

BILLS OF RESPONSIBILITIES

Is one needed to counter the 'excesses' of the ACT Human Rights Act 2004?

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Wherever there is talk about rights and Bills of Rights, the question of responsibilities is not far away. Australia's first Bill of Rights, the *Human Rights Act 2004* (ACT), is no exception. It has provoked debate both within and beyond the Australian Capital Territory (ACT) about the best way to protect human rights.¹ It has also led to discussion about whether the ACT needs a Bill of Responsibilities. The ACT Liberal Party's Bill Stefaniak has argued that the ACT needs such a Bill to counter the 'excesses' of the *Human Rights Act*:

This is about balance. It is about fairness. It is a question of balancing rights and responsibilities. If we have to have a Human Rights Act — and we have one in place now, and it has been operating since 1 July — we need responsibilities as well. We need something to counter any excesses in rights.²

The idea of legal protection for responsibilities rather than rights has powerful support. In a radio interview, Prime Minister John Howard described the ACT Bill of Rights as 'ridiculous' and went on to agree that Bills of Responsibilities should be introduced at both the national and state levels in Australia.³ The idea of a Bill of Responsibilities has also received international attention. Miguel Martínez, appointed as a Special Rapporteur for the United Nations Commission on Human Rights, reported on the subject of rights and responsibilities in March 2003.⁴

Stefaniak deserves credit for actually drafting a Bill of Responsibilities. In June 2004, he introduced the Charter of Responsibilities Bill into the ACT Legislative Assembly.⁵ With its Bill of Rights, the ACT set an Australian first, and with the Bill of Responsibilities it sets another in having the first such Bill debated in an Australian parliament, if not in any parliament in the world. The Bill draws on work by the InterAction Council for Former Heads of Government, an independent body of international political leaders, who produced a Draft Universal Declaration of Human Responsibilities⁶ ('InterAction Draft') for submission to the United Nations in 1997.

The Charter of Responsibilities Bill was debated and put to a vote in the ACT Legislative Assembly on 18 August 2004. Without the support of the governing Labor Party it was defeated by nine votes to five.⁷ While we think that the right decision was made to reject the Bill, there is merit in debating the concept of a Bill of Responsibilities and in examining the ACT Bill as a rare (perhaps unique) example of a concrete legislative proposal. After all, while the term

Bill of Responsibilities may be unfamiliar, the idea of responsibilities is pervasive in Australia in the media and in political and community debate. Indeed, the idea that people have responsibilities to the nation, the community and to other individuals can sometimes be more prevalent than the notion that they possess fundamental rights.

References to responsibilities are also made as part of the idea of mutual obligation that is so often found today in government policy. It, or like terms, can also be found in broad statements of principle like that in the preamble to the *Australian Citizenship Act 1948* (Cth): 'Australian citizenship is a common bond, involving reciprocal rights and obligations'. That we owe responsibilities as social beings is not in dispute. The more controversial questions are about the recognition of particular responsibilities, the legal form in which they might be expressed and what impact they might have on the protection of human rights.

Rights versus responsibilities?

The framing of a Bill of Responsibilities as a counter to the *Human Rights Act* has the potential to pit rights against responsibilities. But no such contest should exist. The InterAction Council highlighted in the preamble to the InterAction Draft that '[b]oth the rule of law and human beings depend on the readiness of everyone to act justly', thereby recognising that rights cannot endure without commitment to the responsibilities that come with them. At the simplest level, an individual's right to life is meaningless without a recognition that, as members of a society, we have an obligation to respect the right to life of others. In addition, rights often exist in tension with each other, and thus the possession of rights also entails the need to exercise them responsibly.

Issues that have traditionally been framed in terms of rights, particularly social, economic and cultural rights, can even be better understood within a framework of responsibilities. A right to health or housing, for example, is meaningless without recognition of a responsibility by government to provide funding and other support. International human rights conventions acknowledge the relationship between rights and responsibilities. The preambles to both the *International Covenant on Civil and Political Rights*⁸ and the *International Covenant on Economic, Social and Political Rights*⁹ recognise the 'obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms' and the

