SUBMISSION TO THE INQUIRY INTO A HUMAN RIGHTS ACT

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

MAY 2016

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RESOLUTION OF APPOINTMENT

At its meeting of 27 November 2012 the Legislative Assembly for the ACT passed a resolution which, among other things provided that there would be a Standing Committee on Justice and Community Safety to:

> perform a legislative scrutiny role and examine matters related to community and individual rights, consumer rights, courts, police and emergency services, corrections including a prison, governance and industrial relations, administrative law, civil liberties and human rights, censorship, company law, law and order, criminal law, consumer affairs and regulatory services.[1]

[1] Legislative Assembly for the ACT, *Debates*, 27 November 2012, p.46.

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1 BACKGROUND

1.1 This is a submission to an inquiry by the Queensland Parliament's Legal Affairs and Community Safety Committee inquiry into a human rights act for Queensland.[2]

1.2 The Committee thanks the Legal Affairs and Community Safety Committee for its invitation to contribute to its inquiry.[3]

1.3 This submission considers:

- the present form of the ACT's *Human Rights Act 2004* and associated rights-protection legislation: the *Discrimination Act 1991* and the *Human Rights Commission Act 2005*; and
- the development of the *Human Rights Act 2004*; and
- arguments offered by proponents and opponents of the Human Rights Bill 2003 when in debates in the Legislative Assembly for the ACT.

The Committee provides a brief commentary on each of these areas at the end of each of these chapters.

1.4 In addition, Appendix A provides a brief summary of the single case in which an ACT Court has issued a declaration of incompatibility under s 32 of the *Human Rights Act 2004*.

[2] See http://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/14-HumanRights

[3] Email from Principal Research Officer, Legal Affairs and Community Safety Committee to the Justice and Community Safety Committee, Friday 18 March 2016.

2 LEGISLATION

INTRODUCTION

2.1 The *Human Rights Act 2004* (ACT) is the most relevant item of ACT legislation for the Standing Committee on Legal Affairs and Community Safety's inquiry into a human rights Act for Queensland.

2.2 However, the *Human Rights Act*, while important, forms only one part of a wider rights-protection framework in the ACT. The *Discrimination Act 1991*, and the *Human Rights Commission Act 2005* are further key elements of this framework, and consideration of these Acts, below, provides a context for reflections on the *Human Rights Act* and shows its distinctive attributes with respect to other ACT legislation.

2.3 Each of these Acts plays a distinctive part in the present ACT rights protection framework:

- the *Human Rights Act 2004* creates for human rights obligations which are binding on Government and the Executive;[4]
- the *Discrimination Act 1991* creates obligations which are binding for public and private sector entities to refrain from discrimination on specified grounds;[5] and
- the *Human Rights Commission Act 2005* provides an administrative structure for a Human Rights Commission to administer rights-protection in the ACT, particularly in view of recent amendments which create an expanded Commission.[6]

2.4 These are considered below, followed by a listing of other legislation engaged by these Acts.

[4] *Human Rights Act 2004* (ACT), , available at: http://www.legislation.act.gov.au/a/2004-5/current/pdf/2004-5.pdf

[5] See Section 7, *Discrimination Act 1991*, available at: http://www.legislation.act.gov.au/a/1991-81/current/pdf/1991-81.pdf

[6] Human Rights Commission Act 2005, available at: http://www.legislation.act.gov.au/a/2005-40/current/pdf/2005-40.pdf

HUMAN RIGHTS ACT 2004 (ACT)

2.5 A note to part 3 of the *Human Rights Act 2004*, 'Civil and political rights', states that the primary source of these rights is the *International Charter for Civil and Political Rights*, as set out in Schedule 1 of the Act.[7]

2.6 Similarly, a note to Part 3A indicates that Section 27A of the Act, providing a right to education, gives statutory effect to a provision of the *International Convention on Economic, Social and Cultural Rights*, as set out Schedule 2 of the Act.[8]

2.7 The Act focuses primarily on the Civil and political rights set out in Part 3, which include assertions of the right to equality before the law; right to life; protection from torture; and the right to privacy and reputation, among others (Sections 8, 9, 10 and 11).

2.8 Economic, social and cultural rights are set out in Part 3A. Presently the only provision in this Part of the Act is Section 27A, which provides that 'Every right has the right to have access to free, school education appropriate to his or her needs' (Section 27A (1)).

2.9 Part 3B sets out principles for limitations of human rights (in Section 28).

2.10 Part 4 provides direction on the interpretation of laws in light of the *Human Rights Act* (in Sections 30 and 31). In this part, the Act also provides mechanisms for instances where laws of the Territory are found by the ACT Supreme Court to be in conflict with the *Human Rights Act* (in Sections 32 and 33), in which case the Court may choose to issue a 'declaration of incompatibility'.

2.11 Part 5 of the Act provides that the Attorney-General must prepare a written statement for each bill, regarding whether the bill is or is not consistent with the Act (Section 37), and that 'the relevant standing committee' of the Legislative Assembly must consider, for all new Bills, whether Bills are consistent with the Act (Section 38). Section 39 provides that: 'A failure to comply with section 37 or section 38 in relation to a bill does not affect the validity, operation or enforcement of any Territory law'.

2.12 Part 5A of the Act indicates that obligations created by the Act are binding on public authorities (Sections 40, 40A and 40B). Section 40C provides a right of action, whereby a person may bring an action in the ACT Supreme Court against a public authority alleged to have 'acted in contravention of' Section 40B, 'Public authorities must act consistently with human rights'.

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[7] See Note to Part 3, 'Civil and political rights', *Human Rights Act 2004* (ACT), and Schedule 1, pp.28-29.

[8] Schedule 2, *Human Rights Act 2004*, p.30.

2.13 In this part, the Act also provides (in Section 40D) that 'Other entities may choose to be subject to obligations of public authorities', by applying to the Minister in writing, asking that the Minister 'declare that the entity is subject to the obligations of a public authority'.

CHANGES BROUGHT ABOUT BY THE *HUMAN RIGHTS AMENDMENT ACT 2016*

2.14 The *Human Rights Act 2004* has recently been amended by the Legislative Assembly passing the Human Rights Amendment Bill 2015.

2.15 The subsequent *Human Rights Amendment Act 2016* renamed Section 27 from 'Rights of minorities' to 'Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities',[9] and created a new Section 27(2) with the following wording:

> (2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—
>
> (a) to maintain, control, protect and develop their—
>
> (i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and
>
> (ii) languages and knowledge; and
>
> (iii) kinship ties; and
>
> (b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.[10]

2.16 Clause 4 of the Act changed terminology in the Preamble to the Act so that it references 'Aboriginal and Torres Strait Islander peoples' rather than 'Indigenous people' as previously.[11]

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[9] Human Rights Amendment Act 2016, Clause 6, available at: http://www.legislation.act.gov.au/a/2016-5/20160226-62903/pdf/2016-5.pdf

[10] Human Rights Amendment Act 2016, Clause 7. A note to Clause 7 states that 'The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.'

[11] Human Rights Amendment Act 2016, Clause 4.

DISCRIMINATION ACT 1991

2.17 Section 5AA of the Act defines 'disability'.

2.18 Section 7 of the *Discrimination Act 1991* states that the Act applies to 'discrimination on the ground of any of the following attributes':

(a) sex;

(b) sexuality;

(c) gender identity;

(d) relationship status;

(e) status as a parent or carer;

(f) pregnancy;

(g) breastfeeding;

(h) race;

(i) religious or political conviction;

(j) disability;

(k) industrial activity;

(l) age;

(m) profession, trade, occupation or calling;

(n) association (whether as a relative or otherwise) with a person identified by reference to an attribute referred to in another paragraph of this subsection;

(o) spent conviction or extinguished conviction within the meaning of the *Spent Convictions Act 2000*.

