

HOT TOPICS

LEGAL ISSUES IN PLAIN LANGUAGE

This is the fifty-fourth in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is the subject of change or public debate.

AUTHORS: Kate Eastman, Barrister (Overview, International Perspective); Professor George Williams (Australia's Approach, Bill of Rights For and Against); Helen Watchirs, ACT Human Rights Commissioner and Victoria Coakley (ACT Bill of Rights, Human Rights Principles in the HRA).

EDITOR: Cathy Hammer

DESIGN: Bodoni Studio

Bill of Rights

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Overview

Human rights are concerned with the inherent dignity and security of all human beings. Human rights laws are about defining human rights and providing legal protections for the rights. The legal protection of basic human rights is often found in a bill of rights. The expressions 'bill of rights' or 'charter of rights' refer to the type of laws that protect an individual's human rights.

WHY IS IT IMPORTANT TO PROTECT HUMAN RIGHTS?

Put simply, promoting and encouraging respect for human rights and fundamental freedoms ensures that society operates by the rule of law which secures peace, democracy, justice, equality, pluralism, development, better standards of living and solidarity.

WHAT ARE HUMAN RIGHTS?

Human rights reflect community values, so the concept of human rights continues to evolve as community values develop. Human rights preserve the inherent dignity of all human beings. Human rights derive from the dignity and worth inherent in the human person. Human beings are the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiaries and should participate actively in the realisation of human rights and fundamental freedoms.¹

Traditionally, human rights have been divided into two groups – the first group, civil and political rights and the second group, economic, social and cultural rights.

Civil and political rights describe the rights associated with participation in civil society and public life. These rights include the following types of rights:

- > freedom from arbitrary killing and a right to life
- > freedom from torture
- > freedom from slavery and forced labour
- > liberty and security of the person (being a right not to be detained without reason and the right to challenge the validity of detention)
- > humane treatment whilst in detention
- > fair trial
- > privacy and freedom from arbitrary interference with home, family and private life

- > freedom of speech
- > freedom of association and assembly
- > freedom of movement
- > freedom of religion
- > freedom to marry
- > equality of treatment and freedom from discrimination
- > the right to vote

It is argued that these rights will be protected if the State leaves its citizens alone. Civil and political rights are the type of rights which may be immediately recognised and protected by national laws. Civil and political rights can be enforced by courts. In this respect, these human rights are sometimes described as fundamental freedoms because the enjoyment of the right is the freedom to speak, travel, assemble with others etc.

The rights are recognised internationally in the *Universal Declaration of Human Rights* 1948 and the *International Covenant on Civil and Political Rights* 1966 (ICCPR). Australia has been a party to the ICCPR since August 1980.

Economic, social and cultural rights describe the rights which secure quality of life. These rights include:

- > the right to work and to just and favourable conditions of work
- > the right to education
- > the right to the highest attainable standard of health
- > the right to an adequate standard of living
- > the right to participate in cultural life.

It is argued that these rights will be protected if the State invests resources and takes an active role in creating the infrastructure to realise economic, social and cultural rights. The nature of these rights is such that they may not be immediately enforced and may only be realised over time. The protection of these rights requires States to commit resources on an ongoing basis to achieve the rights. This is why economic, social and cultural rights have been described as 'positive' rights.

These rights are recognised internationally in the *Universal Declaration of Human Rights* 1948 and *International Covenant on Economic, Social and Cultural Rights* 1966 (ICESCR). Australia has been a party to the ICESCR since December 1975.

1. From the Preamble to the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

When the *Universal Declaration of Human Rights* was adopted by the United Nations General Assembly in 1948, no distinction was made between the types of rights. However, the division between civil and political rights and economic, social and cultural rights was steadfast from the 1960s through to the late 1980s. The division reflected the ideological and political East-West divide which existed in international affairs. Civil and political rights were considered to reflect Western liberal democratic traditions while economic, social and cultural rights reflected Soviet socialist traditions.

With the end of the Cold War these political divisions and views about human rights started to break down. In the 1989 *Convention on the Rights of the Child*, civil, political, economic, social and cultural rights are included and work together.

By 1993 at the World Conference on Human Rights held in Vienna, the international community confirmed that the division between rights was artificial.

The international community also wanted to ensure that there was no hierarchy of rights that made some rights more important than others. So, in the *Vienna Declaration and Programme of Action*, the international community proclaimed:

Clause 5: All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

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ZIMBABWE-MUGABE-CLEAN-UP

The Munkuli family stand in front of what used to be the family's bedroom, Plumtree, Zimbabwe, 18 June 2005. The Mugabe government's campaign of demolishing 'illegal structures' has drawn global condemnation. The operation has so far left between 200,000 and 1.5 million people homeless, according to the United Nations and the opposition respectively.

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RELATIONSHIP BETWEEN BILLS OF RIGHTS AND HUMAN RIGHTS

Bills of rights are one means of protecting human rights. Traditionally, bills of rights have protected civil and political rights.

Generally, bills of rights set out the rights of individuals and the responsibilities of governments and government agencies. Bills of rights are concerned with striking a balance between an individual's rights and the responsibilities of those in government to provide a safe and secure society. Sometimes the balance is difficult to strike but a bill of rights provides guidance to the courts as to how the balance should be struck.

A bill of rights might operate to prevent the government passing laws that remove or restrict basic human rights. These bills of rights are usually part of the country's constitution. A bill of rights may empower a court to declare whether a law contravenes the bill of rights. In this respect, a bill of rights will prevail over inconsistent laws and practices. These bills of rights give judges significant powers to determine whether the parliament's actions are lawful. The Canadian Charter of Rights operates in this way.

Other bills of rights do not empower the courts to overrule the parliament's laws. These bills of rights enable alleged contraventions of rights to be investigated and resolved. They may provide for remedies such as changing practices or compensation. Some of the bills of rights enable the courts to recommend that a government amend or repeal an offending law. The New Zealand *Bill of Rights Act* and the United Kingdom *Human Rights Act* operate in this way.

HISTORY OF BILLS OF RIGHTS

The *Magna Carta* in 1215 is recognised as the first form of a bill of rights. The *Magna Carta* was an agreement between King John and the English feudal lords. The purpose of the agreement was to set out minimum standards of treatment that the lords could expect in their dealings with the King. The *Magna Carta* protected various personal and property rights. It required the King to be subject to the rule of law, rather than act on the basis that he was above the law. While the *Magna Carta* only protected the rights of a limited group in English society, it does represent the first attempt by citizens to limit the scope of powers to be exercised by the King.

The *Magna Carta* was followed by the *Bill of Rights* in 1688. The Bill of Rights came about following a struggle between the authority of the King and the authority of the English Parliament. Like the *Magna Carta*, the *Bill of Rights* sought to limit the power of the King. The King could not act arbitrarily and was subject to the rule of law.

The *Bill of Rights* declared the 'rights and liberties' of Englishmen. These rights were not limited to protecting property. They included rights to freedom of speech and the liberty of the person.

The political setting continued to be the place for later bills of rights. In 1776, the American Declaration of Independence declared the familiar catch-cry of:

"... all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness."

This statement reflected the philosophy and values that were later entrenched in the amendments to the United States of American Constitution in 1791, which formed the Bill of Rights. The United States Bill of Rights provides specific political and civil rights to citizens of the United States.

Around the same time as the United States Bill of Rights was being developed, the French Revolution saw another battle front between the arbitrary powers of a king and his subjects. The bloody and violent French Revolution produced the *Declaration of the Rights of Man* in 1789. Like the American Declaration of Independence, the French Declaration declared the equality of all men and the rule of law.

Since 1945, bills of rights have become more common in national legal systems. The adoption of bills of rights in constitutions and national laws reflects the growth of democracy, the decline of colonialism and the development of international human rights.

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King John (1167-1216) Famous as the king who signed the Magna Carta in 1215 at Runnymede. From the Chronicle of England by Peter de Langtoft, c. 1307-1327.

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Australia's approach

Australia does not have a national bill of rights. It is now one of few modern democracies that does not have a bill of rights.

