

# 11 Statutory models of human rights protection: a comparison

This chapter compares human rights Acts that have been introduced overseas and in Victoria and the Australian Capital Territory. The Consultation Committee's terms of reference specify that any options the Committee identifies should not include a constitutional bill of rights, so this chapter focuses on jurisdictions that have adopted statutory bills of rights. Further, since the majority of submissions favouring a human rights Act proposed that Australia adopt a 'dialogue' model of human rights protection, the discussion here is limited to that model. Alternative models are discussed in Chapter 14.

## 11.1 The dialogue model

What is common to the human rights Acts adopted in New Zealand, the United Kingdom, Victoria and the ACT is that they aim to facilitate a 'dialogue' between the three arms of government—the executive, the parliament and the judiciary. The Acts set out a range of rights to be protected and then give distinct roles to each arm of government in relation to those rights:

- The executive (the government and its agencies) is required to act in a manner consistent with human rights in its decision making and can face court action if it fails to do so. When introducing new legislation into parliament, the government is (or members of parliament are) generally required to include a statement about whether the legislation is 'human rights compliant'. When a court makes a declaration that specific legislation is inconsistent with human rights, some models require the government to report to parliament on the inconsistency.
- The parliament is given the final say on laws. It can decide to pass legislation that overrides human rights. If a court makes a declaration that specific legislation is inconsistent with human rights, parliament can choose whether to amend the legislation. Parliamentary committees are involved in scrutinising Bills for human rights compliance before they are passed.
- The judiciary is required to interpret legislation in a manner consistent with human rights. It may be empowered to provide remedies if the executive breaches human rights and to make declarations of incompatibility if legislation is found to be inconsistent with human rights. Importantly, such a declaration

does not affect the operation or validity of the legislation: it is merely a signal to the government that it should consider amending the legislation.

In this way the three arms of government prompt responses from each other when a proposed law or policy is inconsistent with human rights. This is often referred to as the 'dialogue' model.

## 11.2 New Zealand

In 1990 New Zealand passed the *Bill of Rights Act 1990* after a failed attempt at introducing an entrenched bill of rights, which would have empowered the courts to declare legislation invalid.

### Who must comply?

The Bill of Rights Act applies to 'acts' done by the legislative, executive or judicial branches of government and to 'any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law'. Those acts must be performed in a manner consistent with human rights.<sup>1</sup> This obligation can also extend to private bodies when they engage in public functions.

Unlike the human rights Acts in the ACT and Victoria, the New Zealand Bill of Rights Act does not specify which factors are relevant to determining whether a function is of a public nature, although the courts have generally taken into account whether the body is acting in the public interest, conferring a public benefit, acting to implement government policy, subject to special obligations that other private bodies do not have, receiving public funding, or exercising powers under a statute or regulation.<sup>2</sup>

### Who is protected?

The Bill of Rights Act protects both natural persons (that is, individuals) and legal persons (such as corporations), which means, for example, that both individuals and corporations are able to bring claims for breaches of human rights. This protection is not limited to citizens of New Zealand.

---

<sup>1</sup> Unlike the ACT and Victorian human rights Acts, the New Zealand Act does not spell out public authorities' specific obligations in relation to human rights. It applies to all 'acts' done by public authorities: New Zealand Ministry of Justice, *The Handbook of the New Zealand Bill of Rights Act 1990: an introduction to the rights and freedoms in the Bill of Rights Act for the public sector* (2004) 10.

<sup>2</sup> New Zealand Ministry of Justice, *The Handbook of the New Zealand Bill of Rights Act 1990: an introduction to the rights and freedoms in the Bill of Rights Act for the public sector* (2004) 13–14.

## **Which rights and responsibilities are included?**

The Bill of Rights Act provides for civil and political rights such as the right not to be subjected to torture; the right to vote; freedom of thought, conscience and religion; freedom of association; freedom from discrimination; the rights of individuals during search, arrest and detention; and the rights of minorities to enjoy their culture, practise their religion and use their own language. The Act does not make mention of responsibilities. It does, however, provide that any existing rights or freedoms are not abrogated merely because they are not mentioned in the Act.

## **Can the rights be limited?**

Some human rights Acts contain a general limitation clause allowing all rights to be limited in particular circumstances. Others allow limitations only in relation to specific rights. The New Zealand Act takes the former approach, providing that rights ‘may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

## **The dialogue framework**

### **Statements of compatibility**

Unlike human rights Acts in other jurisdictions, the New Zealand Act does not require that every Bill introduced into parliament be accompanied by a ‘statement of compatibility’ that sets out whether the Bill is compatible with the rights provided for in the Act. Rather, if legislation introduced into parliament appears to be inconsistent with the Act, the Attorney-General is required to bring the inconsistent provisions to parliament’s attention. Nevertheless, failure to comply with this requirement has no effect on the validity of the legislation. New Zealand’s *Cabinet Manual* also requires Ministers presenting Bills to Cabinet to confirm that each Bill complies with the Bill of Rights Act, the *Human Rights Act 1993* (NZ) and various other legal principles and obligations.<sup>3</sup>

### **Scrutiny of Bills**

Some jurisdictions require that every Bill introduced into parliament be scrutinised for human rights compliance by a parliamentary committee. The New Zealand Bill of Rights Act does not require this, but the parliamentary Justice and Electoral Committee is empowered under different legislation to review Bills on a range of matters, including human rights.