2.19 Section 8, 'What constitutes discrimination', provides that:

(1) For this Act, a person discriminates against another person if—

(a) the person treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7; or

(b) the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging people because they have an attribute referred to in section 7.

2.20 Section 9 provides that discrimination includes behaviour in which 'the discriminator treats the other person unfavourably because that person possesses or is accompanied by a guide-dog, a hearing dog, assistance animal or some other aid associated with the disability'.

2.21 Part 3, 'Unlawful discrimination', sets out circumstances of unlawful discrimination.

2.22 This includes Division 3.1, 'Discrimination in work', which includes Section 10 'Applicants and employees', creating obligations on employers not to discriminate in selecting or offering terms of employment, or in matters relating to retention of employees. Section 11, 'Employees—religious practice', creates obligations on the part of the employer to accommodate the religious convictions and practices of employees.

2.23 Other sections in this Division create obligations not to discriminate with respect to: commission agents (s 12); contract workers (s 13); partnerships (s 14); professional or trade organisations (s 15); qualifying bodies (s 16); or employment agencies (s 17).

2.24 Division 3.2, 'Discrimination in other areas', creates obligations not to discriminate with regard to: education (s 18); access to public premises (s 19); 'goods, services and facilities' (s 20); accommodation (s 21); clubs (s 22); and 'requests … for information' (s 23), that is: to discriminate by 'requesting or requiring information … in connection with, or for the purpose of performing, an act that is or would be unlawful under any other provision'.

2.25 Part 4 provides for 'Exceptions to unlawful discrimination', including in Division 4.1 'General exceptions' such as those provided in relation to persons employed in domestic duties in a private residence (Section 24) and providing residential care of children in the same circumstances (Section 25).

2.26 Further divisions in this part provide for: 'Exceptions about sex, relationship status, pregnancy or breastfeeding' (Division 4.2); 'Exceptions relating to race' (Division 4.3); 'Exceptions relating to religious or political convictions' (Division 4.4); 'Exceptions relating to disability' (Division 4.5); 'Exceptions relating to age' (Division 4.6); and 'Exceptions relating to profession, trade, occupation or calling' (Division 4.7).

2.27 Part 5 makes specific provision for Sexual harassment including setting out a definition:

> a person subjects someone else to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated.[12]

2.28 In this part the Act provides makes sexual harassment, as defined, unlawful in the context of: employment (Section 59); educational institutions (Section 60); access to premises (Section 61); provision of goods, services and facilities (Section 62); accommodation (Section 63); and clubs (Section 64).

2.29 Part 6, 'Racial, sexuality and HIV/AIDS vilification' provides for certain 'public acts', defined in Section 65 as 'any form of communication to the public' (s 65 (a)), 'any conduction …

[12] *Discrimination Act 1991*, Section 58 (1).

observable by the public' (s 65 (b)), or the 'distribution or dissemination of any matter to the public' (s 65 (c))to be unlawful where these acts 'incite hatred towards, serious contempt for, or severe ridicule of' persons or groups under Section 66, 'Unlawful vilification—race, sexuality etc ', on grounds of race (s 66 (1)(a)), sexuality (s 66 (1)(b)), gender identity (s 66 (1)(c)), or HIV/AIDS status (s 66 (1)(d)). Section 67, 'Serious vilification offence—race, sexuality etc' provides for more serious offences of vilification on such grounds.

2.30 Part 7, 'Other unlawful acts', provides in Section 68, 'Victimisation' that it is unlawful 'for a person … to subject someone else … to any detriment' because the 'other person' has brought forward a grievance regarding discrimination, for example in the ACT Civil and Administrative Tribunal (ACAT) (s 68 (1)(a)(i) or by making 'a discrimination complaint (s 68 (1)(a)(ii).

2.31 Section 69, 'Unlawful advertising', makes it unlawful for a person 'to advertise any matter' that 'indicates an intention to do an act that is unlawful' under specified parts of the Act (s69 (a)), or that 'could reasonably be understood as indicating such an intention (s69 (b)).

2.32 Part 8, 'General principles about unlawful acts', sets out legal principles for the application of the provisions of the Act, including:

- 'Onus of establishing exceptions' (s 70), providing that the onus of establishing an exception under the Act 'under part 3, part 5, section 66 or part 7' falls to 'the person seeking to rely on it';
- 'Unlawful act not an offence' (s 71), providing that acts are not offences 'only because [they are] unlawful' under the above specified sections of the Act;
- 'Unlawful act no basis for civil action' (s 72), providing that civil actions cannot be brought for actions made unlawful by the above specified sections of the Act; and
- 'Aiding etc unlawful acts' (s 73), providing that 'person who aids, abets, counsels or procures someone else to do an act that is unlawful' under the above specified sections of the Act, 'is taken … also to have done the act'.

2.33 Part 10, 'Exemptions' provides for applications for exemptions to the Human Rights Commission (s 109) and for the review of such decisions by the ACT Civil and Administrative Tribunal (s110).

2.34 Part 12, 'Miscellaneous', makes provision for 'Secrecy' (s 121) in connection with proceedings of a person with a grievance under the Act, and in 'Acts and omissions of representatives' (s 121A), provides for persons with a grievance to authorise, or not authorise a representative to act on their behalf.

HUMAN RIGHTS COMMISSION ACT 2005

2.35 Part 1 of the Act is 'Preliminary', providing the name of the Act (s 1); and sets out the status of the Dictionary in the Act (s 3), and Notes in the Act (s 4). Section 5 provides that offences against the Act fall within the purview of the *Criminal Code*, and that penalty points are defined in s 133 of the *Legislation Act*.

2.36 In Part 2, the *Human Rights Commission Act 2005* states that the 'main object of the Act is to promote the human rights and welfare of people living in the ACT' (s 6 (1)).

2.37 This part of the Act sets out protections for the rights of users of 'prescribed services', as defined (in s 6A), and further defined in sections on 'health services' (s 7); 'disability services (s 8); services for 'children and young people' (s 8A); services for 'older people' (s 9); and services for 'victims of crime' (s 9A).

2.38 Part 3 of the Act sets out the 'Establishment, constitution and functions' (Division 3.1) of the Human Rights Commission. It sets out 'Members of the commission' as being: the president; the children and young people commissioner; the disability and community services commissioner; the discrimination commissioner; the health services commissioner; the human rights commissioner; the public advocate; and the victims of crime commissioner (s 12 (1) (a) to (1)(h)).

2.39 Section 14 sets out the 'Commission's functions', which include:

- 'encouraging the resolution of complaints made under this Act, and assisting in their resolution' (s 14 (1)(a));
- 'encouraging and assisting users and providers of prescribed services to make improvements in the provision of services' (s 14 (1)(b));
- 'encouraging and assisting people providing prescribed services … to develop and improve procedures for dealing with complaints' (s 14 (1)(c)); and
- 'identifying, inquiring into and reviewing issues relating to the matters that may be complained about under this Act' (s 14 (1)(d)).

2.40 Section 16 provides for the independence of the commission:

> The commission is not subject to the direction of anyone else in relation to the exercise of a function under this Act or a related Act, subject to section 17 (s 16).

2.41 Section 17 provides that the relevant Minister, at present the Attorney-General, may 'direct the commission to inquire into and report to the Minister in relation to a matter that can be complained about under this Act' (s 17 (1)) and that the Commission 'must comply with the direction (s 17 (2)).

2.42 Division 3.2 sets out the functions of the President of the Commission.

2.43 Division 3.2A provides that members of the Commission are to be appointed by the Executive (s 18D), and that appointments may be terminated by the Executive on grounds specified conditions (s 18E).

