THE HUMAN RIGHTS ACT 2004 (ACT)

Making a stand in the ACT

JON STANHOPE

In a joint press release issued by the Minister for Foreign Affairs, the Hon Alexander Downer and the Australian Attorney General, the Hon Philip Ruddock MP on 28 January 2005, the Australian Government announced that Mamdouh Habib had arrived back in Australia following his release from Guantanamo Bay. The release went on to say:

> The specific criminal terrorism offences of being a member of, training with, funding or associating with a terrorist organisation such as al Qaida did not exist under Australian law at the time of Mr Habib's alleged activities. For this reason, on the evidence and advice currently available to the Government, it does not appear likely that Mr Habib can be prosecuted for his alleged activities under those Australian laws.
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> As stated previously, Mr Habib remains of interest in a security context because of his former associations and activities. It would be inappropriate to elaborate on those issues. Because of this interest, relevant agencies will undertake appropriate measures. Consistent with long standing practice, the Government does not intend to detail the nature of these measures.

For over three years the Australian Government has ignored:

- Mr Habib's human right to liberty and security of the person and to be free from arbitrary arrest or detention
- his human right to be free from torture and from cruel, inhuman or degrading treatment or punishment
- his human right, upon arrest, to be informed promptly of any charges against him
- his human right to be treated with humanity and respect for the inherent dignity of the human person when deprived of his liberty
- his human right to be free from arbitrary or unlawful interference with his privacy, family, home or correspondence, or from unlawful attacks on his honour and reputation.[1]

It must be small consolation to Mr Habib that the Australian Government has grudgingly chosen to respect Mr Habib's human right not to be subject to retrospective criminal laws,[2] notwithstanding that he 'remains of interest in a security context'.

The Australian Government's treatment of Mr Habib is the highpoint of our disgrace in the face of our obligation to protect, respect and promote internationally recognised human rights. Unfortunately, it is accompanied by a long list of equally regretful circumstances, including our pre-emptive and illegal invasion of Iraq, our failure to progress reconciliation with indigenous Australians and our treatment of refugees. Most recently, Cornelia Rau, an Australian citizen with an acute mental illness was held for over three months in a remote detention centre apparently because she spoke in a foreign language. A government truly regretful about this incident would accede to the *Optional Protocol to the Convention Against Torture* that obliges states to consent to ad hoc inspection of all detention facilities. European states have conformed to this Protocol for many years and yet Australia's opposition to it continues.

Arundhati Roy, when giving the Sydney Peace Prize Lecture on 7 November 2004, commented upon international developments in a way that had particular relevance for Australia that:

> It is becoming more than clear that violating human rights is an inherent and necessary part of the process of implementing a coercive and unjust political and economic structure on the world ... increasingly, human rights violations are being portrayed as the unfortunate, almost accidental fallout of an otherwise acceptable political and economic system.

It is against this backdrop, namely an Australian government, a legal system and a community that have failed to protect internationally recognised human rights, that the *Human Rights Act 2004* (ACT) ('the Act') commenced on 1 July 2004.

When I first raised the prospect of enacting a Bill of Rights in October 2001 and consistently for over two years during its development, I was told by opponents that a Bill of Rights is unnecessary in Australia because we have well established procedures and systems in place to protect human rights. Sadly, it is a brave person that seriously advances this argument nowadays.

What's in the Act

The primary purpose of the Act is to promote respect for and the protection of human rights. It seeks to achieve this by incorporating the *International Covenant on Civil and Political Rights (ICCPR)* into the law of the ACT. The legislation adopts an interpretive approach to rights protection and is based on the dialogue model. The dialogue model — a term borrowed from the UK — does not disturb the existing constitutional balance between the executive, the legislature and the judiciary. Instead, by giving a new role to each arm of government, the Act is intended to institutionalise consideration of human rights in decision-making, policy development and the law making processes of government.

REFERENCES

1. *International Covenant on Civil and Political Rights*, arts 7, 9,10,15 and 17.
2. *ICCPR*, art 15.

The Act is an ordinary piece of legislation but has constitutional significance because it addresses the fundamental relationship between the individual and state.

The Act is an ordinary piece of legislation but has constitutional significance because it addresses the fundamental relationship between the individual and state. As a statute of general application we expect the Act to take a prominent role in providing a benchmark against which to measure executive and judicial action.

At the heart of the Act is a mandatory statutory direction to all public officials to interpret and apply the law in a manner that is consistent with human rights. The direction is subject to the proviso that a meaning consistent with human rights must prevail but only to the extent that it is possible to do so without overriding the clear intention of the legislature. This new rule applies to all Territory officials exercising functions, powers and duties under the authority of the law — not just administrative decision-makers, but also statutory office holders, tribunal members and the judiciary.