REFERENCES

1. See Julie Debeljak, 'The Human Rights Act 2004 (ACT): A Significant, Yet Incomplete, Step Toward the Domestic Protection and Promotion of Human Rights' (2004) 15 *Public Law Review* 169; Carolyn Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32 *Federal Law Review* 291; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) 66–76; George Winterton, 'The ACT Bill of Rights' (2004) 7(2) *Constitutional Law and Policy Review* 47. See also Gilbert + Tobin Centre of Public Law's Bills of Rights Resource Page <www.gtcentre.unsw.edu.au/bills-of-rights-resources.asp> at 30 March 2005.
2. ACT, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 3883.
3. Prime Minister John Howard, Interview with John Laws, 8 March 2004, <www.pm.gov.au/news/interviews/Interview738.html> at 30 March 2005.
4. *Promotion and Protection of Human Rights: Human Rights and Human Responsibilities*, Final report of the Special Rapporteur, Miguel Alfonso Martínez, on the Study requested by the Commission in its resolution 2000/63, and submitted pursuant to Economic and Social Council decision 2002/277, (2003) E/CN.4/2003/105, 17 March 2003.
5. See ACT, *Parliamentary Debates*, Legislative Assembly, 23 June 2004, 2457 (Bill Stefaniak). The Bill is available at <www.legislation.act.gov.au/b/db_12795/current/pdf/db_12795.pdf> at 30 March 2005.
6. See <www.interactioncouncil.org> at 30 March 2005.
7. See ACT, *Parliamentary Debates*, Legislative Assembly, 18 August 2004, 3873.
8. Opened for signature 16 December 1966, 999 UNTS 302, entered into force 23 March 1976.
9. Opened for signature 19 December 1966, 993 UNTS 3, entered into force 3 January 1976.

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responsibility of the individual, 'having duties to other individuals and to the community to which he belongs ... to strive for the promotion and observance of the rights recognized in the present Covenant'.

Responsibilities form a necessary part of human rights instruments. However, the importance of responsibilities does not mean that nations like Australia need a Bill of Responsibilities to complement a Bill of Rights. Indeed, the idea that the state as well as individuals owes responsibilities is so intrinsic to any human rights framework that a well drafted Bill of Rights can make legal recognition of responsibilities in a separate Bill redundant. A careful analysis of the human rights that are already protected can show that responsibilities are already part of the scheme of legal protection.¹⁰

An idea whose time has come?

The idea of a Bill of Responsibilities has received a mixed reception in the international arena. The InterAction Council prepared its Draft with the intention of distributing it to states parties to the United Nations to gather support for its adoption as a UN Declaration. Reactions to the declaration were varied: governments opposed the declaration on the basis that it would weaken the cause of human rights, the UN High Commissioner for Human Rights expressed concern that it could divert attention from other problems, and a number of non-government organisations (NGOs) also expressed opposition.¹¹ As a result, its proposed submission to the UN General Assembly in 1998 was deferred.

In both his interim and final reports, Special Rapporteur Martínez noted that there was a 'North-South' polarisation in the opinions expressed by governments, with Northern, developed countries opposing a formal establishment of responsibilities, and those countries in support of defining individual responsibilities overwhelmingly from the under-developed South.¹² His interim report also acknowledged that the majority of NGOs thought it inappropriate to attempt to define a person's responsibilities and feared that such definitions could be used by governments to hamper their work in human rights.¹³

Ultimately, Martínez expressed support for the idea of enshrining responsibilities in an international instrument.¹⁴ His final report contained a 'pre-draft' Declaration on Human Social Responsibilities — a statement of non-binding principles intended to mirror

the 1948 Universal Declaration of Human Rights (UDHR). A motion for continuing consideration of his report in the UN Commission on Human Rights was defeated in 2003,¹⁵ but the issue was reopened in 2004 with a decision to allow the Commission to circulate the pre-draft Declaration to states and to submit to the 2005 meeting of the Commission an overview of state responses to the document.¹⁶

The idea of a Bill of Responsibilities at the international level has a strong Australian connection. It has been championed by former Australian Prime Minister Malcolm Fraser, who has been involved in the InterAction Council since its creation in 1983. As both Chairman and Vice-Chairman of the Council, Fraser has highlighted how United Nations human rights instruments, beginning with the UDHR, need to be understood within their historical context of decolonisation, when emerging nations were asserting their basic rights against colonial powers. He has argued that, more than 50 years later, it is time to consider a Universal Declaration of Human Responsibilities. Fraser has expressed concern about the individualistic emphasis in contemporary societies, arguing that '[a] world dependent upon rights alone would be an unhappy and discordant one. Rights are something that people demand, that we all too often expect others to provide for us.'¹⁷ Martínez expressed a related concern. The central motivation behind his conclusion in favour of enshrining responsibilities is the recognition that they are *necessary* for the protection of rights.¹⁸ He conceives of a declaration on responsibilities as an integral part of protecting human rights. Article 5 of the pre-draft declaration states:

The rights of the individual and his or her social responsibilities are indissolubly linked. They mutually reinforce each other and for that reason deserve express recognition of their equal value and importance to life in society.