2.44 Subsequent divisions in this part set out the functions and obligations of commission members: the Children and young people commissioner (Division 3.3); the Disability and community services commissioner (Division 3.4); the Discrimination commissioner (Division 3.5); the Health services commissioner (Division 3.6); the Human rights commissioner (Division 3.7); and the Public advocate (Division 3.7A).

2.45 Part 4 of the Act provides mechanisms and principles for complaints handling. This includes provision for 'Making complaints (Division 4.1); 'Dealing with complaints' (Division 4.2); 'Conciliation of complaints' (Division 4.3); 'Consideration of complaints' (Division 4.4); and 'Closing complaints and reporting' (Division 4.5).

2.46 Division 4.2A provides for the 'Referral of discrimination complaints' to the ACT Civil and Administrative Tribunal (ACAT), in particular that the Commission must refer a complaint to the ACAT (s 53A (2)(a)) and notify the complainant and person complained about (s 53A (2)(b)) where it has issued a 'discrimination referral statement' under S 45 (2)(d) of the Act.

2.47 Section 45 (2)(d) provides for instances where the Commission:

> decides to consider the complaint by a commission-initiated consideration under section 48 (2)—tell the person who made the complaint, in writing, about the decision and that the person will not receive progress reports about the consideration.

2.48 In Part 5, Division 5.1, the Act provides for a 'Health code of health rights and responsibilities' which may be approved by the Minister (s 89) and sets out 'Contents of health code' (s 90).

2.49 Division 5.2 sets out the relationship between the Commission, 'health profession boards and veterinary surgeons board', mechanisms for 'Referral of complaints to boards' (s 92) and communications between the Commission and such boards (s 93), but also that the Commission 'may consider a complaint about a health practitioner or a veterinary surgeon' (s 94 (1).

2.50 In Part 6, 'Miscellaneous', the Act sets out, among other things:

- obligations for services defined in the Act to provide information to clients about the availability of complaints processes (s 95);
- Section 96 'Inspection of incorporated documents' and Section 97 'Notification of incorporated documents' refer to documents setting out grounds for complaint in connection with Section 39, 'When may someone complain about a health service?' and Section 40, 'When may someone complain about a disability service?'. Section 96 places an obligation for such documents to be 'made available for inspection free of charge to the public on business days at reasonable times', and Section 97 sets out processes for the formal notification of such documents, which are Notifiable Instruments (s 97 (3)).

2.51 Section 98, 'Victimisation', makes it an offence to victimise a person on grounds that the person has made a complaint under the Act.

2.52 Section 99, 'Secrecy', makes it an offence for certain persons—'a commissioner', 'a person present at conciliation', or 'a member of the staff of the commission' (s 99 (1)(a))—to divulge 'protected information', being 'information about a person that is disclosed to, or obtained by, a person to whom this section applies because of the exercise of a function under this Act by the person or someone else'(s 99 (1)).

2.53 Section 100 and Section 100A set out provisions which protect members or staff of the Commission, persons making a complaint, or persons making statements to the Commission, from civil or (in s 100a) 'Civil or criminal liability'.

2.54 Section 101 provides that the responsible Minister can make arrangements with the Commonwealth, either to :

- exercise on a joint basis of any of the Commonwealth commission's functions (s 101(1)(a));
- exercise by the commission, on behalf of the Commonwealth, of any of the Commonwealth commission's functions (s 101(1)(b)); or
- exercise by the Commonwealth commission, on behalf of the Territory, of any of the commission's functions (s 101(1)(c)).

2.55 Finally, Section 105A provides that a review (s 105A (1)) of amended arrangements effective 1 April 2016 should be commenced 'as soon as practicable' after 1 April 2019 (s 105A (2)) and should be concluded within 12 months of it commencing (s 105A (3)).

COMMITTEE COMMENT

2.56 Reflecting on the Acts described above, the Committee notes that each of the three Acts provides a distinct component of the rights-protection framework in the ACT.

2.57 The Human Rights 2004 sets out overarching human rights principles, providing a legislative point of articulation between statute in the ACT and international treaties to which Australia is a signatory: the *International Charter for Civil and Political Rights* and the *International Convention on Economic, Social and Cultural Rights*.

2.58 The legal obligations imposed by the Act fall on public authorities, with the exception of any other entities who may elect to be 'subject to obligations of public authorities' under Section 40D.[13]

2.59 Importantly, the *Human Rights Act 2004* does not create any offences.[14] The main emphasis in the Act is on positive statements of rights; holding decision-makers to those rights by way of placing obligations on public authorities; requiring proponents of legislation to make statements regarding human rights implications of the legislation (s 37); and providing that the Assembly will scrutinise legislation for human rights implications in the work of the relevant committee (s 38).

2.60 Avenues for those seeking redress for a grievance under the Act are strongly constrained. The sole right of action specifically under the Act is that of application to the ACT Supreme Court under Section 40C (a), although under Section 40C (b) a person who considers that they have a grievance under the Act may 'rely on the person's rights under this Act in other legal proceedings'. Consistent with this approach, the Human Rights Commissioner is not able to accept or consider human rights complaints.[15]

2.61 This amounts to limited access to avenues for making a human rights complaint, given the likely cost involved in initiating an action in the ACT Supreme Court and uncertainties due to limited jurisprudence for complaints of this nature.

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[13] At time of writing the ACT Legislation Register shows that 7 organisations have opted-in under the provisions of s 40D under Human Rights (Private Entity) Declarations, which are notifiable instruments. See: http://www.legislation.act.gov.au/

[14] This was noted by Mr Brendan Smyth MLA in debate on the Human Rights Bill 2003. See *Debates*, 2 March 2004, p.525.

[15] This was indicated in debate on the Human Rights Bill 2003 by the sponsor of the Bill: 'The government agrees with the consultative committee that involving the Human Rights Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT law', Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4249

2.62 The *Discrimination Act 1991,* in contrast, asserts that it is 'unlawful' to discriminate in ss 10, 'Applicants and employees'; 11, 'Employees—religious practice'; 12, 'Commission agents' and in other places indicated above. It also creates offences in ss 67, 'Serious vilification offence—race, sexuality etc' and 121, 'Secrecy'. As noted above, it is significant that the obligations imposed by the *Discrimination Act* apply not only to public authorities, as in the *Human Rights Act*, but also to other kinds of entities.

2.63 Together with the powers given to commissioners in the *Human Rights Commission Act 2005*, these amount to significantly more accessible—and more often used— avenues for those who consider that they have a grievance. While the only point of access for a human rights grievance, as such, is the ACT Supreme Court, discrimination matters—where the remedies open to a relevant commissioner have been exhausted—are considered in a jurisdiction of the ACT Administrative and Civil Appeals Tribunal: altogether a less senior and expensive forum for grievances.

2.64 Although the *Human Rights Commission Act 2005* is an essential part of the statutory rights protection framework in the ACT in that it provides for an administrative mechanism for the handling of complaints under the *Discrimination Act*, also extends the ACT statutory rights-protection framework by for providing for complaints in relation to the 'prescribed services' indicated above. These last are independent of provisions of the *Discrimination Act* and cannot be considered to derive from them. Clearly, these also are less expensive, and more frequently employed, mechanisms than those described in the *Human Rights Act*.

2.65 The Committee considers that from this picture it can be taken that the statutory rights-protection framework in the ACT consists of a hierarchical structure in which placing obligations are placed on different kinds of entities, and designed to limit the undue litigation on grounds of human rights claimed by opponents of the Bill in debate in the Legislative Assembly considered below.