The Australian Constitution was drafted in the 1890s before being enacted by the British Parliament and coming into force in 1901, at the time of Federation. It was not written as a people's document, but as a compact between the six colonies that came together as the states that formed the new Australian nation. The framers of the Constitution, who are often referred to as the founding fathers, considered whether a bill of rights should be included in the new Constitution. There was a proposal for an Australian bill of rights modelled on the American Bill of Rights. The issue was debated.

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The drafting of the Australian Constitution was entrusted to three lawyers: (left to right) Sir John Downer, Mr (later Sir) Edmund Barton and Mr Richard O'Connor, Federal Convention, Adelaide, 1897.

© National Archives.

Many considered that the legal system inherited from England adequately protected rights and a bill of rights was not necessary. The founding fathers decided against a bill of rights and against providing for individual's rights in the Constitution.

The Constitution deals with issues of trade and commerce as well as the relations between the states and the federal government. It divides power between them and also establishes the High Court as the arbiter of disputes.

THE AUSTRALIAN CONSTITUTION AND RIGHTS

The Australian Constitution says little about the relationship between Australians and their governments. It does not set out the fundamental rights or aspirations of the Australian people and contains few provisions that are explicitly rights-orientated. It even still contains some of the discriminatory attitudes from the time of its drafting, such as the 'races' power in section 51(26). It grants the Federal Parliament the power to make laws about 'The people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws'. The power was included, in the words of Edmund Barton the Leader of the 1897-1898 Convention, Australia's first Prime Minister and an original member of the High Court, to enable the Parliament to 'regulate the affairs of the people of coloured or inferior races who are in the Commonwealth'.

While the exclusion of Indigenous people from the races power was removed by referendum in 1967 (along with a discriminatory reference in section 127 that prevented them from being included in any 'reckoning [of] the numbers of the people of the Commonwealth'), the Constitution has never been amended to provide that the races power can only be used for the benefit, rather than the detriment, of a particular race.

This power as well as other provisions show how the focus of the Constitution remains not upon the rights of citizens, but on the interaction of the institutions and tiers of government. As expressed by Lowitja

O'Donoghue, former Chairperson of the Aboriginal and Torres Strait Islander Commission:

[The Constitution] says very little about what it is to be Australian. It says practically nothing about how we find ourselves here – save being an amalgamation of former colonies. It says nothing of how we should behave towards each other as human beings and as Australians.

Although the Constitution lacks a Bill of Rights, it can still play an important role in the protection of human rights. The Constitution creates a separation of powers in which an independent High Court can interpret and apply the Constitution and uphold the rule of law. It also establishes Australia as a democratic nation in which 'the people' vote for the federal Senate and House of Representatives. The Constitution also contains a few scattered express and implied rights as set out below.

EXPRESS RIGHTS

Right to vote

Section 41 grants the right to vote in federal elections to any 'adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a state.' Accordingly, the section only operates where a state law already allows a person to vote. Moreover, the High Court held in 1983 in *R v Pearson* that section 41 only applies to a person who had acquired the entitlement to vote at the state level before the enactment of the uniform federal franchise in the *Commonwealth Franchise Act 1902*. To invoke the provision, a person would need to have been 21 in 1902 and thus 123 years old today – so it's hardly surprising that the 1988 constitutional commission described section 41, the closest we have to a guarantee of a right to vote, as a 'dead letter.'

Trial by jury

Section 80 guarantees that 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury.' In a series of cases beginning with *R v Archdall* in 1928, the High Court severely limited the protection offered by this provision. It held that a jury trial need only be provided where the federal parliament has determined that a trial is to be 'on indictment.' In other words, the Commonwealth may pick and choose when an accused will receive a jury trial. So there is no individual entitlement to a jury trial, even when a person is charged with a crime punishable by a lifetime in prison. Australian academic Geoffrey Sawer's comment in 1967 that the guarantee in section 80 'has been in practice worthless' remains correct today.

Freedom of religion

Section 116 limits the Commonwealth (but not the states) in four separate ways: the federal parliament cannot 'make any law for establishing any religion,' impose 'any religious observance' or prohibit 'the free exercise of any religion,' and 'no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' In the few cases that have dealt with section 116, the High Court has reached a narrow interpretation. Indeed, the court has never upheld a claim based on section 116. For example, *Krygger v Williams*² in 1912 concerned whether a person could avoid compulsory military training on the basis of section 116. Edgar Krygger argued that 'attendance at drill is against my conscience and the will of God' and that it would clash with 'the free exercise of my religion.' The court rejected this, with the chief justice, Sir Samuel Griffith, arguing: 'It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of section 116.' While the High Court has given section 116 a limited scope, we are also fortunate that few laws have been passed in Australia that might infringe the guarantee. We have not, for example, seen a law like the one passed in France in 2004 banning religious clothing – Jewish skullcaps, Sikh turbans, Muslim head-scarves or Christian crosses – in schools.

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Muslim students protest against the law banning the wearing of Islamic headscarves and other religious signs in French public schools. The placard reads 'Discrimination: action to isolate, to treat differently some individuals compared to others'.

© Cedric Joubert, AP.

2. (1912) 15 CLR 366 available at www.austlii.edu.au/au/cases/cth/HCA/1912/65.html

Rights of out-of-state residents

Section 117 prohibits governments from imposing ‘any disability or discrimination’ on the basis of an individual’s place of residence. For example, the section is designed to prevent the NSW parliament excluding the residents of any other state from its universities. Initially, this provision was interpreted almost out of existence when the High Court decided not to apply it to blatant examples of discrimination against a person residing in another state. The court’s approach took a dramatic about-turn in *Street v Queensland Bar Association*³ in 1989, when the court held that the section had been breached by rules governing admission as a barrister in Queensland – rules that required a barrister to give up his or her work, and hence residence, in another state. As a result of this decision, section 117 has an important impact in enabling people to choose to work or study in different states.

Right to review of government action

Section 75(v) states that ‘In all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ... the High Court shall have original jurisdiction.’ This means that a person has the right to seek High Court review of government decisions in regard to the listed remedies. In this, the section secures an important aspect of the rule of law – namely, that government may only act in accordance with the law and that people who believe that the government has acted unlawfully can take their case to the High Court for review. Section 75(v) can provide a crucial, and sometimes the only, opportunity for a court to review the lawfulness of government action. This was certainly so when the High Court heard the case of *Plaintiff S157/2002 v Commonwealth*⁴ in 2003. The plaintiff was an asylum seeker who could not be named, according to the *Migration Act 1958*. At the height of the *Tampa* controversy from August to September 2001, the Federal Parliament had inserted a new section 474 into the *Migration Act 1958*. The section states that certain decisions, such as whether a person is a refugee and thus entitled to remain in Australia, are ‘final and conclusive’ and ‘must not be challenged, appealed against, reviewed, quashed or called in question in any court.’ Despite its clear language, the High Court interpreted the section to allow for review of these decisions. The court also indicated that any attempt to oust its power of review under section 75(v) would be unconstitutional. In this, the court emphasised its role in maintaining the rule of law, with the central judgment concluding:

In any written constitution, where there are disputes over such matters, there must be an authoritative decision-maker. Under the Constitution of the Commonwealth the ultimate decision-maker in all matters where there is a contest, is this court.

Freedom of interstate trade

Section 92 provides that ‘trade, commerce and intercourse among the states ... shall be absolutely free.’ Unlike many of the other freedoms in the constitution, this guarantee of economic rights has been applied many times to strike down federal and state laws. For example, in the *Bank Nationalisation case*⁵ of 1948 the High Court struck down the Chifley government’s attempt to nationalise banking. The court found that the progressive prohibition ‘of the carrying on of banking business by private banks’ was inconsistent with the ‘freedom’ to conduct interstate trade under section 92. In 1988 the court adopted a more limited view of the provision in *Cole v Whitfield*⁶ – a case about the sale of interstate crayfish in Tasmania – when it held that the section would only strike down a law that is ‘discriminatory against interstate trade and commerce in that protectionist sense.’