---

<sup>3</sup> Cabinet Office, Department of Prime Minister and Cabinet, *Cabinet Manual 2008*, (2008) 95.

### **An override provision**

In some jurisdictions parliament can expressly provide that a piece of legislation is to have effect despite being incompatible with human rights—an ‘override provision’. This means that the human rights Act will not apply to that legislation. The New Zealand Bill of Rights Act contains no such provision.

### **An interpretative provision**

All the human rights Acts discussed in this chapter require that legislation be interpreted in a manner consistent with human rights, although they all adopt slightly different formulations of that obligation. Section 6 of the New Zealand Bill of Rights Act provides that ‘wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in [the Bill of Rights Act], that meaning shall be preferred to any other meaning’. The obligation is not limited to the courts and applies to anyone interpreting legislation, including public servants. This formulation is broader than formulations applying in other jurisdictions since those interpreting legislation are not required to assess whether their interpretation is consistent with the intention of parliament; if the legislation can be interpreted consistently with human rights, that interpretation must be preferred.<sup>4</sup>

### **Declarations of incompatibility**

Some jurisdictions empower courts to make a ‘declaration of incompatibility’ if they find that a piece of legislation cannot be interpreted in a manner consistent with human rights. The declaration has no effect on the validity of the legislation. The New Zealand Bill of Rights Act contains no such provision.<sup>5</sup>

The New Zealand Supreme Court has, however, generally noted where legislation disproportionately or unreasonably interferes with human rights, ‘seeing this as the initiation of a “dialogue” with the legislative branch which might cause it to amend the law’.<sup>6</sup> A number of judges have gone further and issued formal ‘declarations of incompatibility’.<sup>7</sup> Some argue that this is in fact permissible under the Bill of Rights Act. Although the Act provides that a court cannot hold legislation to be impliedly repealed or revoked solely on the grounds of inconsistency with the Bill of Rights

---

<sup>4</sup> See, for example, *R v Poumako* [2000] 2 NZLR 695 [37].

<sup>5</sup> Although under the *Human Rights Act 1993* (NZ) the Human Rights Review Tribunal and, on appeal, the High Court may issue declarations of incompatibility in relation to legislation that is found to be inconsistent with s. 19 of the Bill of Rights Act (the provision concerning discrimination).

<sup>6</sup> A Twomey, Submission. Associate Professor Twomey offers the examples of *Hansen v R* [2007] 3 NZLR 1 [253]–[254] (McGrath J) and [267]–[268] (Anderson J), as well as *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [20].

<sup>7</sup> See, for example, *R v Poumako* [2000] 2 NZLR 695 [86]–[107] (Thomas J); *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 [20].

Act, this does not necessarily exclude the making of declarations that have no effect on the validity of the legislation.<sup>8</sup>

## Subordinate legislation

Some human rights Acts empower the courts to strike down subordinate legislation (including regulations, statutory rules and bylaws) that is inconsistent with human rights. Although the New Zealand Bill of Rights Act does not specifically empower the courts to do this, the courts have stated they will strike down inconsistent subordinate legislation if the statute pursuant to which it was enacted does not expressly authorise the inconsistency.<sup>9</sup>

## Causes of action

The Bill of Rights Act does not provide for individuals a free-standing right to bring court actions against public authorities for human rights breaches. Instead, a party must raise a human rights complaint in the context of other court proceedings—for example, a claim in tort or an application for judicial review.

## Remedies

The New Zealand Bill of Rights Act does not expressly provide for any remedies for human rights breaches, although the courts have found that a variety of remedies are nonetheless available. For example, evidence obtained in breach of the Act may be excluded in criminal proceedings.<sup>10</sup> In the landmark *Baigent's Case* the Court of Appeal also held that damages may be awarded against those who commit human rights breaches.<sup>11</sup> In that instance compensation was awarded to a woman whose house had been raided by the police, despite her daughter pointing out that the police had the wrong address. The courts have, however, tended to award damages only as a last resort and in modest amounts.<sup>12</sup>

## The role of the Human Rights Commission

The Human Rights Commission of New Zealand is not given any powers under the Bill of Rights Act. Instead, its powers come from the *Human Rights Act 1993*, and its primary functions are to advocate and promote respect for human rights and to encourage the maintenance and development of harmonious relations between individuals and the diverse groups in the New Zealand community. The commission has the power to resolve disputes relating to unlawful discrimination but not

---

<sup>8</sup> AS Butler, 'Strengthening the Bill of Rights' (2000) 31 *Victoria University of Wellington Law Review* 129.

<sup>9</sup> *Drew v Attorney-General* [2002] 1 NZLR 58.

<sup>10</sup> *R v Shaheed* [2002] 2 NZLR 377.

<sup>11</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*).

<sup>12</sup> J Philpott, 'Damages under the United Kingdom's *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*' (2007) 5 *New Zealand Journal of Public and International Law* 211.

disputes under the Bill of Rights Act. The Human Rights Review Tribunal also has jurisdiction to hear complaints under the *Privacy Act 1993*, the *Health and Disability Commissioner Act 1994* and the Human Rights Act.

## Conclusion

Overall, the New Zealand Bill of Rights Act is said to have ‘infused public debate, influenced public attitudes, shaped legislation, and improved the conduct of state actors’.<sup>13</sup> Its effect has been seen in the formulation of policy and legislation and in the decisions of courts.