3 DEVELOPMENT OF THE ACT

INTRODUCTION

3.1 The *Human Rights Act 2004* has undergone a process of development that has included:

- considerable debate before legislation was were introduced to the Legislative Assembly; and
- a history of significant amendment to the Act.

3.2 These are considered below.

DEVELOPMENT

EARLY YEARS OF SELF-GOVERNMENT

3.3 Members of the Legislative Assembly for the ACT made a number of references to human rights in the in the early years of self-government in the ACT.

3.4 In June 1989 Members made substantial reference to human rights in Assembly debates in connection with *National Inquiry into Youth Homelessness*, the report of which was tabled in Federal Parliament on 20 October 1993,[16] and is commonly referred to as the 'Burdekin Report'.[17]

3.5 In November 1989 Members engaged in significant debate in the Assembly regarding Australia's anticipated signing of the UN Convention on the Rights of the Child.[18] Debate on human rights was also occasioned by events in China relating to Tiananmen Square.[19]

3.6 In March 1990 in Assembly debates Members made reference to the absence of an office of the (Federal) Human Rights and Equal Opportunity Commission in the ACT, including in an extended Discussion of Matter of Public Importance on Human Rights.[20]

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[16] Australian Human Rights Commission, 'Report of the National Inquiry into the Human Rights of People With Mental Illness', available at: https://www.humanrights.gov.au/publications/report-national-inquiry-human-rights-people-mental-illness

[17] *Debates*, 29 June 1989, p. 572 *ff.* The *Report of the National Inquiry into Youth Homelessness* is available at: https://www.humanrights.gov.au/our-work/childrens-rights/publications/our-homeless-children

[18] Mr Dennis Stevenson MLA, *Debates*, 15 November 1989, pp.2531.

[19] *Debates*, 21 November 1989, p.2742 *ff*.

3.7 In May 1990 questions were raised in the Assembly regarding a proposal by the ACT Government to 'set up its own human rights office'.[21]

3.8 September 1990 saw a Member of the Assembly make the first attempt at instituting a Human Rights Bill in the ACT. The Human Rights Bill 1990 introduced in the Assembly as a Private Members Bill. [22] It was subsequently set aside on grounds that it had 'the object or effect of disposing or charging any public money of the Territory'—which could only be done by a Minister— and therefore contravened Standing Order 200 of the time, and Section 65 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth), upon which it was based.[23]

ADVENT OF THE *DISCRIMINATION ACT 1991*

3.9 In November 1990 a draft Discrimination Bill was introduced in the Assembly.[24]

3.10 In October 1991 the Human Rights and Equal Opportunity Bill 1991 was presented in the Assembly. The title was subsequently amended and the Bill passed into law as the *Discrimination Act 1991*.[25]

3.11 In September 1992 debate in the Assembly referred to the ACT Government's establishment of an ACT Human Rights Office,[26] 'run on a cooperative basis with the Federal Human Rights and Equal Opportunity Commission'.[27]

3.12 In April 1993 the first annual report of the ACT Discrimination Commissioner, as required by the *Discrimination Act 1991*, was tabled in the Assembly.[28]

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[20] Mr Wayne Berry MLA, *Debates*, 22 March 1990, p.803 and *Debates,* 22 March, p.793 *ff.*

[21] *Debates*, 1 May 1990, p.1388.

[22] *Debates,* 12 September 1990, p.3093 *ff*.

[23] See Speaker's Ruling, *Debates*, 13 September 1990, p.3205 and subsequently motion to withdraw the Bill, p.3206. See also further Speaker's Ruling, *Debates*, 12 February 1991 pp.17-18. This Bill was not the only Bill considered to contravene Standing Order 200, and Section 65 of the *Australian Capital Territory (Self-Government) Act 1988* on which it was based. Another example was the *Royal Canberra Hospital Bill 1991* (see *Minutes of Proceedings* 22 October 1991). Standing Order 200 was amended on 16 June 1994 to read: 'An enactment, vote or resolution for the appropriation of the public money of the Territory must not be proposed in the Assembly except by a Minister. Such proposals may be introduced by a Minister without notice'.

[24] Mr Bernard Collaery MLA, *Debates,* 29 November 1990, p.4828 *ff*.

[25] Ms Rosemary Follet MLA, *Debates*, 17 October 1991, p.3887 *ff*. Regarding the title of the Act, see Mr Michael Moore MLA, *Debates*, 24 March 1993, p.712.

[26] Ms Rosemary Follet MLA, *Debates*, 8 September 1992, p.2021.

[27] Mr Terry Connolly MLA, *Debates*, 1 April 1993, p.1085.

[28] Mr Terry Connolly MLA, *Debates*, 1 April 1993, p.1085.

3.13 In December 1993 a discussion paper entitled 'A Bill of Rights for the ACT' was presented in the Assembly.[29] This was followed in May 1995 by the presentation in the Assembly of the Bill of Rights Bill 1995, a Private Member's Bill. The Bill lapsed on 21 February 1998.[30]

ADVENT OF THE HUMAN RIGHTS BILL 2003

3.14 In April 2002 Terms of Reference were presented in the Assembly for a 'Committee to inquire into an ACT bill of rights'.[31]

3.15 In October 2003 the report of the Committee was tabled in the Assembly.[32]

3.16 In November 2003 Human Rights Bill 2003 presented to the Assembly, which was subsequently passed and enacted as the *Human Rights Act 2004.*[33]

3.17 The Human Rights Commission Bill 2005, providing among other things an administrative framework for management of human rights matters in the ACT, was presented in the Assembly on 7 April 2005 and was passed on 23 August 2005.[34]

SUBSEQUENT AMENDMENTS TO THE HUMAN RIGHTS ACT 2004

3.18 In December 2007 the Human Rights Amendment Bill 2007 was presented in the Assembly, introducing a 'direct right of action' (by way of the ACT Supreme Court, see s 40C (2)(a) of the Act) in connection with the *Human Rights Act 2004.* The amendment, which was passed by the Assembly, also imposed a duty such that '[a]ll public authorities will be required to act in a way that is compatible with human rights unless the incompatible conduct is required by law'.[35]

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[29] Mr Terry Connolly MLA, *Debates*, 16 December 1993, p.4732 *ff*.

[30] Mr Terry Connolly MLA, *Debates*, 3 May 1995, p.107 *ff*.

[31] Mr Jon Stanhope MLA, *Debates*, 9 April 2002, p.829 *ff*. The Bill history and the Bill itself are available in the ACT Legislation Register at: http://www.legislation.act.gov.au/b/db_7645/default.asp

[32] See *Debates*, 23 October 2003, p.4028 *ff*. The motion that the Assembly take note of the paper was continued and resolved in the affirmative on 25 November 2003: see *Debates*, 25 November 2003, p.4573 *ff*.

[33] Mr Jon Stanhope MLA, *Debates*, 18 November 2003, pp. 4243-4249. As also recorded in *Minutes of Proceedings*, debate on the Bill was started on 18 November 2003 (MoP No.78, p.1004 *ff.*) and was adjourned; was continued on 2 March 2004, (MoP No. 90—2 March 2004, p.1126 *ff.*) and adjourned, and was resumed on 3 March 2004 (MoP No. 90-2, 3 March 2004 p.1128 *ff.*) and the question was put and passed the same day (MoP No. 90-2, 3 March 2004 p.1132).