Discord within the international community also forms a backdrop to international efforts to enshrine responsibilities. Commenting on the North-South divide, Martínez notes in his final report that only 51 of the 191 current members of the United Nations participated in the drafting of key human rights documents including the UDHR.¹⁹ He sympathises with the argument that the early human rights documents of the UN reflect the philosophical background of those who wrote them.²⁰ By contrast, Martínez highlights the inclusion of responsibilities in regional human rights

10. See Ben Saul, 'In the Shadow of Human Rights: Human Duties, Oblations and Responsibilities' (2001) 32 *Columbia Human Rights Law Review* 565 at 583–8.

11. The reception of the InterAction Draft is discussed in *Promotion and Protection of Human Rights: Human Rights and Human Responsibilities*, Report of Mr Miguel Alfonso Martínez, Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights to undertake the study requested by the Commission in its resolution 2000/63 (2002) E/CN.4/2002/107, 19 March 2002 [110]–[116]. See also Saul, above n 10 at 580–616; Theo van Boven, 'A Universal Declaration of Human Responsibilities?' in Barend van der Heijden and Bahia Tahzib-Lie (eds), *Reflections on the Universal Declaration of Human Rights, A Fiftieth Anniversary Anthology* (1998).

12. Martínez, above n 11, [90]; Martínez, above n 4, [13]–[16].

13. Martínez, above n 11, [105].

14. Martínez above n 4, [28].

15. Draft decision E/CN.4/2003/L.86 was defeated but with 25 votes to 25 and 3 abstentions; see Commission on Human Rights, Report on the 59th Session, E/CN.4/2003/135 (17 March–24 April 2003) [535].

16. Decision 2004/117 (26 votes to 25 with 2 abstentions); see Report to the Economic and Social Council on the Sixtieth Session of the Commission (Draft Report of the Commission) E/CN.4/2004/L.11/Add.7 (22 April 2004) 82.

17. Malcolm Fraser, 'The Responsible Course of Action' *The Australian* (Sydney) 12 September 1997, 13.

18. Martínez, above n 4.

19. *Ibid* [31].

20. *Ibid* [32].

instruments, including the African Charter on Human and Peoples' Rights (the Banjul Charter).²¹

Fraser has also argued that while rights and responsibilities are closely intertwined, 'the converse is not true: there are responsibilities which do not flow from rights'.²² He has cited the right to a free press, which demands state support and enforcement but does not create a commensurate responsibility on the media to report fairly and accurately. One could frame media responsibility in terms of a right of citizens to have access to reliable and unbiased information, but this is arguably an example of a social good that is better conceived of in terms of responsibilities than rights.

The motivating factors behind international efforts to recognise responsibilities are understandable and debate will continue for many years. Human Rights instruments were debated at an international level before being introduced, and indeed, it has generally taken years for each instrument to garner sufficient support to come into force. The international process has barely begun in relation to a Bill of Responsibilities.

Charter of Responsibilities Bill 2004 (ACT)

The Charter of Responsibilities Bill recognises civil responsibilities as obligations owed by individuals, just as human rights are possessed by individuals under the *Human Rights Act*.²³ The substantive responsibilities are set out in Schedule 1 of the Bill, and are divided into responsibilities towards others (Part 1.1) and responsibilities to society (Part 1.2). The Bill is similar to the *Human Rights Act* in that individuals cannot bring actions against others for breaching a civil responsibility provision. Rather, the bill forms part of the broader context for the interpretation of ACT law. Section 8(1), in similar terms to s 30 of the *Human Rights Act*, provides that 'In working out the meaning of a Territory law, an interpretation that is consistent with civil responsibilities is to be preferred to any other interpretation'.