Acquisition of property on just terms

As a consequence of section 51(xxxi), which was the section of the constitution made famous in the well-known movie *The Castle*, the Commonwealth may only acquire ‘property’ on ‘just terms.’ In other words, if the Commonwealth forcibly takes your property, it must give you fair value in return. This section has been broadly applied by the High Court to strike down federal laws. In 1944, in *Minister of State for the Army v Dalziel*⁷, Justice Sir Edward McTiernan found that ‘property’ includes ‘any tangible or intangible thing which the law protects under the name of property.’ The interests protected against unjust acquisition by this section may include native title rights, intellectual property rights (such as copyright), and even the right to bring an action in a court against another person. The High Court has, however, held that it does not protect welfare rights such as unemployment or sickness benefits, the amount of which is dependent on legislation that is susceptible to change.

3. [1989] HCA 53; (1989) 168 CLR 461, available at www.austlii.edu.au/au/cases/cth/HCA/1989/53.html

4. [2003] HCA 2, available at www.austlii.edu.au/au/cases/cth/HCA/2003/2.html

5. *Bank of New South Wales v Commonwealth* [1948] HCA 7; (1948) 76 CLR 1 available at www.austlii.edu.au/au/cases/cth/HCA/1948/7.html

6. [1988] HCA 18, available at www.austlii.edu.au/au/cases/cth/HCA/1988/18.html

7. [1944] HCA 4; (1944) 68 CLR 261, available at www.austlii.edu.au/au/cases/cth/HCA/1944/4.html

Summary of express rights

section 75(v)	right to review of government action
section 80	trial by jury
section 92	freedom of movement between Australian states
section 116	freedom of religion
section 117	non-discrimination on the basis of state residence
section 51(xxxi)	the right for acquisition of property to be on just terms

IMPLIED RIGHTS

The freedoms protected by the Australian Constitution are not limited to express rights. In recent times, the High Court has found that other rights can also be implied. In charting the rights contained in the Australian constitution while he was a judge between 1975 and 1986, Lionel Murphy, who had been Attorney-General in the Whitlam government, found what almost amounted to an implied Bill of Rights. For example, in *R v Director-General of Social Welfare*⁸ he held that: 'It would not be constitutionally permissible for the Parliament of Australia or any of the states to create or authorise slavery or serfdom.' He justified this conclusion in two sentences: 'The reason lies in the nature of our Constitution. It is a Constitution for a free society.' As this quote suggests, Justice Murphy was not afraid to venture beyond the express words and accepted understandings of the constitution. He subsequently recognised other rights, such as freedom of movement and communication, freedom from 'cruel and unusual punishment,' and freedom from discrimination on the basis of sex. This approach was rejected by other members of the High Court. In 1986 Murphy referred to 'guarantees of freedom of speech and other communications and freedom of movement' in *Miller v TCN Channel Nine*, a case dealing with section 92 of the constitution, which was handed down an hour before he died. This final judgment drew strong criticism from the other members of the court, including Justice Sir Anthony Mason, who stated: 'It is sufficient to say that I cannot find any basis for implying a new section 92A into the Constitution.'

Justice Mason became chief justice of the High Court in 1987. Five years later, in *Australian Capital Television Pty Ltd v Commonwealth*⁹, the court held that the constitution includes a freedom to discuss matters relating to Australian government. A majority of the court applied this freedom of political communication to strike down sections of the *Political Broadcasts and Political Disclosures Act 1991*, which limited political advertising on radio and television during election periods. The freedom of political communication was implied from sections 7 and 24 of the constitution, which require, respectively, that the members of the Senate and the House of Representatives be 'directly chosen by the people.' It was held that this choice must be a 'genuine' or 'informed' choice, and that it could not be undermined by a government restricting access to relevant political information. Similar reasoning might also support a freedom to associate for political purposes and perhaps freedoms of movement or assembly. In each case, though, the freedom would be limited to protecting the conduct necessary for voters to elect their representatives. Hence, while the freedom of political communication would prevent a government from banning speech on a topic relevant to an election campaign, it does not generally protect artistic or other speech.

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Ivan Ivanechko (Ivan Polyukhovich) leaves Adelaide court, 1992. His prosecution for war crimes was the subject of a 1991 case before the High Court (see over).

© Image UMA/I/867, John Ellis Collection, University of Melbourne Archives.

8. *R v Director-General of Social Welfare (Vic); Ex parte Henry* [1975] HCA 62; (1975) 133 CLR 369, available at www.austlii.edu.au/au/cases/cth/HCA/1975/62.html

9. [1992] HCA 1, available at www.austlii.edu.au/au/cases/cth/HCA/1992/1.html

The High Court has found other rights relating to the judicial process to be implied in the constitution. One example was in the 1991 *War Crimes Act case*¹⁰, which arose from the prosecution of Ivan Polyukhovich for having committed war crimes in Ukraine when it was under German occupation during the Second World War. In that case, Justices Sir William Deane and Mary Gaudron found that the Commonwealth Parliament could not establish criminal offences that operate retrospectively. While this finding did not attract the support of the other judges, a majority did hold that the Commonwealth could not enact a Bill of Attainder, a law by which a parliament rather than a court judges a person to be guilty of a crime. The federal parliament could not enact a law that stated, for example: 'Jane Doe is guilty of murder and is to be imprisoned for life.' Under the constitution, guilt or innocence must be determined in a court, not by parliament. How this might affect recent federal law that allows the Attorney-General to proscribe terrorist organisations, with flow-on criminal offences for their members and supporters, has yet to be determined by the High Court.

AUSTRALIAN INTEREST IN A BILL OF RIGHTS SINCE FEDERATION

Attempts to enact a national bill of rights have always failed. In 1973, Senator Lionel Murphy introduced the *Human Rights Bill* into the Senate. The purpose of that Bill was to enact the International Convention on Civil and Political Rights (ICCPR) directly into Australian law and create a Human Rights Commission which could enforce those rights. At that stage, Australia had not ratified the ICCPR. Senator Murphy's bill attracted much criticism. It lapsed when an election was called in 1974 and was not revived. Senator Murphy later became Justice Murphy of the High Court of Australia. In that capacity, he often referred to international human rights standards and sought to apply those standards in the resolution of Australian legal disputes.

However, the Whitlam government did enact other important laws which protected human rights in the area of race discrimination. Australia ratified the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1975 and the *Racial Discrimination Act 1975* (Cth) came into effect in October 1975.

Some of the states adopted anti-discrimination laws which guaranteed equality of treatment in the areas of employment, education and the provision of services.

In 1980, the Liberal Coalition government ratified the ICCPR. In 1981, it enacted the *Human Rights Commission Act 1981* (Cth). The Act referred to ICCPR. It created limited rights for individuals to complain about breaches of the rights in the ICCPR. It also created the first Human Rights Commission based in Canberra. While not a bill of rights, the creation of a Human Rights Commission was an important step in the protection of human rights in Australia.

In 1984, the *Sex Discrimination Act 1984* (Cth) was enacted to give effect to the *International Covenant on the Elimination of All Forms of Discrimination Against Women*.

In 1985, the Labor Government made a further attempt to enact a statutory bill of rights. The *Australian Bill of Rights Bill* was introduced into the House of Representatives. The Bill reflected international human rights standards. The intention was to create a statutory bill of rights and to replace the Human Rights Commission with a body that could investigate and enforce human rights. This bill also failed. However, in 1986 the Human Rights Commission was replaced by the Human Rights and Equal Opportunity Commission which was provided with powers to investigate and conciliate complaints about breaches of the human rights found in the ICCPR, the International Labour Organisation Convention on Discrimination in Employment and Occupation and other United Nations declarations concerning the rights of children and disabled persons.

At the state level there have also been attempts to introduce state bills of rights. These have also failed with the exception of the Australian Capital Territory which now has the *Human Rights Act* in place. See the *ACT Bill of Rights*, p 14.

10. Polyukhovich v Commonwealth [1991] HCA 32; (1991) 172 CLR 501, available at www.austlii.edu.au/au/cases/cth/HCA/1991/32.html

BILL OF RIGHTS FOR AND AGAINST

For

- > A Bill of Rights would recognise and protect universal rights, including many that are not currently protected by Australian law.
- > A Bill of Rights would enhance our democracy by setting out and protecting the rights that attach to Australian citizenship.
- > A Bill of Rights would protect the rights of minorities, possibly including the rights of non-citizens.
- > A Bill of Rights would give legal rights to Australians who are otherwise powerless.
- > A Bill of Rights would bring Australia into line with every other western nation.
- > A Bill of Rights would meet the obligations we have voluntarily assumed to incorporate into our law instruments such as the International Covenant on Civil and Political Rights.
- > A Bill of Rights would put rights above politics and above arbitrary governmental action.
- > A Bill of Rights would improve government policy-making and administrative decision-making.
- > A Bill of Rights would help to educate Australians about human rights and their system of government.
- > A Bill of Rights would promote tolerance and understanding in the community and could contribute to a stronger culture of respect for human rights.