[34] See ACT Legislation Register, 'Human Rights Commission Bill 2005', available at: http://www.legislation.act.gov.au/b/db_16458/default.asp

[35] Mr Simon Corbell MLA, *Debates*, 6 December 2007, p.4026 *ff*. The Bill was passed 4 March 2008. See the ACT Legislation Register, 'Human Rights Amendment Bill 2007', at: http://www.legislation.act.gov.au/b/db_31588/default.asp

3.19 In August 2009 a paper on the 'Human Rights Act 2004—The First Five Years of Operation' was presented in the Assembly, under the terms of s 44 'Review of the Act' (now expired), requiring the Attorney-General to present a review report in the Assembly by 1 July 2009.[36]

3.20 In December 2009 the Human Rights Commission Legislation Amendment Bill 2009 was presented in the Assembly, including introduction of terms 'gender identity' and 'industrial activity'.[37]

3.21 During this period the Human Rights Act 2004 became a regular part of Assembly discussion of new legislation. For example, in June 2010 there was significant debate on human rights aspects of the Road Transport (Alcohol and Drugs) (Random Drug Testing) Amendment Bill 2009.[38] In October 2010 there was significant debate on human rights aspects of the Discrimination Amendment Bill 2010,[39] and the Corrections Management (Mandatory Urine Testing) Amendment Bill 2010.[40]

FURTHER AMENDMENT AND DEVELOPMENT OF THE *HUMAN RIGHTS ACT 2004*

3.22 Since 2010 there have been a number of amendments to the *Human Rights Act 2004*.

3.23 In November 2010 the Justice and Community Safety Legislation Amendment Bill 2010 (No 4) was presented in the Assembly. Once passed, the subsequent Act provided for changes to procedures for handling complaints and conciliation under the *Human Rights Commission Act.*[41]

3.24 In December 2010 the report of the 'Australian Capital Territory Economic, Social and Cultural Rights Research Project' was presented in the Assembly.[42] In March 2012 the Human Rights Amendment Bill 2012 was presented in the Assembly. Passed in amended form in August 2012, it changed the wording of s 28(1) so that limitations to human rights could be considered in relation to laws not only of the ACT, and creating a right to education, meaning 'access to education without any discrimination that prevents that access', thus introducing first statutory protections of economic, social and cultural rights.[43]

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[36] Mr Simon Corbell MLA, *Debates*, 18 August 2009, p.3229 *ff.*

[37] Mr Simon Corbell MLA, *Debates*, 10 December 2009, pp.5640-5643.

[38] *Debates*, 29 June 2010, pp.2705-2709. *ff.*

[39] Mr Zed Seselja MLA and others, *Debates*, 27 October 2010, p.5099 *ff*.

[40] Mr Jeremy Hanson MLA and others, *Debates*, 27 October 2010, p.5103 *ff.*

[41] Mr Simon Corbell MLA, *Debates*, 18 November 2010, p.5638 *ff*.

[42] Mr Simon Corbell MLA, *Debates*, 9 December 2010, pp.6123-6126.

[43] Mr Simon Corbell MLA, *Debates*, 29 March 2012, pp.1499-1500 and *ff*. An amended Bill was subsequently passed on 23 August 2012: see *Minutes of Proceedings*, 23 August 2012, p.2058. See ACT Legislation Register, 'Human Rights Amendment Bill 2012', available at: http://www.legislation.act.gov.au/b/db_44345/default.asp

3.25 In March 2015 Human Rights Amendment Bill 2015 was presented in the Assembly. Passed in February 2016, it extended statutory protections of economic, social and cultural rights for Aboriginal and Torres Strait Islander persons, among other things.[44]

3.26 In November 2015 the Protection of Rights (Services) Legislation Amendment Bill 2015 was presented in the Assembly, and was passed on 9 February 2016. The resulting Act amended the *Human Rights Act 2004* and other Acts to provide, among other things, for an enlarged membership of the Human Rights Commission so as to include the Public Advocate and the Victims of Crime Commissioner.[45]

COMMITTEE COMMENT

3.27 The Committee considers that the history of the development of the *Human Rights Act 2004* justifies a picture of it as a comparatively cautious process which has seen the gradual introduction of wider provisions, such as those included under Economic, Social and Cultural Rights in Part 3A of the Act. It is notable that in its first incarnation, the *Human Rights Act* did not make any right of action available to those who considered that they had a grievance under the Act, and that this was only introduced when the Act was amended in 2007.

3.28 This pattern of development supports the observation made in Committee comment above that the design and mode of introduction of the provisions of the Act reflects a cautious approach which anticipated, and took seriously, objections that were raised by opponents of the Human Rights Bill 2003 in the Assembly debates considered below.

[44] *Debates*, 26 March 2015, pp.1190-1993.

[45] ACT Legislation Register, 'Protection of Rights (Services) Legislation Amendment Bill 2015', available at: http://www.legislation.act.gov.au/b/db_53095/default.asp

4 DEBATE ON THE HUMAN RIGHTS BILL 2003

INTRODUCTION

4.1 On 18 December 2003, the ACT Chief Minister, Mr Jon Stanhope MLA, presented the Human Rights Bill 2003 in the Legislative Assembly for the ACT. Debate continued on the Bill on 2 March 2003, and the Bill as amended was put and passed on that day.[46]

4.2 In debate, Members of the Assembly put forward arguments in favour of, and against, the Bill and these are considered below.

ARGUMENTS IN FAVOUR OF THE BILL

INTRODUCTION

4.3 Members arguing in favour of the Bill in debate told the Assembly that:

- that there was a need for a Human Rights Bill as rights were not adequately protected at present;
- that there was a specific benefit in codifying rights in legislation to which other legislation was subject;
- that the Bill set out provisions that would discourage undue litigation;
- that in providing for the recognition of human rights the Bill struck a balance in providing for the powers of the Legislature and the Judiciary;
- that the experience in other international jurisdictions that had enacted similar legislation had been positive;
- that the rights set out in the Bill were not unduly individualistic rights; and
- that the Bill did not reduce or remove rights of the unborn child, either in connection with international treaties or ACT statute law.

4.4 Some Members in favour of the Bill also told the Assembly that the Bill did not go far enough, and that its protections of rights should extend to economic, social and cultural rights rather than focusing exclusively on civil and political rights as now.

4.5 These arguments are considered below.

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[46] See *Debates*, 2 March 2004, p.586.

NEED FOR A BILL OF RIGHTS

4.6 In his speech to the motion 'That this bill be agreed to in principle', Mr Jon Stanhope MLA, Chief Minister and sponsor of the Bill, told the Assembly about what he saw as the need for such a Bill, arguing that rights were not sufficiently protected at that time. He told the Assembly that:

> It is true that we enjoy high standards of representative government, an independent judiciary and respect for the rule of law. But, in truth, Australia is a human rights backwater. In the common law world, Australia is the only country that has neither a constitutional nor statutory bill of rights.[47]

4.7 In support, he quoted the former federal Attorney-General, Senator Lionel Murphy, to the effect that:

> Although we believe these rights to be basic to our democratic society, they now receive remarkably little legal protection in Australia. What protection is given by the Australian Constitution is minimal and does not touch the most significant of these rights. The common law is powerless to protect them against the written laws and regulations made by Parliament, by Executive Government under delegated legislative authority, and by local government and other local authorities. The common law exists only in the interstices of statutory legislation.[48]

4.8 The Chief Minister went on to say that:

> The piecemeal and partial recognition of rights in the common law and in various statutes is no longer a satisfactory basis on which to address rights issues. Without a yardstick against which to measure rights, we risk the whittling away of rights protection. [49]

4.9 Ms Roslyn Dundas MLA, in her speech to the motion, told the Assembly that a human rights bill was needed in the ACT because:

> The common law and our system of government do not offer adequate protection against the abuse of human rights. There are no guarantees that future governments will respect human rights. There are currently very few restrictions on the laws that the government can pass if it has the numbers.[50]

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[47] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4246.

[48] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4246.

[49] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4246.

[50] Ms Roslyn Dundas MLA, Debates, 2 March 2004, pp.507-508.

