we commit ourselves to minimum standards in our law making. It is a bottom line, a floor below which we should not fall. Some are nervous about the impact of this law. Let me say this: rights exist in a social context that is well recognised in international human rights law, but it is too frequently lost in debate which exaggerates the scope and impact of rights. Some human rights are absolute. The right not to be tortured is one such right. I am sure no-one in this Assembly would disagree with that proposition. But the covenant does not permit the use of human rights as a pretext to violate the rights of others. We have taken care to reflect this principle in our bill and to ensure that restrictions on rights do not go further than is necessary.

I am aware that some will say that this bill does not go far enough. There are many who want to see economic, social and cultural rights enshrined in law, but I have to say to you, “Let us at least begin.” Let us begin with what is well accepted in the rest of the common law world. The world has moved on from the Magna Carta. Let us begin by incorporating the work done 60 years ago at the formation of the United Nations. This bill may not be exhaustive of all rights, but it is a beginning. I have already announced that economic, social and cultural rights will form part of the social plan. This issue can be looked at as part of a review of the Human Rights Act in the future. Mr Speaker, I now turn to some of the major features of the bill. The first is individual civil and political rights. First, this bill will recognise in legislation fundamental rights and freedoms drawn from the International Covenant on Civil and Political Rights. Consequently, rights such as equality before the law, the protection of family life and children, personal freedoms such as freedom of religion, thought conscience and expression, the right not to be arbitrarily

detained, the right to a fair trial and so forth, will be interpreted and applied in the ACT context.

To achieve that goal the bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that is consistent with the human rights protected in the act. Unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. Decision makers in all government areas will have to incorporate consideration of human rights into their decision-making process, and a statutory discretion must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right.

As I have already said, some rights, such as the right not to be tortured, are absolute. Other rights must be balanced against the rights of others. Limitations on a fundamental right must be read as narrowly as possible. By drawing on the International Covenant on Civil and Political Rights, we are able to ensure that the principles in the bill are interpreted in a way that is coherent with established human rights law. In practice, decision makers and others authorised to act by a territory statute in the courts and tribunals must take account of human rights when interpreting the law. If an issue concerning the interpretation of human rights arises, that issue can be raised in the context of criminal or civil proceedings. In practice, the opportunity to raise the issue will only arise where there is already provision for a proceedings in a court or tribunal.

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The covenant and related instruments, case law and materials which form part of the jurisprudence of civil and political rights, would inform the interpretation of the rights protected by the bill. And I reiterate, lest there is any confusion on the point, the bill does not invalidate other territory law, nor does it create a new cause of action. If, in the ordinary course of litigation, the question is raised in the Supreme Court about whether a territory law is consistent with human rights and the Supreme Court is unable to conclude that the law is consistent, the court will have the power to issue a declaration of incompatibility. The bill is abundantly clear that a declaration does not invalidate either primary or subordinate legislation. Nor would it make the operation or enforcement of the law invalid or in any way affect the rights or obligations of anyone.

The purpose of the declaration is to alert the government and the Assembly and indeed the community to an issue of incompatibility. It is appropriate that this power be vested only in the higher court which has a supervisory function over lower courts and tribunals, lthough all courts and tribunals are engaged in the process of interpretation of our laws. If the government is not a party to the proceedings, the court must notify me, as Attorney-General, if it is considering making a declaration. This is to guarantee that the government has the opportunity to put argument if the attorney considered it necessary to do so in the same way that currently exists when constitutional law questions are raised. If a declaration is issued it will be presented to the Assembly, and within six months the attorney will provide a written response also for presentation to the Assembly. A declaration does not bind the government or the Assembly to change primary or subordinate legislation. Nor would we expect that a declaration would be issued except in relatively rare cases.