The effect of the new rule is to bind administrative and judicial authorities to use their discretion in a way that is compatible with human rights unless primary or subordinate legislation makes it absolutely clear that they are required to act inconsistently with human rights.

Courts must also take a different approach to interpreting and applying the law from that which they normally adopted before the Act came into force. Instead of the traditional search to give effect to the intention of the Legislative Assembly as expressed in any one statute, the courts must now, so far as possible, carry out the intention of the Assembly that all legislation must be read and implemented in a manner compatible with human rights. This is not limited to situations where the law is ambiguous and it is not a simple codification of the common law presumption that parliament does not intend to legislate inconsistently with human rights. It requires an active search for the human rights consistent meaning.

It is intended that human rights principles in the local context are to be informed by international human rights law. The ACT law actively invites recourse to the judgments of other national courts such as the UK House of Lords and the New Zealand Court of Appeal and the judgments, decisions and views of international human rights bodies such as the UN Human Rights Committee and the European Court of Human Rights. The definition of international law in the dictionary is deliberately non-exhaustive so as not to unnecessarily limit administrators or judicial officers from taking account of human rights treaties other than the *ICCPR* or other relevant UN rules or guidelines that do not have treaty status.

This is a logical requirement if ACT law is to develop alongside and consistently with internationally accepted human rights norms. Although it is commonplace for Australian judges to look to comparable jurisdictions for guidance it is rare for the judgments of international human rights bodies or international materials to play an explicit role in judicial reasoning. The introduction of the Act will mean that, in the ACT at least, judicial method becomes internationalised and international human rights law will become entwined with our domestic law.

The Act does not apply to conduct, nor does it create an independent right of action in the Supreme Court. This makes the legislation more difficult to explain. However, it is an elementary principle that a public body may only act when it has express or implied legal authority to do so. The Bill of Rights applies to conduct by attaching to the law that authorises executive and judicial actions.

In practice human rights arguments are most likely to be raised in proceedings for judicial review, by criminal defendants, before the Mental Health Tribunal, Guardianship Tribunal and so forth. A human rights argument might also be raised when a Territory authority is being sued for breach of a statutory duty or to strengthen a claim for breach of duty of care. It is in this area of tort law that the Bill of Rights may have an indirect impact on private bodies because of our civil wrongs statute. Private bodies that perform functions under ACT legislation, like the ACT Law Society, will also have to ensure that their powers are exercised consistently with the Act.

In addition to existing remedies, the Act confers on the Supreme Court the power to issue a declaration of incompatibility if the Court finds it is unable to interpret a Territory law consistently with human rights.[3]

Such a declaration would not alter the rights of the parties or invalidate the law, nor would it prevent the continued operation or enforcement of the law. A copy of any declaration must be sent to the Attorney General who is obliged to table it in the Legislative Assembly within six sitting days and provide a written response to it within six months. Any court declaration would not bind the government to change the law but it would mean that government must consider the issue and have it debated in the Legislative Assembly.

3. *Human Rights Act 2004* (ACT), s 32.

A human rights culture

The Act aims to create broad cultural change within the public service and to ensure that frontline managers are making decisions within a human rights framework. Section 37 of the Act imposes a statutory obligation on the Attorney General to form an opinion on the compatibility of each government Bill with the Act and present this to the Assembly. Where legislation is inconsistent with the Act, the Attorney General is required to say how the Bill is inconsistent.

The purpose of the statement of compatibility is to institutionalise human rights considerations into the policy development and law making process. In practice this will involve a small team of lawyers providing human rights law advice on new legislative proposals and final Bills. Although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt.

The ACT model centralises the function in the Attorney General's portfolio and requires a statement for every government Bill — not just those that limit human rights. Each minister is responsible for presenting the statement at the same time as the Bill and explanatory statement are presented to the Legislative Assembly and must explain any justification for limitations on rights in the explanatory statement.

To complement these new procedures the Scrutiny of Bills Committee has been given a new statutory responsibility to report to the Assembly on issues arising under the Act. The Scrutiny of Bills Committee is quite influential in the ACT and, unlike at the Federal level, the Government responds to all its reports. The Committee will have to adopt a human rights framework when looking at all Bills and regulations (government and private). This should have the effect of increasing the understanding of human rights amongst parliamentarians and improving the standard of debate.