By August 2009 the Attorney-General had reported 49 times under s. 7 of the Act on Bills (both government and non-government) that appear to be inconsistent with human rights.<sup>14</sup> Although the Attorney-General is not required to give a statement of reasons, since 2003 advice from the Ministry of Justice and the Crown Law Office in relation to identified inconsistencies has been published online. Parliament’s response to these reports has been mixed: some Bills have been amended and some have remained unchanged.<sup>15</sup> One commentator has noted that Parliament often fails to engage with the substance of s. 7 reports or to explain why certain breaches of human rights are justified.<sup>16</sup> Another commentator has, however, pointed to the benefits s. 7 reports produce before Bills even get to parliament:

Because all proposed legislative measures must pass muster under the [Bill of Rights Act], or else receive the unwanted attention of an Attorney-General’s section 7 report, section 7 has ensured that the [Act] is a significant factor in the policy formulation and the law drafting processes.<sup>17</sup>

As noted, s. 7 is buttressed by the *Cabinet Manual*, which requires that all draft legislation submitted to Cabinet be certified as ‘human rights compliant’. In addition, a handbook published by the Ministry of Justice in 2004 gives to policy advisers advice on how to take human rights into account in the development of policy. It is said that measures such as these have ensured that the Bill of Rights Act ‘has been woven into the fabric of New Zealand law and society’.<sup>18</sup>

---

<sup>13</sup> EW Thomas, ‘A bill of rights: The New Zealand experience’ (Paper presented at ANU Comparative Perspectives on Bills of Rights conference, Canberra, 18 December 2002) 30.

<sup>14</sup> See Ministry of Justice, *New Zealand Bill of Rights Act 1990* <<http://www.justice.govt.nz/bill-of-rights/>> at 20 August 2009.

<sup>15</sup> One commentator notes that, in relation to the 17 reports tabled by the Attorney-General between 2003 and 2008, seven of the Bills were not enacted, eight were enacted with the impugned provisions unchanged, one was enacted with the extent of the breach lessened, and one was enacted with the breach removed entirely: T Bromwich, ‘Parliamentary rights-vetting under the NZBORA’ (June 2009) *New Zealand Law Journal* 189.

<sup>16</sup> T Bromwich, ‘Parliamentary rights-vetting under the NZBORA’ (June 2009) *New Zealand Law Journal* 189, 190–1.

<sup>17</sup> AS Butler, ‘Strengthening the Bill of Rights’ (2000) 31 *Victoria University of Wellington Law Review* 129.

<sup>18</sup> EW Thomas, ‘A bill of rights: The New Zealand experience’ (Paper presented at ANU Comparative Perspectives on Bills of Rights Conference, Canberra, 18 December 2002) 30.

As in many jurisdictions, there was initially a fear that passage of the Bill of Rights Act would result in a flood of litigation. Despite this, during the Consultation Committee Chair's visit to New Zealand—which included meetings with judges, government officials and legal academics—it became clear that this fear has not been realised. The Act has, however, been severely criticised for the way it has encouraged a spate of 'judicial activism': courts are said to have 'invented' the power to award damages and issue declarations of incompatibility.<sup>19</sup> The judges acted because parliament failed to clarify the question of remedies, it is said.<sup>20</sup> Although parliament has always been able to limit or remove these powers by passing further legislation, it has not done so.

### 11.3 The United Kingdom

The United Kingdom's *Human Rights Act 1998* gives UK courts power to enforce the rights provided for under the Convention for the Protection of Fundamental Rights and Freedoms (known as the European Convention on Human Rights) and some of its protocols. Before the Act's passage in 1998 individuals could go only to the European Court of Human Rights in Strasbourg to enforce their rights under the convention.

#### Who must comply?

Under the UK Human Rights Act it is unlawful for public authorities to act in a way that is incompatible with rights provided for under the European Convention on Human Rights. 'Public authorities' includes courts and tribunals and any person whose functions are of a public nature. The definition does not include either house of parliament or a person exercising functions in connection with a parliamentary proceeding. Unlike the human rights Acts in the ACT and Victoria, the UK Act does not contain a list of factors to be taken into account when determining whether a function is of a public nature.

#### Who is protected?

The UK Human Rights Act does not specify whether natural or legal persons are protected, but a person may bring proceedings only if he or she is or would be a victim of a human rights breach. This protection is not limited to citizens of the United Kingdom.

---

<sup>19</sup> See, for example, J Allan, 'What's wrong about a statutory bill of rights?' in J Leeson and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 83–95, Submission.

<sup>20</sup> EW Thomas, 'A bill of rights: The New Zealand experience' (Paper presented at ANU Comparative Perspectives on Bills of Rights CONFERENCE, Canberra, 18 December 2002) 28.

## **Which rights and responsibilities are included?**

The Act does not set out its own list of rights; rather, it protects certain rights under the European Convention on Human Rights and its protocols. These are mostly civil and political rights—among them the right to life; freedom from torture and slavery; the right to due process; respect for private and family life; freedom of thought, conscience and religion; the right to peaceful assembly; and the right to marry. The Act also protects the right to peaceful enjoyment of possessions, the right to free elections and, significantly, the right to education. With one exception, it makes no mention of responsibilities; the exception is the right to freedom of expression, in relation to which the Act specifies that the right ‘carries with it duties and responsibilities’.