The preamble to the Charter recognises the relationship between rights and responsibilities, and some provisions of the Bill affirm rights already protected by the *Human Rights Act*. For example, s 2 mandates 'respect for life', reinforcing the recognition of the right to life in s 9 of the *Human Rights Act*. The Bill also creates responsibilities that have no correlative in the *Human Rights Act*. For example, under the banner of 'honesty', it provides that 'no-one may rob

or dispossess anyone else or any group of people'.²⁴ Section 18(1) states that 'economic and political power should not be misused as instruments of domination, but [should be used] for service to humanity'. Section 20 recognises the responsibility of all to care for the environment. The preamble of the Bill also acknowledges the limits of the law: that community 'cannot be created or enforced by laws, prescriptions and conventions alone'. Such provisions are bold, if aspirational, statements of principle.

The Bill also enshrines what is essentially a code of ethical practice for professionals. Lawyers, judges and journalists receive separate treatment, but all professionals are subject to the requirements of honesty and integrity under s 8. Much of the substantive content of this part of the Bill reflects what is already mandated by other codes of practice or legislation. For example, s 9 requires that lawyers serve their clients competently and diligently, maintain their client's confidentiality and avoid conflicts of interest, as well as requiring candour, competence and honesty in their dealings with the court. Section 10 requires judges to conduct themselves with three main objectives: upholding public confidence in the administration of justice; enhancing public respect for the judiciary as an institution; and protecting the reputation of individual judicial officers and the judiciary. Section 11 requires journalists to report news and current affairs accurately and fairly, to respect the privacy and dignity of both subjects and viewers of stories, to exercise sensitivity in dealing with distressing images and to clearly distinguish the reporting of factual material from commentary and analysis.

The Charter contains some serious flaws. Section 8(3) provides that, where the Charter of Responsibilities and the *Human Rights Act* 'would achieve a different result', only the Charter is to be applied. This gives precedence to responsibilities over rights. Yet, responsibilities and rights are inseparable and one cannot meaningfully be understood without the other. Because of this, the section introduces a fundamental conceptual problem that threatens to undermine the whole idea of a Bill of Responsibilities. If responsibilities are to be given separate legal recognition, it should occur in a way that is complementary to rights protection rather than competing with it. Further problems with the Charter are examined below.

21. Martínez, above n 11 [66]–[86].

22. Malcolm Fraser, 'Rights without Duties are a Danger', *The Age*, (Melbourne) 31 March 1998, 13.

23. Charter of Responsibilities Bill 2004 (ACT) s 5, *Human Rights Act 2004* (ACT) s 6.

24. Section 5(2).

Indeed, the idea that the state as well as individuals owes responsibilities is so intrinsic to any human rights framework that a well drafted Bill of Rights can make legal recognition of responsibilities in a separate Bill redundant.

Concerns about rights

There are provisions in the Bill that have the potential to undermine rights that are already recognised in the ACT and the international arena. For example, s 2 deals with 'respect for life', but the way it is worded is important. Section 2(1) states that 'no-one has the right to kill or injure except in self-defence' — phrasing which leaves room to re-open the abortion debate. This is in contrast to the *Human Rights Act* which provides in s 9(2) that the right to life applies 'from the time of birth'. There are also sections that may have troubling implications for criminal procedure. Section 3 states that 'in respecting the rule of law, everyone must assist the police and authorities in the course of their duties and in the exercise of their functions under the laws of the territory'. Section 17 requires that 'a person who breaks the law has a responsibility to confess and accept appropriate punishment'. How these sections would interact with a right to silence, or with the differential treatment of certain relatives of individuals accused of crimes under the rules of evidence, is unclear.²⁵ Further, s 10(5) requires that the judiciary 'should always consider the public it serves' and cites as an example that the judiciary 'must take community expectations into account when sentencing offenders in criminal matters and in giving judgments in civil claims affecting the community generally'.

The potential for these provisions to undermine rights is of concern given that the Bill trumps the *Human Rights Act* in the case of inconsistency. This prioritisation stands in contrast to the InterAction Draft, which provides in art 19:

Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the responsibilities, rights and freedom set forth in this Declaration and in the Universal Declaration of Human Rights of 1948.

Article 29 of the pre-draft Declaration on Human Social Responsibilities similarly states:

Nothing in the present Declaration can be interpreted as diminishing the purposes and principles of the United Nations, nor the obligations and duties freely contracted by States in other pertinent instruments of international law in the field of human rights.