Against

- > Rights are already well enough protected in Australia.
- > The High Court is already protecting rights through its interpretation of the constitution and the common law.
- > Rights listed in the law actually make little or no practical difference to the protection of rights.
- > The political system itself is the best protection of rights in Australia. We should trust in our politicians and our power to vote them out.
- > A Bill of Rights would actually restrict rights; in other words, to define a right is to limit it.
- > A Bill of Rights would be undemocratic because it might give unelected judges too much power over important social issues.
- > A Bill of Rights would politicise the judiciary and affect public confidence in the courts.
- > A Bill of Rights would be expensive given the amount of litigation it could generate.
- > A Bill of Rights would be alien to our tradition of parliamentary sovereignty.
- > A Bill of Rights would protect some rights that may not be as important to future generations.

Taken from *The Case For An Australian Bill Of Rights: Freedom In The War On Terror*, George Williams, UNSW Press, Sydney, 2004.

International perspective

UNITED NATIONS AND INTERNATIONAL BILL OF RIGHTS

In 1945, the United Nations convened a group chaired by Mrs Eleanor Roosevelt, known as the Human Rights Commission. The Commission worked on developing international standards for basic rights. The result was in the form of the *Universal Declaration of Human Rights*. The *Universal Declaration of Human Rights* was intended to be a comprehensive statement of all of the rights that mankind may enjoy regardless of locality, religious belief or social structure within their particular country. While the United Nations never intended the *Universal Declaration of Human Rights* to create binding legal obligations, it did anticipate that the Declaration would be a model for bills of rights to be adopted within each country.

The *Universal Declaration of Human Rights* defines human rights very broadly. The concept of human rights is to provide basic protections against abuse by the governments. It includes civil and political rights as well as economic, social and cultural rights.

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Eleanor Roosevelt holds up the *Universal Declaration of Human Rights*, adopted by the UN General Assembly in 1948. She was elected chairperson of the Human Rights Committee, and regarded her part in the Declaration as the greatest achievement of her lifetime.

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Following the adoption of the *Universal Declaration of Human Rights*, the United Nations has continued to work on developing international human rights standards and making these standards legally binding. In international law human rights become legally binding in States when they agree to sign and ratify (ie, become a party to) an international treaty or convention. Once a State is a party to a treaty or convention, its failure to observe its terms may be a breach of international law and appropriate action may be taken by the international community.

Australia is a party to a number of important international human rights instruments. These include:

- > International Covenant on Civil and Political Rights 1966 (ICCPR);
- > First Optional Protocol to the International Covenant on Civil and Political Rights;
- > International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR);
- > International Convention on the Elimination of all Forms of Racial Discrimination 1965 (CERD);
- > Convention on the Prevention and Punishment of the Crime of Genocide 1948;
- > Covenant on the Elimination of all Forms of Discrimination against Women 1979 (CEDAW);
- > Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT);
- > Convention on the Rights of the Child 1989 (CRC);
- > Convention relating to the Status of Refugees 1951.

While Australia is a party to these international treaties, the rights in these treaties do not have the force of law in Australia. The rights contained in these treaties do not automatically become part of Australian law. This is only the case where an Australian parliament enacts laws that reflect the terms of the international treaty. This has been done to a limited extent at the Federal level with the enactment of the *Human Rights and Equal Opportunity Commission Act* and other discrimination laws and privacy laws.

The First Optional Protocol to the ICCPR, CERD and CAT allow persons in Australia to lodge complaints with the international committees established by these treaties. The committees can consider complaints where the alleged victim of a human rights abuse has exhausted all Australian remedies. The committees consider the complaints based on written arguments and will make a decision as to whether the rights in the ICCPR, CERD or CAT have been breached by Australia. The decisions are not binding on Australia and the victim cannot demand an enforceable remedy. Since 1992, there have been a number of complaints lodged with the committees. These complaints have been concerned with human rights violations where there is no remedy in Australian law. Complaints to these committees have highlighted the inadequacy of Australian laws to protect internationally recognised human rights.

If Australia had a Bill of Rights, such a Bill of Rights would operate consistently with international treaties.

One benefit of the bill of rights is that it allows Australia to demonstrate that it can comply with its international human rights obligations and provide effective domestic remedies in Australian law.

One of the results of Australia's failure to enact a bill of rights is that its human rights record has been criticised from time to time. In July 2000, the Human Rights Committee established under the ICCPR published its comments on Australia's human rights record and its compliance with the ICCPR. The Committee said:

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the Covenant, there remain lacunae [meaning 'holes' or 'gaps'] in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated have an effective remedy (art. 2).

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Some of the 434 people rescued from a ferry ship stranded in the Indian Ocean, including pregnant women, children and sick people, photographed onboard the Norwegian cargo ship Tampa, 28 August 2001. The Australian Government refused to allow the asylum-seekers to land on its territory, and they were eventually sent to Nauru and New Zealand.

© AAP.

The lack of effective human rights protections based on the ICCPR, ICESCR and the other international treaties has resulted in Australia being criticised for its human rights record. Australia's treatment of asylum seekers has been one area where Australia has been criticised for failing to recognise the human rights of non-citizens. The particular human rights concerns have focused on:

- > arbitrary detention
- > treatment in detention
- > the lack of access to lawyers and courts to have the conditions of detention reviewed. The Human Rights Committee has considered a number of complaints about Australia's treatment of asylum seekers under the ICCPR. The Committee has commented that Australia is in breach of its international obligations where immigration detention continues beyond the period for which Australia can provide appropriate justification. Further that Australia's actions compound the breach because of its failure to consider less invasive means of achieving the same ends, that is to say, compliance with Australia's immigration policies. The approach taken by the Human Rights Committee recognises the rights of the individuals concerned and also the right of Australia to develop and enforce its immigration policies. While the Human Rights Committee acknowledges that the human rights in question are not absolute and there may be some restrictions or limitations on the rights, the Committee provides guidance as to how and when the rights may be limited.

If Australia had a bill of rights which protected individuals from arbitrary detention and guaranteed humane treatment in detention, then Australian courts could have a role in determining where the balance should be struck between the rights of individuals and the extent to which Government fairly regulates those rights.

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Canada's Bill of Rights.

© Human Rights Canada.

At the present time, Australian law provides no effective remedy for an asylum seeker in detention to challenge the appropriateness of his or her detention from a human rights based perspective. The only recourse is for complaints to be made to international bodies such as the Human Rights Committee under the First Optional Protocol to the ICCPR.

BILLS OF RIGHTS IN OTHER COUNTRIES

Australia is one of the few western democratic countries which does not have a bill of rights. It is helpful to consider how other countries with a similar legal system to Australia have incorporated bills of rights.

Canada

Canada has a constitutionally entrenched Charter of Rights. The rights are legally enforceable in the Supreme Court of Canada. The Charter of Rights protects the civil and political rights found in the ICCPR, but also includes rights that are specific to Canada. These include:

- > rights for Canadian indigenous peoples
- > the right to use either of Canada's official languages
- > the right of French and English linguistic minorities to an education in their language.

The Charter was entrenched into the Canadian Constitution in 1982. This followed 20 years of statutory protections in the Canadian Bill of Rights. The Charter of Rights has had a significant impact on the development of Canadian law. The Canadian Supreme Court spends much of its time dealing with cases under the Charter of Rights. The Supreme Court may declare laws invalid if they are inconsistent with the Charter.

In Canada, the Charter has been described as follows:

For more than 20 years, the Charter has been the driving force of change, progress and the affirmation of our society's values. Canadian courts have rendered more than 300 decisions in which they invoke the Charter to bring Canadian laws into accordance with the principles and values of Canadian society.