## **Can those rights be limited?**

In contrast with the situation in New Zealand, the ACT and Victoria, the UK Human Rights Act does not contain a general limitation clause. Instead, it allows some limitations in relation to specific rights. For example, the right to peaceful assembly can be subject to such limitations as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety. The UK Act also provides that rights can be suspended in times of national emergency (see ‘An override provision’ in the next section).

## **The dialogue framework**

### **Statements of compatibility**

The Minister with responsibility for a Bill introduced into parliament must make a statement that the Bill is compatible with convention rights or that, despite its incompatibility, the government wishes to proceed with its enactment. Failure to do this does not affect the validity of the legislation.

### **Scrutiny of Bills**

Although the Human Rights Act does not provide for scrutiny of Bills by a parliamentary committee, the Joint Committee on Human Rights routinely scrutinises Bills for their compatibility with human rights. The committee also examines government action taken in response to judgments of the UK courts or the European Court of Human Rights and conducts thematic inquiries into matters associated with human rights.

### **An override provision**

The Act makes provision for recognising derogations made by the United Kingdom from its obligations under the European Convention on Human Rights and its protocols. A ‘designated derogation order’ made by the Secretary of State will make

a derogation effective in domestic law. The scope for parliamentary and judicial scrutiny of such orders is uncertain.<sup>21</sup>

### **An interpretative provision**

The Act provides that, so far as it is possible to do so, primary and subordinate legislation must be read and given effect in a way that is compatible with convention rights. Like the New Zealand Bill of Rights Act, the UK Human Rights Act does not expressly provide that the interpretation adopted must be in accordance with the object and purpose of the legislation. The seemingly wide scope of the Human Rights Act's interpretative clause has resulted in some controversial decisions when judges have 'read' certain provisions into legislation.<sup>22</sup> In subsequent cases, however, the House of Lords has made it clear that amendment of primary legislation is the role of parliament and that an interpretation that departs substantially from the fundamental features of a statute is not acceptable.<sup>23</sup>

### **Declarations of incompatibility**

If a court is unable to interpret legislation in a manner consistent with human rights, it may issue a declaration of incompatibility. Such a declaration does not affect the validity or operation of the legislation and is not binding on the parties to the proceedings in which the declaration is made. The Human Rights Act does not require the Minister to respond to the declaration but does allow the Minister to amend the legislation if that is thought necessary.

If a court is considering making a declaration of incompatibility, the government must be notified of the proceedings, and a Minister is entitled to be joined as a party to those proceedings.

### **Subordinate legislation**

Subordinate legislation must also be interpreted in a manner consistent with human rights. Unless the primary legislation prevents the removal of the inconsistent provision, a court may refuse to give effect to inconsistent subordinate legislation.

### **Causes of action**

Like the ACT Human Rights Act, the UK Human Rights Act creates a free-standing cause of action that allows individuals to bring claims against public authorities that

---

<sup>21</sup> Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights*, Thirtieth Report of Session 2007–08 (8 October 2008) (para. 95).

<sup>22</sup> See, for example, *R v A (No 2)* [2002] 1 AC 45.

<sup>23</sup> See, for example, *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291.

act incompatibly with human rights. They can also rely on the Act to establish an ‘unlawful act’ in other legal proceedings, such as applications for judicial review.

## Remedies

The courts may grant ‘just and appropriate’ remedies where public authorities act incompatibly with human rights. The UK Act provides that monetary compensation is to be awarded only when no other remedy is appropriate. The courts have used this power sparingly: in the first eight years of the Act’s operation, damages were awarded in only three reported cases.<sup>24</sup>

## The role of the Equality and Human Rights Commission

The Equality and Human Rights Commission is established not under the Human Rights Act but under the *Equality Act 2006* (UK). Among its functions in relation to the Human Rights Act are promoting an understanding of that Act, holding inquiries, and initiating judicial review proceedings.

## Conclusion

A 2006 review conducted by the UK Department for Constitutional Affairs concluded that the Human Rights Act has had a significant and beneficial impact on the development of law and policy by providing a framework for ensuring that the needs of the UK population are properly considered.<sup>25</sup> This view was echoed by Murray Hunt, legal advisor to the UK Joint Committee on Human Rights, at the public hearings the Consultation Committee held. The Act also seems to have had an impact on the day-to-day lives of ordinary people. A recent study by the British Institute of Human Rights outlined a range of instances in which the Act had been used outside the courts to call for improvements to, for example, conditions in nursing homes.<sup>26</sup>

The 2006 review also concluded that the Act had ‘not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary’.<sup>27</sup> It found that there had been only 11 occasions on which superior courts had upheld declarations of incompatibility and that in each case parliament had passed further legislation to resolve the inconsistency.<sup>28</sup> Additionally, courts had used the interpretative provision on only 12 occasions since 2000.<sup>29</sup> On the other hand, Felicity McMahon argued at the Consultation Committee’s public hearings that the Act had undermined parliamentary sovereignty; she has elsewhere said the

---

<sup>24</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 18.

<sup>25</sup> *ibid.* 19.

<sup>26</sup> British Institute of Human Rights, *The Human Rights Act—changing lives* (2006); see also 2nd edn (2008).

<sup>27</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 1.

<sup>28</sup> *ibid.* 4.

<sup>29</sup> *ibid.* 4, 20.

‘interpretative obligations contained in the HRA have unleashed judicial activism on a scale that Parliament did not intend’.<sup>30</sup> Such criticisms must, however, be read in the context of the United Kingdom having adopted a comparatively broad interpretative provision.