4.10 In light of this, she told the Assembly, she believed that:

> this Assembly does need to enshrine in some legislation what we believe needs to be embodied as a bill of rights so that people can look up to this document and work with this document to see that their rights are protected, along with all the other laws here in the ACT. A charter of rights and freedoms, or the Human Rights Bill that we debate today, is a human rights safety net. We should see it as a shield to help protect people and enable citizens to know what their rights are and to exercise their freedoms underneath them.[51]

4.11 Ms Kerry Tucker MLA also spoke in favour of the Bill in these terms. She told the Assembly that:

> As much as we may like to believe that legislators will always bear in mind the basic principles that respect humanity and our responsibilities to each other when we live together in communities, it's a sad fact that in the heat of pursuit of particular goals, these are not always protected.[52]

4.12 Ms Tucker also referred to the findings of the consultative committee which had considered whether there was a need for such a bill, which had found, she told the Assembly that there was 'no comprehensive, sufficient or transparent protection of human rights within the ACT'.[53]

4.13 Ms Tucker went on to consider the 'main arguments put forward in favour' of the Bill, emphasising the need for further rights protection. She told the Assembly that among these were that:

> the existing legal protections for human rights do not act as broad statements conferring equal rights upon all; and the unicameral nature of the ACT government renders the ACT legislative process vulnerable to human rights concerns.[54]

4.14 In connection with this second point, Ms Tucker noted that:

> since 1989 the ACT has been run by a minority government and often the balance of power is in the hands of one or two people. An ACT bill of rights could constitute a baseline for political negotiations, or at least prompt a debate about human rights.[55]

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[51] Ms Roslyn Dundas MLA, Debates, 2 March 2004, p.508.

[52] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.451.

[53] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.451.

[54] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.452.

[55] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.452.

4.15 She went on to say that another argument in favour of the Bill was that:

> it would be an accessible statement of community values, and would enable the community access to information on their rights and educate public authorities and others on appropriate rights respecting behaviours et cetera.[56]

4.16 In his closing speech, the Chief Minister made further comment on the need for human rights legislation, in particular suggesting that this had been recognised by other international jurisdictions which could be considered comparable to the ACT. He told the Assembly that:

> A nation to which we might appropriately compare ourselves is the United Kingdom—as I mentioned before—the mother of the common law, which in its wisdom has acknowledged that the common law no longer deals adequately or appropriately with human rights. This point needs to be made in the context of the slavish commitment to the common law as a bulwark against threats to our human rights, which the Liberal Party is so wedded to. Not even the United Kingdom—the generator of the common law, the home of the common law, the nation that gave birth to the common law—accepts any longer that the common law is an adequate protector of the human rights of its citizens.[57]

IMPORTANCE OF CODIFYING RIGHTS IN OVERARCHING LEGISLATION

4.17 Regarding the importance of having rights codified in an overarching piece of legislation, with which other legislation, and actions by Government, would be required to conform, Mr Stanhope told the Assembly that the Bill would respond to the present absence of rights protection by giving recognition 'in legislation to basic rights and freedoms', [58] that is that it would:

> recognise in legislation fundamental rights and freedoms drawn from the International Covenant on Civil and Political Rights. Consequently, rights such as equality before the law, the protection of family life and children, personal freedoms such as freedom of religion, thought conscience and expression, the right not to be arbitrarily detained, the right to a fair trial and so forth, will be interpreted and applied in the ACT context.[59]

4.18 He went on to say that:

> To achieve that goal the bill requires that all ACT statutes and statutory instruments must be interpreted and applied so far as possible in a way that is consistent with the human rights protected in the act. Unless the law is intended to operate in a way that

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[56] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.452.

[57] Mr Jon Stanhope MLA, Debates, 2 March 2004, pp.536-537.

[58] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4247.

[59] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4247.

is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. [60]

4.19 As a result, he told the Assembly:

> Decision makers in all government areas will have to incorporate consideration of human rights into their decision-making process, and a statutory discretion must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right.[61]

4.20 Ms Roslyn Dundas MLA put a similar view in her comments on the Bill when she told the Assembly that:

> The positive thing about this bill is that it makes it very clear to everyone that our rights are being taken away when this happens as a result of a new law. We will have the discussion and consultation under the Human Rights Bill about every new piece of legislation.[62]

4.21 Ms Katy Gallagher MLA put a similar view when she told the Assembly that:

> The bill before us today … explicitly encapsulates the ICCPR and gives it legal standing directly for the laws of the territory. These rights remain at the core of a democratic society and are deserving of protection and enhancement. Rights to assembly, expression, movement and due process are indisputably essential to guaranteeing democratic freedoms. As with the Canadian Charter of Rights and Freedoms and the New Zealand Bill of Rights Act, it is expected that these rights will be of particular relevance in ensuring that our legal system preserves the rights of those appearing before the courts.[63]

4.22 She told the Assembly that:

> The rights of individuals to fair and transparent processes under government will be enhanced by this bill. Whilst the Human Rights Bill will not give a new right of action against government agencies, it does put the emphasis on urging government to act consistent with the rights contained in the bill at all times in relation to the whole community rather than the actions of an individual. That will prevent unnecessary litigation while at the same time improving this systemic role of the bill of rights.[64]

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[60] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4247.

[61] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4247.

[62] Ms Roslyn Dundas MLA, Debates, 2 March 2004, p.508.

[63] Ms Katy Gallagher MLA, Debates, 2 March 2004, p.515.

[64] Ms Katy Gallagher MLA, Debates, 2 March 2004, p.515.

4.23 In relation to the Assembly's power to make laws, she told the Assembly that:

> Under the act, the Legislative Assembly will be able to make laws in the same way as it does now. This new legislation will not prevent the Assembly from passing laws that limit rights if it is necessary to do so, but it will require that human rights be taken into consideration during the development of new laws and will also ensure that the Assembly is fully informed if a bill departs from the rights enshrined in the *Human Rights Act*.[65]

4.24 She went on to say that:

> These provisions will improve the scrutiny of bills from the legislative end of the process. Public statements of these sorts will form the basis of more informed community debate and help many in the community to evaluate the actions of government against a recognised community and human rights standard.[66]

LIMITATIONS AND PROTECTIONS AGAINST UNDUE LITIGATION

4.25 In his comments on the Bill the Chief Minister spoke about limitations on rights in the legislation. The Bill, if passed into law, would not 'allow complaints to the Human Rights Commissioner', on grounds that 'involving the Human Rights Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT law'.[67]

4.26 In light of such limitations, he told the Assembly, the Bill would 'not encourage unnecessary litigation', but would 'ensure that human rights are taken into account when developing and interpreting all ACT laws' and would:

> promote a dialogue about human rights within the parliament, between the parliament and the judiciary, and, most importantly, within the Canberra community.[68]

4.27 The Chief Minister also told the Assembly , in his closing speech, that:

> What the ACT Human Rights Bill does not do at this stage is provide a direct right of action in the Supreme Court. Rather, the bill will make available, in litigation that is already under way based on other causes of action, additional arguments about the interpretation of the law and human rights guarantees.[69]

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[65] Ms Katy Gallagher MLA, Debates, 2 March 2004, p.515.

[66] Ms Katy Gallagher MLA, Debates, 2 March 2004, p.515.

[67] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4249.

[68] Mr Jon Stanhope MLA, Debates, 18 November 2003, p.4250.

[69] Mr Jon Stanhope MLA, Debates, 2 March 2004, pp.531-532.