The Charter has had a major impact on the promotion and protection of human rights in Canada. With respect to language rights, it has reinforced the rights of official-language minorities. With regard to equality rights, it has led to the recognition and enforcement of the rights of a number of minority and disadvantaged groups. In penal matters, the Charter has clarified to a considerable extent the State's powers with respect to offender rights.¹¹

11. see http://www.pch.gc.ca/progs/pdp-hrp/canada/freedom_e.cfm

United Kingdom

Like Australia, the United Kingdom is a party to the ICCPR. It is also a party to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The ECHR provides for a range of civil and political rights in much the same terms as the ICCPR. Like Australia, the ICCPR and ECHR had no direct effect on English law. However, since 1966 victims of alleged violations of ECHR were able to make complaints about the United Kingdom to the European Commission on Human Rights and the European Court of Human Rights, based in Strasbourg, France. The European Court has found the United Kingdom in violation of the ECHR in the areas of detention of alleged IRA terrorists, the treatment of prisoners, privacy rights, free speech rights, access to the Courts and fair trial. The European Court also noted the absence of a bill of rights in English law.

In 1998, the *Human Rights Act* was enacted to respond to the growing number of cases being brought under the ECHR. The purpose of the *Human Rights Act* is to give greater effect to the ECHR in English law. It does so by requiring the law to be interpreted in a way which is consistent with the ECHR and also requires public authorities to act and make decisions which take into account the ECHR and are compatible with the ECHR.

The *Human Rights Act* does not empower the English Courts to declare laws to be invalid in the same way as the Canadian Supreme Court does. The English Courts may find and declare a law to be incompatible with the ECHR but it is then up to the English Parliament to amend, repeal or otherwise cure the incompatibility.

New Zealand

New Zealand adopted a *Bill of Rights Act* in 1990 to protect civil and political rights in New Zealand law. The *Bill of Rights Act* is closely modelled on the ICCPR. Unlike the Canadian Charter, the New Zealand *Bill of Rights Act* is an ordinary statute – it does not override other legislation.

The *Bill of Rights Act* requires the New Zealand courts to interpret the law in a way that is consistent with the human rights in the *Bill of Rights Act*. If there is an inconsistency between a law and the *Bill of Rights Act*, the courts cannot invalidate the offending law. As with the United Kingdom, the inconsistency is drawn to the Parliament's attention and it is for the Parliament to decide whether the offending law is to be amended or repealed.

South Africa

Following the fall of the apartheid regime, South Africa introduced a very extensive Bill of Rights into its Constitution. The introduction to the Bill of Rights states:

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”

The South African Bill of Rights includes civil, political, economic, social and cultural rights, children's rights and environmental rights. The South African Bill of Rights is the most extensive and far reaching bill of rights. A person who believes any of these rights have been violated may apply to a court for a remedy. The court is given extensive powers to make a range of orders to ensure that the relevant human rights are protected and the victim receives appropriate redress. In South Africa, the Constitutional Court has been asked to consider a number of human rights cases which touch upon the right to medical treatment, the right to housing and the prohibition of death penalty. Many of these cases have been controversial and concerned difficult social and political issues. In those cases, the Constitutional Court has been required to interpret the law to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. In doing so, the Constitutional Court has found a balance between the rights of individuals and the demands on government to fund and resource the relevant rights.

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Winning school entry in the 2005 ACT Human Rights Art award, created by students of Years 5 & 6, Isabella Plains Primary School.

ACT bill of rights

[This section contributed by Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, and Victoria Coakley, Human Rights Legal Advisor, ACT Human Rights Office April 2005]

“Australia’s smallest territory, enacted a legislative innovation that has the potential to fundamentally alter the way we think about, administer and protect the fundamental human rights of all people within our land. In time it may stand as an example for far wider, even constitutional, reform in other Australian jurisdictions.

I refer to the Human Rights Act 2004 (ACT) – Australia’s first ever Bill of Rights”

ACT Chief Justice Terence Higgins¹²

The journey for the first Bill of Rights in Australia did not happen overnight. As in other jurisdictions like NSW,¹³ discussion about a Bill of Rights has a history. In 1993 the ACT Attorney-General released an Issues Paper on an ACT Bill of Rights. Community consultations led to a draft of a proposed ACT Bill of Rights. This was circulated in early 1995, but lapsed after a change of government at the March 1995 election.

The idea was revived in 2002 when the ACT Chief Minister and Attorney-General, Jon Stanhope, appointed the ACT Bill of Rights Consultative Committee. The Committee conducted a thorough public consultation program, including a deliberative poll.¹⁴ In 2003 it concluded that some form of a bill of rights was appropriate and desirable in the ACT: ‘While highly visible abuses of human rights are not commonplace in the ACT, rights are currently protected in a partial and piecemeal manner under Commonwealth and ACT law. A bill of rights would improve the protection of rights and also provide an accessible statement of the rights that are fundamental to a life of dignity and value.’¹⁵

The Committee was chaired by Professor Hilary Charlesworth, who was awarded an ACT Human Rights Award on 8 March 2005, International Women’s Day, in acknowledgement of her central role in developing a Bill of Rights.

The ACT *Human Rights Act 2004* (HRA) was enacted in March 2004 and came into force on 1 July 2004.¹⁶ The Act provides an opportunity to build a human rights culture in the ACT community, but does not apply to Federal matters. The HRA is an ordinary ACT law, and is most similar to the UK *Human Rights Act 1998* and New Zealand’s *Bill of Rights 1990*, rather than the constitutionally entrenched United States or Canadian models. The moral compass of the Act is contained in the Preamble: ‘Human rights are necessary to live lives of dignity and value’. The Act has received criticism ranging from it being ineffectual, to being a ‘lawyers picnic’¹⁷.

SCOPE OF THE HRA

The concept of equality is based on the universal principle that everyone has inalienable human rights, deriving from everyone’s inherent dignity and value. Therefore, the HRA recognises that human rights apply to everyone who is subject to the laws of the ACT, whether or not people are residents or citizens. Under section 6 of the HRA only individuals have human rights; not corporations or other incorporated bodies.

CIVIL AND POLITICAL RIGHTS PROTECTED BY THE HRA

Specific human rights protected under the HRA are set out in sections 8 to 27 of the HRA. These rights are derived from the International Covenant on Civil and Political Rights (the ICCPR) – Australia ratified this international human rights treaty in 1966 and it came into force in 1976. Some rights in this UN document are

12. ‘Australia’s First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative’, delivered at the National Press Club, 3 March 2005.

13. NSW Standing Committee on Law and Justice, *A NSW Bill of Rights* (2001) NSW Parliament Paper No. 893.

14. See: <http://www.ida.org.au/billofrights.htm>

15. The Consultative Committee’s report can be found at: <http://www.jcs.act.gov.au/prd/rights/index.html>

16. Found at: <http://www.legislation.act.gov.au/a/2004-5/default.asp>

17. ‘The HRA in the Courts’, Gabrielle McKinnon, paper presented at the conference ‘Assessing the First Year of the Human Rights Act’ 29 June 2005. Available at www.gtcentre.unsw.edu.au/publications/papers/17.asp

not included in the ACT HRA because they are in exclusively Federal areas, including self-determination, marriage and immigration. There are some minor amendments to use more plain English language, and major changes to clarify issues, such as the right life only commencing from birth. Schedule 1 to the HRA is a table giving a detailed list of rights in the HRA, and referring to equivalent articles in the ICCPR.

THE RELATIONSHIP OF THE HRA WITH OTHER LEGISLATION

The HRA is an ordinary statute that affects the way Territory laws are interpreted and applied. The HRA does not override other laws, if the Legislative Assembly clearly intended to legislate inconsistently with human rights.

The courts do not have the power to strike down inconsistent laws. All courts and tribunals must give effect to any legislation that clearly expresses the intention of the Legislative Assembly to limit rights. However, the Supreme Court can issue a statement that legislation is in breach of human rights – under section 32 this is called a ‘Declaration of Incompatibility’ (see p 16 on the role of the Supreme Court).

The HRA does not create a separate right of action (as under the *Human Rights Act 1998* in the UK) to test the compatibility of legislation before the courts independently of other legal proceedings. Compatibility issues can be raised before magistrates courts and tribunals and the Supreme Court. Matters can also be appealed to the ACT Court of Appeal and ultimately the High Court.