The introduction of the UK Act was met with fears that it would result in increased litigation and be abused by criminals but, as Murray Hunt noted at the public hearings, the flood of litigation has not come. The 2006 review provided evidence that the Act had been substantively raised in only 2 per cent of cases determined by appellate courts.<sup>31</sup> The review also found that the Act had had no significant impact on the criminal law or the government’s ability to fight crime.<sup>32</sup>

Although the UK Government has said it remains committed to the Human Rights Act, it is now considering possibilities for reforming the human rights framework. In March 2009 the Ministry of Justice released a Green Paper that raised the possibility of passing a UK ‘bill of rights and responsibilities’, which would include certain rights and responsibilities not included in the European Convention on Human Rights.<sup>33</sup>

## 11.4 The Australian Capital Territory

In 2002 the ACT Government appointed the ACT Bill of Rights Consultative Committee to inquire into whether the ACT should adopt a human rights Act. In 2003 the committee recommended that a bill of rights be adopted in the ACT, finding that:

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 laws. 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.<sup>34</sup>

The committee’s report contained a draft Human Rights Bill. The ACT Legislative Assembly subsequently enacted the *Human Rights Act 2004*, which was based on most, but not all, of the committee’s recommendations.

---

<sup>30</sup> F McMahon, ‘The *Human Rights Act 1998* (UK): an impossible compromise’ in J Leaser and R Haddrick (eds) *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) 272, Submission.  
<sup>31</sup> Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 10.  
<sup>32</sup> *ibid.* 10.  
<sup>33</sup> Ministry of Justice, *Rights and Responsibilities: developing our constitutional framework* (2009).  
<sup>34</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: report of the ACT Bill of Rights Consultative Committee* (2003) 2.

## Who must comply?

As a result of recent amendments to the ACT Human Rights Act, public authorities have a duty to act in a manner consistent with human rights. It is unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision. A ‘public authority’ is defined as follows:

an administrative unit; a territory authority; a territory instrumentality; a Minister; a police officer, when exercising a function under a Territory law; a public employee; and an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

A ‘public authority’ does not, however, include the Legislative Assembly or a court (unless either is acting in an administrative capacity).

The Act outlines the functions that are taken to be of a public nature—among them operating correctional centres and providing a range of listed services—and sets out a range of factors that may be considered in determining whether a function is of a public nature, including whether the function is conferred under ACT law or publicly funded.

The recent amendments have also enabled the private sector to ‘opt in’ to the Act and thereby be subject to the same obligations as public authorities.

## Who is protected?

The ACT Human Rights Act provides that ‘only individuals have human rights’. This protection is not limited to citizens of Australia or residents of the ACT.

## Which rights and responsibilities are included?

The Act protects most of the civil and political rights expressed in the International Covenant on Civil and Political Rights. Among the rights protected are the right to equality before the law, the right to life (specified to apply from the time of birth), protection of the family and children, freedom of movement, freedom of expression, the right to take part in public life, rights of children in the criminal process, and the right to a fair trial. The Act also protects the right of anyone who belongs to an ethnic, religious or linguistic minority to declare and practise their religion and to use their own language. Unlike the Victorian human rights Act, it also makes provision for compensation in the event of wrongful conviction.

The Act does not cover specific Indigenous rights or any responsibilities, although both are mentioned in the preamble. The Act itself stipulates that it is not exhaustive of the rights a person might have under domestic or international law.

## Can those rights be limited?

The ACT Human Rights Act contains a general limitation clause that provides that rights may be subject only to reasonable limits set by ACT laws that can be demonstrably justified in a free and democratic society. In contrast with the New Zealand Bill of Rights Act, the ACT Human Rights Act outlines some of the factors that must be considered when making this determination—for example, the nature of the right affected, the nature and extent of the limitation and the importance of its purpose, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose.

## The dialogue framework

### Statements of compatibility

The ACT Human Rights Act requires that the Attorney-General—rather than the Minister with responsibility for a Bill—state whether a Bill introduced into the Legislative Assembly is consistent with human rights. In contrast with the Victorian human rights Act, there is no obligation to provide reasons why a Bill is found to be human rights compliant.<sup>35</sup> If the Bill is found to be inconsistent with human rights, however, the Attorney-General must outline ‘how it is not consistent’. Failure to comply with this provision has no effect on the validity, operation or enforcement of the proposed legislation. The ACT’s Cabinet Paper Drafting Guide also requires that all Cabinet submissions include an assessment of the proposal’s compatibility with human rights.

### Scrutiny of Bills

Under the Act the ‘relevant standing committee’ must report to the Legislative Assembly on human rights questions raised by Bills. In practice, the Scrutiny of Bills and Subordinate Legislation Committee performs this function. Again, failure to comply with this provision does not affect the validity of the proposed legislation.

### An override provision

Unlike the Victorian human rights Act, the ACT Human Rights Act contains no override provision.

### Interpretive provisions

Courts and decision makers must interpret an ACT law (including statutory instruments) in a way that is compatible with human rights ‘so far as it is possible to do so consistently with its purpose’. The ACT Human Rights Act also provides that

---

<sup>35</sup> Under a 2008 agreement between the Greens and the Labor Party, however, the government has committed to including a detailed statement of reasons with each statement of compatibility—H Charlesworth, A Byrnes and R Thilagaratnam, Submission.

international law and judgments of foreign and international courts may be considered when interpreting a human right.