Significant work is being carried out behind the scenes to ensure that the Act is a success. We are conducting training programs, developing pre-enactment scrutiny policy and introducing new procedures across the whole of the ACT public sector.

This is a considerable undertaking for a small government with relatively few resources. The complexity of what we are doing should not be underestimated and it will naturally take time for the public sector to adjust to this new way of thinking. Experience in New Zealand and the UK shows that this is an ongoing process over many years. We are only at the beginning of this process. Real and lasting cultural change requires human rights to be mainstreamed into core administrative processes and it will take time for them to filter through all parts of the system.

Cases so far

During the first six months of the Act four out of some 79 judgments by the Supreme Court have taken account of the Act: *R v O'Neill* [2004] ACTSC 64 (30 July 2004), *Firestone v The Australian National University* [2004] ACTSC 76 (1 September 2004)('*Firestone*'), *Szuty v Smyth* [2004] ACTSC 77 (1 September 2004) ('*Szuty*'), and *R v YL* [2004] ACTSC 115 (27 October 2004).

The first three judgments made reference to the Act in the context of supporting the relevant common law position. For example in *Szuty*, Higgins CJ referred to the right to freedom of expression to support the common law defence of 'fair comment' in relation to the tort of defamation. In *Firestone*, Higgins CJ referred to the rights to freedom of movement and to freedom of association as well as the obligation to interpret the law consistently with human rights, as far as possible when assessing the scope of a Workplace Protection Order. In *R v O'Neill*, Connolly J referred to the right not to be tried or punished more than once to support the common law principle of double jeopardy.

More significantly, in *R v YL* the Act had a real impact on the interpretation of a Territory law. Justice Crispin applied the obligation to interpret the law consistently with human rights as far as possible and the child's right to protection to remove any doubt that he should exercise his discretion under the *Supreme Court Act 1933* not to coerce a child witness to give evidence against his stepmother. He also read the *Director of Public Prosecutions Act 1990*, which authorises the Director to 'decline to proceed' (enter a *nolle prosequi*), to literally mean 'to take no further steps' in order to prevent the Director from terminating a prosecution underway by entering a nolle prosequi upon receipt of a ruling that the Director considered to be adverse. Justice Crispin confirmed the construction of that section by relying upon the obligation to interpret the law consistently with human rights as far as possible together with the requirements under the Act to protect the right to a fair trial and the right to be tried without unreasonable delay.

At the heart of the Act is a mandatory statutory direction to all public officials to interpret and apply the law in a manner that is consistent with human rights.

A Discrimination Tribunal appeal case is pending before the Supreme Court: *IF v Commissioner for Housing*. The applicant is appealing the Tribunal's decision to dismiss a discrimination complaint against the Commissioner for Housing. The appeal is based on various grounds, including an error of law in failing to take account and apply the provisions of the Act and relevant international law, including the UN Declaration on the Rights of Disabled Persons.

Where to now?

The Act is without doubt one of the most important pieces of legislation passed by the Legislative Assembly. It is not radical reform — it is an affirmation of fundamental rights that are already recognised in international human rights law, and it is built on the traditions and cultures that make up this diverse Australian community.

It is important to remember that this is only the first stage. The Act is not an end in itself but a vehicle for encouraging a culture where respect for fundamental human rights and freedoms becomes an integral part of the ethos of the ACT public service when working in the wider community. There have been criticisms that the Act does not include economic, social and cultural rights and does not apply directly to conduct or create a new right of action in the Supreme Court. While I understand these concerns, I make no apology for this. The operation and impact of the Act will be monitored and the Act will be reviewed within five years. The criticisms will be revisited once the ACT has built up experience in human rights law and practice and we can all assess how best to move forward. Ultimately, the success of the Act as a vehicle for rights protection and long-term cultural change rests on the quality of the debate it inspires in all levels of society.

As the Chief Minister and Attorney General, I have a limited ability to impact immediately on issues such as Australia's decision to join the invasion of Iraq, the condoning of the treatment of Mamdouh Habib and the indefinite immigration detention of 'stateless' asylum seekers. However, I continue to be inspired and comforted by the words of Eleanor Roosevelt who, when addressing the UN General Assembly in 1948 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 neighborhood 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.

The aim of the Act is to give meaning to human rights in some of the small places, in the hope that it will contribute to the creation of a community, a nation and a world where human rights matter. In the process, my objective is to establish in Australia what has long been accepted elsewhere, namely that a framework based on internationally recognised human rights can underpin effective, fair and humane government.

JON STANHOPE MLA is the ACT Chief Minister and Attorney General.