DIALOGUE MODEL

The Committee recommended that the Bill of Rights should be designed to encourage a ‘dialogue’ among the three branches of government with parliament having the ‘last say’ therefore preserving parliamentary sovereignty. This model would respect constitutional and democratic boundaries – courts, which interpret and enforce laws; parliaments, which enact and amend statutes; and the executive, which administers or implements laws.

The HRA gives new responsibilities to each arm of government – the courts, which interpret and enforces laws; the ACT Legislative Assembly, which enacts and amends laws; and the government that administers laws. The dialogue model ensures that human rights are considered and debated in administrative and judicial decision-making, and in the development of new laws and reform of existing laws.

THE INTERPRETIVE APPROACH

Section 30 of the HRA states that ‘in working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.’

PRACTICAL EFFECT OF THE HUMAN RIGHTS ACT

Anyone who carries out a role under the authority of a law of the ACT must act consistently with human rights standards, unless the law explicitly authorises limitations. This includes public servants, parliamentarians and judges. The HRA impacts on a wide range of activities undertaken under legislation. Most commonly the conduct of cases in the Magistrate’s Court and the Supreme Court must fulfil the requirements of the right to fair trial. Also an inspector’s power to enter to premises, for example to confiscate assets, must not be done in a way that is unlawful or arbitrary, as required by the right of privacy under section 12 of the HRA. Body cavity and strip searches based on reasonable suspicion of unlawful activities are authorised under legislation, but should not be performed in a way that is degrading under section 10 of the HRA. For example detainees at a remand centre should not be routinely and unnecessarily be required to submit to these searches, merely because of inflexible policies that do not involve decisions being made on a case by case basis.

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Professor Hilary Charlesworth, awarded the ACT Human Rights Award in recognition of her contribution to developing the ACT’s Bill of Rights. Photographed at the National Press Club, Canberra, October 2003.

© Photo: Alan Porritt, AAP.

LIMITATIONS ON HUMAN RIGHTS

Some rights, such as freedom from torture, are absolute – the technical term for this is these rights are ‘non-derogable’. Generally human rights can be limited using very specific criteria. Human rights law provides a framework for balancing complex competing responsibilities and obligations in terms of limitations – it is called a proportionality test.

Proportionality test

The proportionality test is set out in section 28 of the HRA:

“Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.”

The proportionality test is based on international case law and has three elements:

- > the limitation adopted achieves the objective in question
- > the means should impair as little as possible
- > there must be proportionality between the effects of the limitation and the objective.

THE ATTORNEY-GENERAL'S ROLE

The Attorney-General assesses the compatibility of all government Bills with the HRA, and prepares a written compatibility statement to present to the Legislative Assembly. If the Bill is not compatible, then the statement must explain how it is not compatible – no such statement has yet been made in the ACT in the first year of the HRA's operation. The compatibility statement is usually very short and published on the ACT Legislation Register website with the Bill and explanatory statement.

THE LEGISLATIVE ASSEMBLY'S ROLE

Section 38 of the HRA requires that a committee of the Legislative Assembly must report to the Legislative Assembly on human rights matters raised by proposed legislation. The Standing Committee on Legal Affairs examines all proposed legislation for possible interferences with personal rights and liberties, and now also considers human rights issues.

The Legislative Assembly is also the forum for discussing responses to the Attorney-General's statements of compatibility and the Supreme Court's declarations of incompatibility.

DECLARATIONS OF INCOMPATIBILITY

The Supreme Court may issue a declaration of incompatibility if it finds it impossible to interpret a Territory law consistently with human rights. The declaration of incompatibility does not change the rights of parties in dispute or invalidate the law in issue. It also does not prevent the continued operation or enforcement of the law – this can only be addressed by legislative amendment. There is no obligation on the government to amend the inconsistent law, but the issue must be considered and debated by the Legislative Assembly.

THE HUMAN RIGHTS COMMISSIONER'S ROLE

The Human Rights Commissioner is an independent monitor and advocate of the Act, as well as a source of expertise for the community to develop an understanding of and compliance with human rights. The Commissioner's Office does not have a complaint handling function under the HRA, but it does respond to general inquiries.

The Commissioner's role under section 41 of the HRA is to:

- > review the effect of Territory laws on human rights and report in writing to the Attorney-General (which is later tabled in the Legislative Assembly, subject to privacy and public interest considerations);
- > provide human rights education (both to public and legal audiences); and
- > advise the Attorney-General on anything relevant to the HRA.

Reports

- > The Human Rights Audit of Quamby Youth Detention Centre, by the Human Rights Office (30 June 2005) can be accessed from <http://www.hro.act.gov.au/publications.html>.
- > Further reports are planned on adult remand places, including Belconnen Remand Centre.

Advices to the Attorney-General

Advices have been made on several issues including:

- > the length of detention of people on remand;
- > prisoners' right to freedom of expression;
- > human rights protection in the planned new Canberra prison, including issues of the objects of new legislation with a specific aims to rehabilitate prisoners, and that loss of liberty does not include loss of dignity; and
- > indigenous shared responsibility agreements and anti-terrorism laws.

Cabinet submissions & draft legislation

The Human Rights Commissioner is regularly given access to relevant draft Cabinet Submissions. The Commissioner's opinion on human rights compatibility issues in draft Bills, such as the new prison, and emergency electroconvulsive treatment, may result in the Bill being released as an 'exposure draft' before being introduced into the Legislative Assembly, to enable further community consultation. This follows the growing trend in other jurisdictions, such as the UK, towards releasing draft Bills for public consultation before finalising them and introducing them to Parliament. This increases the possibility of making influential contributions on the protection of human rights.¹⁹

Court role

The Human Rights Commissioner can also seek leave from courts and tribunals to intervene in appropriate cases involving the application and interpretation of human rights (section 36).

Community & education

The Human Rights Office can assist individuals and organisations with human rights inquiries, and engagement with the community is seen as central to improving the human rights of vulnerable populations whose rights have traditionally lagged behind the general population, such as people with a non-English speaking background, Aboriginal and Torres Strait Islanders, people with disabilities (including mental illness), the aged and people living in poverty.

Human rights community forums

On International Human Rights Day (10 December 2004) the Human Rights Office convened the first Human Rights Community Forum, which was attended by many non-government organisations, including: Shelter, ACTCOSS (ACT Council of Social Services), Welfare Rights and Legal Centre, Women's Legal Centre, YWCA, Youth Coalition, Council of the Ageing, Unions ACT, Amnesty International, the Aboriginal Justice Centre and Prisoner's Aid), private practitioners, interested statutory office-holders (such as the Victims of Crime Coordinator and the Office of the Director of Public Prosecutions) and human rights academics. The second Human Rights Community Forum was held on the first anniversary of the HRA's operation, 1 July 2005, and focused on the process and content of the review of the HRA.

HUMAN RIGHTS ACTIONS AND REMEDIES IN THE COURTS

The HRA does not create a new or direct right of action to the courts, but strengthens existing causes of action. Relevant human rights arguments may be raised in proceedings, and it may open further grounds on which to base a claim. Although the HRA applies across all areas of government activity, human rights arguments are most likely to be relevant in proceedings involving criminal cases, challenges to administrative decisions (for example breach of statutory duty), and other claims against the government (such as negligence).

LITIGATION

The HRA has not caused a deluge of litigation, but has had a pervasive influence for example in the area of bail applications²⁰.

CASE STUDY

R v YL [2004] ACTSC 115 (27 October 2004)

The accused was charged with committing an assault on her then six-year old stepson. Counsel for the accused challenged the child's competence to give sworn evidence, and expressed concern about the likelihood of the child suffering significant stress if forced to give evidence against his stepmother. An eminent child psychiatrist gave evidence that there was a risk that the child would suffer substantial stress if forced to give evidence, and there was at least some risk that he might ultimately suffer significant harm. The child's lawyer objected to the child giving evidence on behalf of the prosecution under section 18 of the *Evidence Act 1995* (Commonwealth). The Crown submitted that the child should be compelled to give evidence, and attempted to tender a *nolle prosequi* [an unwillingness to proceed in a criminal trial] in order to decline to proceed further and bring the prosecution to an end. This would have had the effect of aborting the trial allowing the Crown the opportunity to obtain leave to test any of judge's rulings on appeal, and could allow for subsequent prosecution of the accused on fresh information.