### **Declarations of incompatibility**

The Supreme Court of the ACT may make a declaration of incompatibility if it is satisfied that legislation is not consistent with a human right. The registrar of the court must give a copy of the declaration to the Attorney-General, who is then required to present the copy to the Legislative Assembly within six sitting days and a response within six months. The declaration has no effect on the validity of the legislation.

When in Supreme Court proceedings a question arises concerning the application of the ACT Human Rights Act or the court is considering making a declaration of incompatibility, the court must ensure that notice of the proceedings has been given to the Attorney-General and the ACT Human Rights Commission and each has had a reasonable time to decide whether to intervene. The Attorney-General may intervene in proceedings as of right; the Human Rights Commissioner may do so only with the leave of the court.

### **Subordinate legislation**

ACT laws are defined to include statutory instruments, meaning that the interpretative clause and the power to make declarations of incompatibility also apply to subordinate legislation.

### **Causes of action**

Initially, the ACT Human Rights Act did not provide any independent cause of action against public authorities for human rights breaches. This meant that such claims could be raised only in the context of other proceedings. Recent amendments mean, however, that a person who claims a public authority has breached its obligations under the Human Rights Act, and who is or would be a victim of the breach, may now bring a claim in the Supreme Court against the public authority or rely on his or her rights under the Act in other proceedings. This is similar to the UK position but broader than that in New Zealand and Victoria.

### **Remedies**

If an action against a public authority is successful the Supreme Court may 'grant the relief it considers appropriate'. Unlike in the United Kingdom, this does not include damages. In practice, however, a human rights argument could be used to strengthen a pre-existing claim for damages in other proceedings.

## The role of the Human Rights Commission

The ACT Human Rights Commission was established by the *Human Rights Commission Act 2005* (ACT), under which the commission has a range of functions, among them resolving complaints made under the Act, promoting community discussion and providing community education about the Act, and inquiring into matters complained about under the Act. The Act gives the Commission two additional functions: as noted, the Human Rights Commissioner may intervene in proceedings relating to the application of the ACT Human Rights Act with the leave of the court, and the commission is to review the effect of ACT laws (including the common law) on human rights and report to the Attorney-General on the results of the review.

## Review of the legislation

The ACT Human Rights Act provides that the Attorney-General must review the operation of the Act and table the resultant report in the Legislative Assembly by 1 July 2009. On 18 August 2009 the Attorney-General tabled the report of a five-year review of the Act, conducted by the ACT Human Rights Act Research Project, and announced that further public consultations would take place before the government implemented any recommendations for reform.

## Conclusion

The ACT Government submitted to the Consultation Committee that it considers the operation of the Human Rights Act to have been ‘an overwhelming success’, leading to ‘better policy processes and legislative outcomes’.<sup>36</sup>

The Human Rights Act Research Project’s report found that one of the Act’s clearest effects has been ‘to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy’.<sup>37</sup> The report noted that the ‘development of new laws by the executive has been shaped by the requirement to issue a statement of compatibility ... and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner’.<sup>38</sup>

It noted, however, that, although the Act has had a beneficial effect on the ‘culture’ of government, ‘the effect has neither been consistent, nor widespread’.<sup>39</sup> Some agencies were said to demonstrate a very high level of engagement with the Act—

---

<sup>36</sup> ACT Government, Submission.

<sup>37</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 6. The findings of this review are also summarised in H Charlesworth, A Byrnes and R Thilagaratnam, Submission.

<sup>38</sup> ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 6.

<sup>39</sup> *ibid.* 42.

especially those not involved in legislative development—but others were found to have little familiarity with the Act or its relevance to their work.<sup>40</sup> The report noted that the new provisions imposing on public authorities obligations to act in a manner consistent with human rights should make the Act more relevant and accessible to staff. It also recommended more intensive and continuing human rights training at all levels of government.<sup>41</sup>

The ACT Government noted that initially there were criticisms that the Act would transfer power to unelected judges ‘who would quash the laws of democratically elected legislature’, cause massive backlogs in the court system, be a ‘lawyers’ picnic’ as a result of protracted litigation, and ‘see a rush of criminals let loose on the community’. Almost five years on, it submitted that all these concerns have proved unfounded.<sup>42</sup> The ACT Human Rights Commission agreed.<sup>43</sup>

By mid-August 2009 the ACT Supreme Court was yet to issue a declaration of incompatibility. Although this might suggest the court has been adopting ‘creative’ interpretations in order to avoid making declarations, the ACT Government submitted that it was not aware of any instance in which the court had adopted a ‘strained’ or ‘far-fetched’ interpretation that is inconsistent with the intention of the Legislative Assembly.<sup>44</sup> The evidence is that the courts have not been flooded with human rights cases. The Human Rights Act Research Project reported that the Human Rights Act has been referred to in 91 cases in ACT courts and tribunals.<sup>45</sup> The Human Rights Commission submitted that there is no evidence of ‘criminals escaping justice through human rights loopholes’ and noted that the Director of Public Prosecutions had described the Act’s overall effect as positive.<sup>46</sup>

Others have criticised the ACT Human Rights Act for not having the transformative effect it was supposed to have. Bill Stefaniak, Appeals President of the ACT Civil and Administrative Tribunal, has noted that the Act has ‘done little if anything to assist ordinary, law-abiding people in Canberra’ and has instead undermined the justice system ‘by unequally favouring the rights of accused criminals over victims’ and ‘led to significant increases in bureaucracy and the creation of a number of costly senior public service positions’.<sup>47</sup>

---

<sup>40</sup> *ibid.* 64.