The facility for a declaration of incompatibility is a vital component of the dialogue model this bill seeks to establish. While preserving parliamentary sovereignty, the declaration will function as a signal to the government and the Assembly. It will make an important contribution to rational and coherent debate about human rights issues. As Attorney-General, I will also have the discretion to intervene in any proceedings before any ACT court and certain ACT tribunals where a question concerning the application of the Human Rights Act arises. In practice, the discretion to intervene will only be exercised where there is a public interest in doing so. The bill does not take away the power of the Assembly to pass laws that are inconsistent with human rights as set out in the Human Rights Act. However, as Attorney-General, I would be required to scrutinise all government bills to ensure they are consistent with fundamental human rights. A statement of compatibility for publication in the Assembly will be issued. If it is necessary to limit or depart from human rights standards we will explain why it is necessary to do so. The scrutiny of bills committee or another committee nominated by the Speaker is obliged to report to the Assembly about human rights issues raised by bills presented to the Assembly. This will apply to both government and non-government bills. To ensure the business of the Assembly is not disrupted or subjected to unnecessary delays if for

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practical reasons either the government or the scrutiny of bills committee fails to report before legislation is considered, this will not effect the validity of laws passed by the Assembly. I want to assure you that this is not a backdoor way out of our obligations. I have no doubt that, if such a situation did arise, members would make their feelings known about it. The bill also establishes the office of Human Rights Commissioner. By making the Discrimination Commissioner the Human Rights Commissioner, we avoid an unnecessary proliferation of institutions. The Human Rights Commissioner will have several functions, namely, to review territory law, conduct education programs and report to the Attorney-General on any matter relating to the Human Rights Act. The commissioner will also have a right of intervention in proceedings that concern the interpretation and application of the act. However, this right may only be exercised with the leave of the court or tribunal. Again it is expected the commissioner's intervention powers will be exercised sparingly and only in cases where there is a significant public interest at stake.

There will be a consequential amendment to the Annual Reports (Government Agencies) Act 1995 requiring government departments and authorities to include a statement describing measures taken to respect, protect and promote human rights. This will promote a more conscious consideration of human rights issues by territory authorities. I have outlined the key components of this bill. It is also incumbent on me to clarify what this bill will not do so as to avoid any confusion in the media, among members of this chamber or in the wider community. The bill I introduced today does not create a new right of action against a public authority on the ground that conduct is inconsistent with human rights as recommended by the consultative committee. My government considers that at this time creating a new right of action would not be appropriate. However, an action that is allegedly based on an incorrect interpretation of the law will be open to judicial review and administrative law remedies. These remedies are already available.

Nor will the Human Rights Act allow complaints to the Human Rights Commissioner. The government agrees with the consultative committee that involving the Human Rights Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT law. As part of our ongoing commitment to exploring how human rights protection can be strengthened, we have included an obligation to review and report to the Assembly within five years of the commencement of the bill. This doesn't preclude us from looking at matters early in the life of the act and as a statute of the parliament, if it is necessary to make amendments we have the ability to do so, subject of course to the agreement of the Assembly. The bill that I present today is the very first human rights legislation in this jurisdiction or anywhere in Australia. We have had the benefit of being able to draw on the experience of comparable jurisdictions such as New Zealand, the UK and Canada to

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create a model that is uniquely our own, one that is appropriately adapted to the special circumstances of the ACT but which is consistent with fundamental human rights principles. The government's model will not encourage unnecessary litigation, but it will ensure that human rights are taken into account when developing and interpreting all ACT laws. It will promote a dialogue about human rights within the parliament, between the parliament and the judiciary, and, most importantly, within the Canberra community. It will also serve to educate us and foster respect for the rights of others and greater understanding of our responsibilities towards each other. By enshrining the values of inclusiveness and decency in our law, we are laying a solid foundation for human rights protection in the ACT—at home, at work, at school and in our neighbourhoods. This is a carefully crafted bill that has been the subject of extensive consultation in the community and within government. I commend this bill to the Assembly, and I look forward to a fruitful debate in the Assembly during the first session of 2004.

Debate (on motion by **Mr Stefaniak**) adjourned to the next sitting.