Justice Crispin held that section 11 of the HRA (the rights to protection of the family and of the child) and section 30(1) allowed him to refuse to exercise coercive powers to compel the seven-year old child to enter court and give evidence against his will. The judge also refused to grant a *nolle prosequi* on grounds using the interpretative provisions of the HRA (s 30(1)) that it would be an abuse of process – the accused has the right to have a decision made at the end of the trial under sections 21 (fair trial) and 22(2)(c) of HRA (unreasonable delay in criminal proceedings).

Available at www.austlii.edu.au/au/cases/act/ACTSC/2004/115.html

19. See David Feldman, 'The Impact of Human Rights on the UK Legislative Process', 25-91 (2004), at 107.

20. The ACT Director of Public Prosecutions, Richard Refshauge, appearing before the ACT Legislative Assembly Standing Committee on Legal Affairs, 11 February 2005.

There have been six Supreme Court decisions (one of them oral, not written), one magistrate's court decision (oral also) and one decision of the Administrative Appeals Tribunal (AAT), that cite the HRA.²¹

IMPACT OF HRA ON GOVERNMENT AND THE COMMUNITY

There is an obligation for agencies to report on measures they have taken to encourage respect, protection and promotion of human rights in their Annual Reports. A breach of the standards in the HRA in executive decision-making can provide a basis for review by the courts.

The HRA provides non-government organisations with an advocacy tool to lobby the government for reforms in areas of concern to the community. In the ACT litigants can raise human rights arguments in the course of existing proceedings, whether against the government (for example, in a prosecution where the right to a fair trial is relevant) or another person (for example, under defamation law the right to freedom of expression is relevant).

The National Judicial College has provided training for the judiciary, and the Human Rights Commissioner has given seminars to the legal profession (for example, the Law Society and the Women Lawyers' Association of the ACT). Special forums on the HRA have been held in specific areas of interest, including corrections and mental health. The Human Rights Office can provide relevant information and education, but needs community support for outreach work, particularly with vulnerable populations that are difficult to reach.

CASE STUDY

***The Queen v O'Neill* [2004] ACTSC 64 (30 July 2004)**

An Australian Federal Police officer on motorcycle duty directed the accused to stop his vehicle, but the vehicle was reversed into the officer's motorcycle and injured him. The accused was charged with using an offensive weapon (the vehicle) against the officer, likely to endanger the officer's life, for the purpose of preventing or hindering his lawful apprehension. The accused was further charged with assaulting the officer, occasioning him actual bodily harm.

Justice Connolly found that this situation amounted to 'double jeopardy' – under this legal principle a person may not be tried twice for the same offence. There is a specific statutory basis for double jeopardy in section 24 of the HRA. A verdict of guilty was entered on the first count on the indictment, so the second count was not considered, as it arose from precisely the same facts, that is, the intentional reversing of a motor vehicle into the officer.

Available at www.austlii.edu.au/au/cases/act/ACTSC/2004/64.html

CASE STUDY

***Merritt and Commissioner for Housing* [2004] ACTAAT 37 (29 September 2004)**

The applicant sought review by the Tribunal of a decision of the respondent to refuse her application for transfer from Early Allocation Category (EAC) 2 to 1. The applicant has two children under five and has been a tenant of ACT Housing since April 2000. She had been allocated housing in Illawarra Court, which she argued was an unsuitable place to bring up young children. In this environment there was regular fighting between tenants, drunkenness and drug use, broken glass, and used syringes in stairwells and in the park where the children played. There was also an incident in December 2002 when an abandoned car was set alight causing her family to flee the apartment due to 'dense, toxic smoke'. The Tribunal determined that none of the circumstances for statutory interpretation set out in s 30(3) of the HRA applied (working out the meaning of a Territory law). The Tribunal found that there was no evidence that the applicant's family was not being afforded protection by society, or that the children were not being afforded the protection needed without distinction or discrimination. To grant the applicant's request would likely have the consequence that some other family or child in more urgent need of accommodation was unable to be assisted, which could itself constitute a breach of s 11 of the HRA.

In the three other Supreme Court cases the HRA was briefly cited in the context of defamation (*Szuty v Smyth*), a workplace protection order (*Firestone v ANU*) and an appeal against a psychiatric treatment order made by the Mental Health Tribunal (*Robertson v ACT*). In these early day cases have not referred to relevant international law, as encouraged under section 31 of the HRA.

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Chelsea Oakman, winner of the 2005 Human Rights Art Award, for her work titled 'Hope'. Pictured with ACT Human Rights Commissioner Helen Watchirs.

21. For a full summary of cases see the HRO website: <http://www.hro.act.gov.au/casesdecisions.html>.

THE HRA AFTER THE FIRST YEAR

Various non-government organisations and government agencies are developing their own specific Charters of Rights, for example in the areas of children, health, mental health, housing, disability and carers – these targeted initiatives which generate ownership and relevance to these communities, are to be encouraged, as long as these Charters at least meet, or are above, the HRA benchmarks. Another recent development is the Human Rights Commission Act 2005, under which the Human Rights Office will merge with other complaints Commissioners on 1 March 2006.

The HRA was reviewed after its first year of operation and will also be reviewed more generally in five years. The first review stated:

“At the end of 12 months we can say that with some certainty that none of the dramatic changes anticipated by either critics or supporters of Bills of Rights have come to pass. There has, however, been a marked increase in the awareness of human rights principles due to the kind of scrutiny now required of proposed legislation, as well as systems already operating under existing laws. The Act is not a magic bullet for creating a society based on full recognition of human rights, but it does at least represent progress in the right direction.”²²

IMPACT OF THE HRA OUTSIDE THE ACT

Other Australian jurisdictions are closely monitoring the progress of the HRA. In March 2005, at conferences hosted by the ACT, participants from many jurisdictions expressed interest in the scrutiny process under the HRA²³. The Victorian Justice Statement (2004-2014) commits the government to consider a Charter of Rights and Responsibilities. The Victorian Human Rights Consultation Committee issued a Discussion Paper in mid 2005 and a report on their consultations is due at the end of 2005.

The lack of a national human rights frame of reference has resulted in recent High Court decisions authorising the indefinite detention of stateless persons, including *Al Khafaji* and *Al-Kateb*,²⁴ although in both cases the Federal government recently issued visas. At the International Criminal Congress in Canberra in 2004, NSW Chief Justice Spigelman made favourable references to the ACT Human Rights Act,²⁵ and Julian Burnside, QC (winner of the 2004 HREOC Human Rights Medal) called it a ‘beacon of hope’.

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The Hussaini family, (from left) Batool, Zahra, Saqlain and Mohammad, are refugees from Afghanistan who are starting a new life in Canberra after a few years in Nauru.

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22. From *Review of the first year of operation of the Human Rights Act 2004*, Helen Watchirs, June 2005, available at <http://democratic.audit.anu.edu.au/WatchirsHRActJune05.pdf>

23. 9th Australasian and Pacific Conference on Delegated Legislation and 6th Australasian and Pacific Conference on the Scrutiny of Bills Australasian conference on ‘Legislative Scrutiny in a Time of Rights Awareness’

24. [2004] HCA 38; 6.08.2004 and [2004] HCA 37; 6.08.2004, respectively.

25. Keynote address by CJ Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004 (ACT)’ 9th International Criminal Law Congress, 28 October 2004.

Human rights principles in the HRA

[Derived from the ACT Department of Justice and Community Safety's Plain English Guide (2004)]

This section is a brief outline of fundamental human rights principles, which have been given direct legal effect in Territory law by the HRA. Some rights are absolute, but generally the rights listed in sections 8-27 may be subject to limitations and must be read in conjunction with the proportionality test set out in section 28.