<sup>41</sup> *ibid.* 43.

<sup>42</sup> ACT Government, Submission.

<sup>43</sup> ACT Human Rights Commission, Submission.

<sup>44</sup> ACT Government, Submission.

<sup>45</sup> As at the end of May 2009: ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): the first five years of operation: a report to the ACT Department of Justice and Community Safety* (2009) 47.

<sup>46</sup> ACT Human Rights Commission, Submission.

<sup>47</sup> B Stefaniak, ‘A reflection on the ACT Human Rights Act 2004’ in J Leeson and R Haddrick (eds) *Don’t Leave Us with the Bill: the case against an Australian bill of rights* (2009) 309–10, Submission.

## 11.5 **Victoria**

In April 2005 the Victorian Government appointed a Human Rights Consultation Committee to lead a public discussion on the future of human rights protection in Victoria. The committee delivered its report in November 2005, providing with it a draft Charter of Human Rights and Responsibilities.<sup>48</sup> The Victorian Parliament subsequently enacted the *Charter of Human Rights and Responsibilities Act 2006*, which is based on the committee's draft charter.

### **Who has to comply?**

It is unlawful for a public authority to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision. Unlike the ACT Human Rights Act, the Victorian charter stipulates that this provision does not require a public authority to act in a way that prevents a religious body from acting in conformity with religious doctrine, beliefs or principles.

A 'public authority' is defined as a public official (as defined); an entity established by legislation and that has functions of a public nature; an entity whose functions are or include functions of a public nature when it is exercising those functions on behalf of the state or a public authority; Victoria Police; a local council; a government Minister; members of a parliamentary committee when that committee is acting in an administrative capacity; and an entity prescribed in the regulations. It does not include parliament; a court or tribunal (unless it is acting in an administrative capacity); or an entity declared by the regulations not to be a public entity.

Like the ACT Human Rights Act, the Victorian charter provides a non-exhaustive list of factors for a court to take into account when determining if a function is of a public nature. This functional definition allows the reach of the charter to cover those private entities to which the government has 'contracted out' certain functions.

### **Who is protected?**

The Victorian charter applies only to persons, not corporations. Protection is not limited to Victorian residents or Australian citizens.

### **Which rights and responsibilities are included?**

The Victorian charter protects rights similar to those protected by the ACT Human Rights Act. The charter's cultural rights provision is, however, broader in that it

---

<sup>48</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: the report of the Human Rights Consultation Committee* (2005).

protects the rights of ‘all persons with a particular cultural, religious, racial or linguistic background’, rather than just minority groups, and gives specific protection to Indigenous peoples. Unlike the ACT Act, the charter also includes a protection from being deprived of property other than in accordance with the law. Apart from in the title of the charter, responsibilities are mentioned in the preamble and in the provision relating to freedom of expression (which provides that special duties and responsibilities are attached to such freedom).

The charter also provides that other rights or freedoms must be not taken to be abrogated or limited simply because the right or freedom is not included in the charter.

### **Are those rights limited?**

Like the ACT Human Rights Act, the Victorian charter includes a general limitation clause providing that a human right may be subject under law only to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. It also sets out which factors are relevant to determining whether a limitation meets this threshold. In addition, it includes some specific limitations for certain rights. Freedom of expression, for example, ‘may be subject to lawful restrictions reasonably necessary to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality’.

## **The dialogue framework**

### **Statements of compatibility**

The Victorian charter requires that all members of parliament who introduce a Bill into parliament table a statement of compatibility. Unlike the ACT Human Rights Act, which merely requires that the Attorney-General state ‘whether’ the Bill is consistent with human rights, the Victorian charter requires the member to say ‘how’ the Bill is compatible. If a Bill is incompatible with human rights, the statement must describe the nature and extent of the incompatibility. Any such statement is not binding on a court or tribunal, and failure to prepare one does not affect the validity, operation or enforcement of the legislation. The Victorian Cabinet has also approved a set of guidelines that require all legal and policy officers to identify the human rights impacts of all proposed policies and Bills before those policies and Bills are submitted to Cabinet.<sup>49</sup>

---

<sup>49</sup> Victorian Government, Submission.

## **Scrutiny of Bills**

The Victorian charter requires the Scrutiny of Acts and Regulations Committee to consider any Bill introduced into parliament (as well as any subordinate legislation laid before the parliament) and to inform parliament whether the legislation is incompatible with human rights.

## **An override provision**

Unlike the ACT Human Rights Act, the Victorian charter allows parliament to expressly declare that an Act or legislative provision applies, despite incompatibility with the charter. The charter states that such declarations should be made only in exceptional circumstances, which would include ‘threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria’.<sup>50</sup> The override declarations expire after five years but can be reinstated. Where such a declaration is made, the charter will have no application: the interpretive provision does not apply, and the Supreme Court cannot make a declaration of inconsistent interpretation.

## **An interpretive provision**

Courts and decision makers must interpret all statutory provisions in a way that is compatible with human rights ‘so far as it is possible to do so consistently with [the provisions]’ purpose’. Like the ACT Act, the charter provides that international law and the judgments of domestic, foreign and international courts relevant to a human right may be considered when interpreting legislation.