4.28 On the other hand the Chief Minister spoke, more positively, about new avenues that would emerge with the passage of the Bill. He told the Assembly that:

> The Human Rights Bill will give rise to actions based on human rights grounds that did not previously exist. For example, a challenge could be brought, under the *Administrative Decisions (Judicial Review) Act 1989*, to an administrative decision, subject to review under the act. The question will be: was the action or decision lawful and consistent with human rights? Failure to interpret the law by reference to human rights may result in an error of law, be otherwise contrary to law or be a failure to take account of a relevant consideration.[70]

4.29 He went on to say that:

> In addition to its power to grant remedies under section 17 of the Administrative Decisions (Judicial Review) Act 1989, the Supreme Court could also grant a declaration of incompatibility. The Administrative Appeals Tribunal can review the merits of a decision and, if the decision was based on an incorrect interpretation of the law, the tribunal can remake the decision.[71]

4.30 The Chief Minister, in his closing speech, also sought to rebut, directly, arguments that the Bill would lead to a more litigious legal culture. He told the Assembly that in the debate on the Bill:

> Some have played on stereotypes of a crime-ridden and litigious American culture or argued that the bill is at the expense of the community rather than in support of it.[72]

4.31 However, he told the Assembly these claims were 'baseless and ill informed, and this polarised debate has kept Australia lagging behind the rest of the world'.[73] Rather, he told the Assembly:

> As all members know, we are the only common law country whose citizens do not enjoy a constitutional or statutory bill of rights.[74]

BALANCE STRUCK BETWEEN LEGISLATURE AND JUDICIARY

4.32 In his closing speech the Chief Minister told the Assembly, in effect, that the Bill struck a balance between the purviews of Parliament and the Courts.

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[70] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.532.

[71] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.532.

[72] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.529.

[73] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.529.

[74] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.529.

4.33 He told the Assembly that at the 'heart of the scheme' was a 'statutory duty to interpret territory laws by reference to human rights and give preference to a meaning that is consistent with those rights'. This, he said, was 'is a new rule of statutory construction', which would result in courts and other interpreters of law 'not just' engaging in 'search for the intention of parliament', but being obliged, under the Act, to 'search for a meaning that is consistent with human rights insofar as that is possible'.[75]

4.34 He went on to say that as a result of the Bill passing into law it was expected that 'a beneficial interpretation [would] be given to human rights and that rights will be read into existing and future laws', but that 'the bill does not allow the courts to rewrite legislation against the clear intention of the Assembly or to strike down a statute that contravenes a human right'.[76]

4.35 Rather, he told the Assembly, the intention in creating the Bill 'was to craft a formula that [would reconcile] the ordinary rules of statutory construction with the new direction to interpret more consistently with human rights'.[77]

EXPERIENCE IN OTHER JURISDICTIONS

4.36 Members speaking in support of the Bill referred in positive terms to the experience of other jurisdictions which had introduced similar legislation.

4.37 Speaking on this point Ms Tucker MLA told the Assembly that:

> Looking at experience in other jurisdictions … the consequences are positive in that such legislation improves governance and policy making. It creates an opportunity for review and improvement of existing legislation as has happened in Hong Kong and the UK as well as guiding new legislation and policy. It is clear that in the UK, whose *Human Rights Act 1998* contains the right to property and the right to education, and in other jurisdictions where claims have been made relating to social, economic, or cultural rights, there is a significant body of jurisprudence which would provide assistance and interpretation. It is incorrect to suggest this is not so. Canadian and UK courts have respected the role of legislators. South Africa also has much to offer here.[78]

4.38 Ms Tucker responded to claims by opponents of the Bill that similar legislation had brought about undue and unwarranted litigation. She told the Assembly that:

> The evidence does not support the claim that jurisdictions have heavily awarded damages for breaches of human rights guarantees. Also, very few damages awards

[75] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.531.

[76] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.531.

[77] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.531.

[78] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.455.

> were made in New Zealand and all for very modest amounts. In summary, this bill is more like running a magnifying glass over our legislation. It provides a moral costing. It can highlight problems before they arise by framing arguments in a more accountable way. It is nothing to be afraid of.[79]

4.39 In his speech closing the debate, the sponsor of the Bill Chief Minister, Mr Jon Stanhope MLA, also referred to positive experiences with human rights bills in other international jurisdictions. He told the Assembly that:

> The Canadians are proud of their Charter of Rights and Freedoms. In Europe 41 countries are party to the European Convention on Human Rights and Fundamental Freedoms, covering some 800 million people. New Zealand has a bill of rights; it has had a bill of rights for over 10 years. The United Kingdom, the homeland of the common law, incorporated the European convention—a bill of rights—in 1998. 151 countries are party to the International Covenant on Civil and Political Rights. The principles of the covenant are reflected in most national constitutions … [80]

4.40 However, he told the Assembly:

> in Australia it serves only as a guide for the work of the federal Human Rights Commissioner, whose jurisdiction is limited to inquiring into the acts and practices under Commonwealth enactments.[81]

4.41 He went on to say that the present Bill was:

> based on an interpretative model, which has drawn on the recent experience of New Zealand and the UK but is adapted to our local needs. It is a model that represents the third way, one that gives effect to civil and political rights in domestic law but which also recognises the traditional importance of the sovereignty of parliament. Its purpose is to increase public accountability in the public service and strengthen our democracy.[82]

RIGHTS IN BILL NOT INDIVIDUALISTIC RIGHTS

4.42 Some Members in favour of the Bill sought to rebut arguments from opponents that the rights set out in the Bill were unduly individualistic, and stood to compromise the rights of the collective.

4.43 Ms Tucker MLA argued in this way when she told the Assembly that:

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[79] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.455.

[80] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.529.

[81] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.529.

[82] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.530.

> Democracy works because people take agency and put arguments up. But the disempowered are less likely to do this—the homeless and the marginalised. Human rights are not, as sometimes caricatured, egotistical and individualistic with no capacity to recognise the common good. [The Bill] is much more about communitarianism, and maybe that's why the Liberals don't like it. It's much more about communitarianism than individualism, requiring above all an understanding of common ethical values.[83]

4.44 Continuing in this vein, Ms Tucker went on to say that:

> Responsibility is inherent in the notion of rights. If human rights are conditions necessary for people to live lives of dignity and value there is a responsibility to support these conditions, not just government and the public authorities but the whole community. This legislation is a statement of those rights. It's enabling a dialogue about those rights when there is concern that those rights are being breached.[84]

4.45 In his closing speech, Mr Jon Stanhope MLA made similar comments. He told the Assembly that:

> There is a view that the bill emphasises individuals at the expense of the community. This is an understandable concern, but it is one that misunderstands both the philosophy and the practice of human rights. Rights have never existed in a vacuum. A man alone on a desert island does not need rights because there is no one there to infringe them; nor does he have to think about his responsibility to others.[85]

4.46 He went on to say that:

> The concept of rights has emerged over centuries out of the struggle to control abuses of executive power and to define rights and responsibilities—the responsibility not just of government to its people but also of individuals to communities and vice versa. Both the covenant and the bill recognise that rights are shaped in a social context and that there are justified limitations. The test is that those limits must be set down in law and must be reasonable and demonstratively justified in a free and democratic society.[86]

4.47 This was, he told the Assembly, 'a standard formulation based on a well-established test used in Europe, Canada and New Zealand'.[87]

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[83] Ms Kerry Tucker MLA, Debates, 2 March 2004, p.455.

[84] Ms Kerry Tucker MLA, Debates, 2 March 2004, pp.455-456.

[85] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.530.

[86] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.530.

[87] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.530.

BILL NOT TO REMOVE OR REDUCE RIGHTS

4.48 In his closing speech Mr Jon Stanhope MLA responded to arguments made by opponents of the Bill: that the Bill sought to remove rights of the unborn child.