SECTION	PRINCIPLE	DESCRIPTION/PURPOSE
section 8	recognition and equality before the law	<ul style="list-style-type: none"> > equal respect recognition and protection by the law regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability, sexual orientation or other status > imports international law concept of equality – requires equality in fact as well as formal equality in law > requires equal treatment by decision makers, courts and tribunals > government decisions to legislate to be made without discrimination > does not exclude different treatment such as programs to meet the particular needs of a group of people where based on objective and rational criteria, aimed at a legitimate outcome to achieve equality in substance
section 9	right to life	<ul style="list-style-type: none"> > action or decision taken to end life must be clearly established by law and subject to legal process > includes obligation to protect the life of those at risk of harm > requires effective investigations of deaths in custody > applies from time of birth
section 10	prohibition on torture, cruel, inhuman or degrading treatment or punishment	<ul style="list-style-type: none"> > absolute, even in time of public emergency > factors in determining whether behaviour is in this category include nature and context of treatment, duration, physical or mental effects, sex, age and state of health of the individual > particularly relevant to treatment of people in police cells, prisons, mental health facilities, other detention centres and hospitals
section 10	no medical or scientific experimentation or treatment without free consent	<ul style="list-style-type: none"> > consent to treatment or experimentation must not be coerced, or gained through undue influence, or lack of information > autonomy of the individual takes priority, even if refusal of treatment may be considered medically unsound > traditional, historical, religious or cultural attitudes do not justify violation of this right > limitations may be acceptable eg in situations of mental illness, but must be clearly expressed by the law and meet the proportionality test (s 28).

SECTION	PRINCIPLE	DESCRIPTION/PURPOSE
section 11	protection of the family	<ul style="list-style-type: none"> > family to be interpreted broadly to reflect different cultural values and social attitudes > aimed at protecting family relationships; closely related to right to privacy and protection from arbitrary interference in family life
section 11	protection of the child	<ul style="list-style-type: none"> > minors recognised as being vulnerable and so entitled to special protection > best interests of the child may at times require intervention > ensure segregation from adults in detention > no publicising of involvement in court proceedings where in child's best interests not to do so
section 12	privacy and reputation	<ul style="list-style-type: none"> > protection from interference with privacy, family, home and correspondence that is unreasonable or unjustified in the circumstances
section 13	freedom of movement	<ul style="list-style-type: none"> > protects the right to move freely across borders, choose where to live without unreasonable exclusion > does not provide access to private property, or require transport to be subsidised > measures that restrict movement for public safety (eg traffic control, public park access) are permissible if according to law and the proportionality test
section 14	freedom of thought, conscience, religion and belief	<ul style="list-style-type: none"> > government cannot interfere with what a person may believe or require anyone to follow a belief or religious practice > protects right to practice religion > extends to atheists, agnostics and sceptics > freedom to live by one's beliefs and conscience is protected absolutely until it affects another – then subject to the proportionality test
section 15	peaceful assembly and freedom of association	<ul style="list-style-type: none"> > ensures people can join together in public or private for any peaceful, lawful activity, including protesting against the state > includes right not to participate in lawful assembly or association
section 16	freedom of opinion and expression	<ul style="list-style-type: none"> > of paramount importance to preservation of individual liberty > includes industrial action, artistic expression, political demonstration, publications and whistle blowing > may be limited to protect the interests of a vulnerable party in court proceedings, or to prevent disclosure of confidential information
section 17	right to vote and to take part in public life	<ul style="list-style-type: none"> > citizens are recognised as having the right to vote, participate generally in public affairs > government able to set minimum age for voting > government should remove barriers to effective exercise of this right and ensure that administration of elections minimises risk of corruption and undue influence
section 18	right to liberty and security of the person and prohibition on arbitrary detention	<ul style="list-style-type: none"> > everyone entitled to carry out lawful activity free of interference and safe from personal harm from government officials or members of the public > no-one may be arrested, detained or deprived of liberty except on lawful grounds > lawful detention may still violate the right to liberty if it is not reasonable in the circumstances of the case > a person detained is entitled to be informed of the reasons for detention, and to have the lawfulness of their detention reviewed

SECTION	PRINCIPLE	DESCRIPTION/PURPOSE
section 19	humane treatment of those deprived of liberty	<ul style="list-style-type: none"> > anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person > inhumane treatment cannot be justified on the grounds of lack of resources
section 19	segregation of accused from convicted prisoners	<ul style="list-style-type: none"> > an accused person is entitled to be presumed innocent until convicted and sentenced by the court > a person held on remand (detained awaiting trial) should be segregated from convicted inmates and should be treated in a way that ensures their safety
section 20	children in the criminal process	<ul style="list-style-type: none"> > an accused minor (under 18) must be segregated from detained adults > they must be treated in a way that is appropriate to their age and unconvicted status, and must be brought to trial as quickly as possible
section 21	fair trial	<ul style="list-style-type: none"> > everyone has the right to a fair trial (both criminal and civil proceedings) > judges and courts must be free from improper influence or conflicts of interest, and have the competence to hear and decide cases in a way that is fair to both parties > everyone to have reasonable access to courts > procedures to allow fairness eg adequate notice, sufficient time to present a case, publishing of decisions > hearings generally to be in public, but judges allowed discretion to exclude media and public eg to protect best interests of a child
section 22	rights in criminal proceedings	<ul style="list-style-type: none"> > accused to be told promptly, in detail, and in language they understand the nature and reason for the charge > must be given adequate time and facilities to prepare their defence > trial should proceed without unreasonable delay > accused has a right to be present at the trial and to an effective defence (themselves or a legal representative) whether publicly funded legal representation is necessary will depend on the circumstances > right to an interpreter > anyone who is convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher court
section 22	prohibition on self-incrimination	<ul style="list-style-type: none"> > based on the principle that the prosecution must bear responsibility for proving their case beyond reasonable doubt > evidence that is coerced is unacceptable and often unreliable
section 22	children's rights in criminal proceedings	<ul style="list-style-type: none"> > procedures for dealing with child and youth offenders must account for the child's right to a fair trial, in view of factors such as age, capacity to understand, gravity of the offence, and consequences of the proceedings
section 23	compensation for wrongful conviction	<ul style="list-style-type: none"> > a person who is the victim of a miscarriage of justice is entitled to compensation if convicted after all appeals and punished for the crime > the right will not apply where the person is in some way responsible for evidence not being disclosed at the trial

SECTION	PRINCIPLE	DESCRIPTION/PURPOSE
section 24	right not to be tried or punished more than once for the same offence	<ul style="list-style-type: none"> > in general, a person cannot be tried for the same offence more than once (after having been tried and acquitted or convicted, and exhausting appeal avenues) > cases can be reopened when there has been a miscarriage of justice
section 25	prohibition on retrospective criminal law	<ul style="list-style-type: none"> > ensures that noone can be charged with an offence for conduct that was not an offence at the time it was carried out > if a penalty is increased, the lower penalty that applied at the time of the offence will apply
section 26	freedom from forced work	<ul style="list-style-type: none"> > modern forms of slavery include trafficking of women and children for sexual services, and men and children for other forms of labour > right applies to all forms of work (physical and intellectual), and force includes direct threat or some form of penalty
section 27	rights of ethnic religious and linguistic minorities	<ul style="list-style-type: none"> > right belonging to minority group to enjoy their culture, religion and language, including those who are not permanent residents or citizens > aimed at long-term survival of the group and recognition of diversity > subject to reasonable limitations

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Protest in San Francisco against police action under the US Patriot Act, 23 July 2003.

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Contacts and further reading

Gilbert & Tobin Centre of Public Law Bill of Rights Project

Provides a good overview and a web section with links to articles
<http://www.gtcentre.unsw.edu.au/resources/billofrights.asp>

Parliament of Australia – Parliamentary Library

Law Internet Resources on Civil and Human rights – see Bill of Rights under Topics
www.aph.gov.au/library/intguide/law/civlaw.htm

NSW Council for Civil Liberties

Bill of Rights page – also has links to many articles
http://www.nswccl.org.au/issues/bill_of_rights/index.php

Australian Policy Online

www.apo.org.au Search “Bill of Rights”

Public Interest Advocacy Centre

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A Bill of Rights for Australia – but do we need it? Hon. Justice Michael Kirby, AC, CMG, *Legaldade* vol 8 (2), May 1996, Warrigal Publications

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Why it's time for a Bill of Rights – Law Society urges debate, Vindi Thampapillai, Law Society Journal, vol 3, no. 3 April 2005

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