If in a court or tribunal a question of law arises as to the interpretation of legislation in accordance with the charter—or the application of the charter in general—the Attorney-General and the Victorian Equal Opportunity & Human Rights Commission have a right to intervene in such proceedings.

## **Declarations of incompatibility**

The Supreme Court may issue a ‘declaration of inconsistent interpretation’ if it considers that a statutory provision cannot be interpreted consistently with a human right. This power is, however, not available where parliament has made an override declaration. A declaration of inconsistent interpretation will not affect the validity of the legislation or create any legal right or give rise to any civil cause of action.

If the Supreme Court is considering making a declaration it must ensure that notice has been given to the Attorney-General and the Equal Opportunity & Human Rights Commission and that they have had a reasonable opportunity to intervene in the proceedings or make submissions.

---

<sup>50</sup> Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 21.

The Supreme Court must provide a copy of the declaration to the Attorney-General, who must provide a copy to the Minister responsible for the legislation. The Minister must then table a copy of the declaration and his or her response in parliament within six months and publish a copy of both in the *government Gazette*.

### **Subordinate legislation**

The responsible Minister is required to prepare a human rights certificate in respect of all proposed subordinate legislation; the certificate must certify whether, in the Minister's opinion, the proposed statutory rule limits any human rights set out in the charter and, if it does, explain why the limitation is considered justifiable. The override provision, interpretative provision and power to make declarations of inconsistent interpretation also apply to subordinate legislation.

### **Cause of action**

Unlike the ACT Human Rights Act and the UK Human Rights Act, the Victorian charter does not establish an independent cause of action against public authorities for human rights breaches. Such claims can be raised only in the context of other proceedings.

### **Remedies**

Unlike the ACT and UK Human Rights Acts, the Victorian charter does not provide any discrete remedies for human rights breaches. If a claim under the charter is raised in the context of another proceeding, it might provide an additional reason for granting the remedy sought in those proceedings, but a person is not entitled to a remedy solely by reason of a breach of the charter.

### **The role of the Equal Opportunity & Human Rights Commission**

The Equal Opportunity & Human Rights Commission has a number of functions under the Victorian charter, among them the following:

- providing to the Attorney-General an annual report on the operation of the charter, all declarations of inconsistent interpretation, and all override declarations made during the year in question
- when requested by the Attorney-General, reviewing the effect of statutory provisions and the common law on human rights and reporting on the results
- when requested by a public authority, reviewing the authority's programs and practices to determine their compatibility with human rights
- providing education about human rights and the charter
- assisting the Attorney-General in statutory reviews of the charter

- advising the Attorney-General on anything relevant to the charter.

The commission's reports to the Attorney-General must be tabled in parliament.

## Review

The Victorian charter is to be reviewed in 2011 and 2015. The first review must consider matters such as whether additional human rights should be included (including economic, social and cultural rights, children's and women's rights, and the right to self-determination), whether auditing of public authorities to assess compliance with the charter should be mandatory, and whether further provision should be made in relation to proceedings that may be brought or remedies that may be awarded in relation to unlawful acts.

## Conclusion

The Victorian Government submitted that the charter has resulted in 'more transparent and accountable government actions and improved scrutiny of government decision-making'.<sup>51</sup> Dr John Tobin submitted that 'human rights are becoming an increasingly important factor in the delivery of services and the development of public policy'.<sup>52</sup> The Victorian Equal Opportunity & Human Rights Commission highlighted the charter's impact on public service culture:

These impacts range from reinvigorating existing practices through to substantial changes in the way organisations operate, make decisions, deliver services and deal with people. The Charter is also encouraging new ways of thinking about human rights, including exploring innovative approaches to giving people a say in decisions that affect them.<sup>53</sup>

The Victorian Government also submitted that the charter does not 'stop the government from taking strong action to protect the community'.<sup>54</sup>

The government further argued that courts have been performing their functions in a 'measured and careful way'. By mid-August 2009 no declarations of inconsistent interpretation had been made. The government submitted that the charter has 'not significantly changed the way courts are already approaching issues under the common law'. Ben Jellis has, however, argued that the charter has introduced an element of uncertainty because it means that previous decisions relating to parliament's intention in enacting a piece of legislation no longer stand.<sup>55</sup>

---

<sup>51</sup> Victorian Government, Submission.

<sup>52</sup> J Tobin, Submission.

<sup>53</sup> Victorian Equal Opportunity & Human Rights Commission, Submission.

<sup>54</sup> Victorian Government, Submission.

<sup>55</sup> B Jellis, 'Look but don't leap: lessons from the Victorian statutory bill of rights' in J Leeser and R Haddrick (eds) *Don't Leave Us with the Bill: the case against an Australian bill of rights* (2009) 323–5, Submission.

The Victorian Bar pointed out several problems with the charter. It submitted that any federal Human Rights Act should depart from the Victorian model by including a free-standing remedy against public authorities based solely on a breach of human rights. It also proposed limiting the Attorney-General's right of intervention in charter matters: the Attorney-General's involvement has generally extended the time taken in court and the resources required to bring a charter action.<sup>56</sup> Associate Professor Carolyn Evans supported limiting the Attorney-General's right of intervention to those cases in which a declaration of incompatibility is being sought.<sup>57</sup>

---

<sup>56</sup> Victorian Bar, Submission.

<sup>57</sup> C Evans, Submission.