The structure of the Charter of Responsibilities Bill also raises some difficulties. Responsibilities are owed by *individuals*, both to each other and to society in general. This leaves out the potential responsibilities of

other important players in society — the state, other institutions and even corporate entities. At times, the Bill seems to recognise such obligations: s 1(3) requires that people in positions of trust and authority, including public servants and police officers, must show respect towards others, show ethical behaviour and 'serve the truth'. Yet these obligations are still constituted in terms of individual, not state, obligations. Mutuality of obligation is conspicuously absent. Again, the InterAction draft stands in contrast. While most of its provisions appear to refer to individual responsibilities, art 3 provides that 'No person, no group or organization, no state, no army or police stands above good and evil; all are subject to ethical standards. Everyone has a responsibility to promote good and to avoid evil in all things.' There is a concerted effort in the InterAction draft to recognise the role of all within a society, including institutions that are not within the control of all individuals. This balances the rights and responsibilities of individuals in a way which the Charter of Responsibilities Bill does not.

Concerns about clarity

There is considerable uncertainty about the effect of the Charter of Responsibilities Bill on existing rights. One of the criticisms levied at the ACT *Human Rights Act* was that it was vague and uncertain. This was despite the fact that the Act draws on International Covenants, as well as Bills of Rights in the United Kingdom, Canada and New Zealand. Like any Bill of Rights, there will always be areas of contest and debate, but the ACT *Human Rights Act* does have the benefit of a rich and growing body of law from around the world to draw on. The Charter of Responsibilities Bill, in attempting to prescribe a range of values that people should hold in professional and daily life, contains a broader range of ambiguous and amorphous concepts than the *Human Rights Act*. It includes, for example, that people should be 'honest and fair' in their dealings with others²⁶ and that 'no-one may treat another as a sex-object'.²⁷ It even states that 'a person must not harass, annoy or interfere with anyone else in their community, for example by not upholding the proper values of the community'.²⁸

While some of these values might be supported in principle, they introduce undefined terms that are unknown to the law and would be uncertain in their application. They are also terms that do not rely on a domestic and international context for guidance. This is especially a concern given the priority given to the

25. See, eg, s 18 of the *Uniform Evidence Act* which allows the spouse, de facto spouse, parent or child of a defendant to object to being compelled to give evidence for the prosecution, and then requires the court to consider, among other factors, the balance between potential harm to the witnesses relationship with the defendant and the desirability of the evidence being heard.

26. Section 5(1).

27. Section 13(1).

28. Section 1(4), examples.

Charter over the *Human Rights Act*. In the absence of clearly defined concepts, the Bill has the potential to be a powerful and unpredictable tool that might even be used to roll back some of the rights that have already been conferred by the *Human Rights Act*. Given that the Bill was proposed as a means of countering the potential 'excesses' of the *Human Rights Act*, its own potential for excess is far more disturbing.

Conclusion

The Charter of Human Responsibilities Bill has a number of flaws. It was fortunate that the ACT Legislative Assembly rejected it. Indeed, it is not yet clear that we need a Bill of Responsibilities at all in Australia. It may be that responsibilities as well as rights can best be protected by further refinement of the *Human Rights Act* and by the introduction of Bills of Rights in other

parts of the nation. Nevertheless, discussion about Bills of Responsibilities does offer a way of continuing debate about how best to protect human rights as well as the responsibilities they give rise to. Open discussion about such matters is crucial to building community values and participation in civic society.

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ABUSE WATCH

Both the December 2004 (p 284) and February 2005 (p 23) issues have run a few examples of what might be called 'low level' abuse by government agencies.

The examples are only 'low level' because they will not appear on the radar of government regulatory agencies or be likely to excite media interest. To be pursued the parties need to be prepared to do a lot of work to gather material which might then attract the attention of other bodies or politicians. Two examples are given this month:

- A citizen lodges an FoI request with one NSW Agency in January 2005 but has received no response by April (a determination is required within 21 days). The Agency claims to have no record of the request even though the fee for payment is shown to have been paid into their bank account. The Agency also says an FoI request must be on a specific form. The applicant set out the request in a letter which complied with s 17 of the

Freedom of Information Act 1989 (NSW). The Act does not require a form and does not prescribe one. Citizen is asked to send copies of everything back and does so — the result silence. What happens next? The citizen wants the information but, if it is standard Agency practice to insist on a form, how to change the system?

- Community group, with long experience of responding to requests for Expression of Interest in receiving grants to supply services to certain target groups, laments that it applies but has learnt from experience the particular department would have decided the successful recipient in advance and adds 'especially if they are a "good" Christian group'. If true, how to prove? Community groups do not have the resources and relevant investigatory bodies would say such a claim does not meet their selection criteria for further enquiry.

Please provide more examples to herzer@ozemail.com.au