4.49 Mr Stanhope told the Assembly that there was 'no internationally recognised right of a child before birth'; that his advice was 'that those claims [were] simply not factual'; that the claims were 'not substantiated by any interpretation of the conventions that have been quoted; and that '[a]nybody who has read around the development of those conventions [would be] aware that issues around the right to life were very much part and parcel of the drafting of this particular provision in the convention'.[88]

4.50 He told the Assembly that:

> one of the most vexed questions facing even this jurisdiction let alone the national government of Australia and the national governments of every country around the world and, indeed, the United Nations is the issue around commencement of life and the status of a foetus or an unborn child.[89]

4.51 He also told the Assembly that 'the United Nations in drafting those conventions did not come to a conclusion on that issue'; that they 'never could and they never will'; and that this was 'why the issue was left as it was, to be dealt with by national and local jurisdictions'.[90]

4.52 Importantly, he told the Assembly, the ACT had 'dealt with the issue in 2002 in the decision it took to decriminalise abortion'. In light of this, he said:

> The government, in subsection 9 (2), is essentially recognising a decision taken by this legislature two years ago to decriminalise abortion. Subsection 9 (2) was included in the *Human Rights Act* to recognise the decision that we had taken to decriminalise abortion.[91]

MINORITY VIEW: THAT BILL SHOULD GO FURTHER

4.53 Some Members arguing in support of the Bill told the Assembly it would be better if the Bill gave protection beyond civil and political rights alone, and extended its protections to economic, social and cultural rights.

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[88] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.541.

[89] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.541.

[90] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.541.

[91] Mr Jon Stanhope MLA, Debates, 2 March 2004, p.541.

4.54 Ms Roslyn Dundas MLA expressed this view when she told the Assembly that:

> I think this bill does not go far enough. Especially considering the thorough evaluation and consultation process that was undertaken by the ACT Bill of Rights Consultative Committee, I think we have ended up with a bill that includes only a subset of the human rights clauses recommended by the consultative committee … [92]

4.55 As a result, she told the Assembly, 'the bill will have only limited effect on the rights of ACT residents'.[93]

4.56 Ms Katy Gallagher MLA, although a government Member, also put the view that rights protections should be extended. She told the Assembly that:

> While asylum seekers remain detained in Australia, indigenous Australians are denied land rights, women are denied equality of outcomes and workers are denied the right to economic justice, fair employment, security and prosperity, human rights law will never be complete.[94]

ARGUMENTS AGAINST THE BILL

INTRODUCTION

4.57 Members arguing against the Bill in debate told the Assembly that:

- no other Australian jurisdictions had adopted similar legislation;
- there was little in the way of popular support for the Bill;
- rights were already adequately protected;
- it was more fitting for rights to be protected by 'traditional' means combining common law rights and a plurality of legislation rather than by a single piece of legislation in which rights were codified;
- that, if passed, would disturb the separation of powers between the Legislature and the Judiciary;
- that the Bill, if passed, would usher-in a significant and unwarranted increase in litigation;
- the rights set out in the Bill were largely individual rights, which stood to compromise the rights of the collective.
- the Bill, if passed, would raise security concerns by frustrating attempts to provide sufficient protection against terrorism; and that

[92] Ms Roslyn Dundas MLA, Debates, 2 March 2004, p.508.

[93] Ms Roslyn Dundas MLA, Debates, 2 March 2004, p.508.

[94] Ms Katy Gallagher MLA, Debates, 2 March 2004, p.515.

- the Bill reduced or removed rights currently protected.

4.58 These arguments are considered below.

NO OTHER JURISDICTION ADOPTED SIMILAR LEGISLATION

4.59 Mr Bill Stefaniak MLA told the Assembly that 'no other Australian jurisdiction [had] enacted a bill of rights' and that the ACT should not do so.[95]

4.60 He also noted that a recent (2001) report by a New South Wales parliamentary Standing Committee had recommended against NSW adopting a Bill of Rights or similar legislation.[96]

LACK OF POPULAR SUPPORT

4.61 Some Members who spoke against the Bill asserted a lack of popular support in the ACT community for the Human Rights Bill 2003.

4.62 Mr Bill Stefaniak MLA told the Assembly that there had been 'certainly no groundswell in our community calling for such a bill'.[97]

4.63 Mrs Jaqui Burke MLA put a similar view. She told the Assembly:

- that the Chief Minister, as sponsor of the Bill, had 'bowled into it without really bringing the Canberra community with him';[98]
- that 'the bill of rights has not been requested by the majority of ACT residents';[99] and
- that 'only approximately 120 people in total … could be bothered to go along to all of the community meetings also held as part of the consultative process'.[100]

RIGHTS ALREADY PROTECTED

4.64 Some Members who spoke against the Bill argued that rights were already sufficiently protected under the legal and legislative regime.

4.65 Mr Bill Stefaniak MLA told the Assembly that:

> Our rights are more than adequately protected. They are protected by convention, they are protected by one of the most democratic and one of the strongest democratic

[95] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.443.

[96] Mr Bill Stefaniak MLA, Debates, 2 March 2004, pp.447-448.

[97] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.443.

[98] Mrs Jaqui Burke MLA, Debates, 2 March 2004, p.509.

[99] Mrs Jaqui Burke MLA, Debates, 2 March 2004, p.510.

[100] Mrs Jaqui Burke MLA, Debates, 2 March 2004, p.510.

> systems in the world. They are protected, too, by the provisions in many of our acts of parliament.[101]
>
> Our traditions and our conventions go right back to Magna Carta in 1215 and they have been enhanced and enshrined over the centuries. Our basic rights have also been protected by our acts of parliament, and these range from the constitution which governs us in this country through to such things like the Crimes Act in the territory.[102]
>
> Our fundamental rights and our freedoms are protected by constitutionally entrenched provisions, the electoral laws, laws governing such things as just terms for compulsory acquired property, jury trial, freedom of religion, the right to freedom of expression, freedom of association, freedom from arbitrary arrest and detention, and numerous rights covering accused persons and prisoners.[103]

4.66 He went on to say that:

> Our statutes, our common law and our conventions also protect the right to privacy, to freedom of movement, the right to a fair trial, freedom of peaceful assembly, democratically elected governments through a secret ballot process, freedom of thought, conscience and religion, and the right to own and acquire property. Through the actions of various governments over the last century and through legislation, other rights, such as the right to social welfare, the right to proper standards in the workplace, the right to rest and leisure, the right to an education, rights centring around the protection of children, the right to a clean environment and rights governing equality between all people in Australia have been guaranteed.[104]

4.67 Mr Stefaniak MLA went on to note the *Discrimination Act 1991* (ACT) as a 'recent example of rights protected by statute'. [105]

CODIFIED VERSUS ORGANIC RIGHTS

4.68 Some Members who argued against the Bill told the Assembly that traditional forms of rights protection were more effective than codifying rights protection under legislation.

4.69 Mr Bill Stefaniak MLA argued in this way when he told the Assembly that:

> Our rights are more than adequately protected. They are protected by convention, they are protected by one of the most democratic and one of the strongest democratic

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[101] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[102] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[103] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[104] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[105] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

> systems in the world. They are protected, too, by the provisions in many of our acts of parliament.[106]
>
> Our traditions and our conventions go right back to Magna Carta in 1215 and they have been enhanced and enshrined over the centuries. Our basic rights have also been protected by our acts of parliament, and these range from the constitution which governs us in this country through to such things like the Crimes Act in the territory.[107]

4.70 He also told the Assembly that:

> we have a system that has evolved over 800 years. … It is a great country because of … our wonderful institutions that have been nurtured, changed, improved, and are always evolving; and our system of law, conventions and culture. We have the ability to change and evolve conventions. We can change our laws when we need to do, so that we can keep up with what society wants. I think we have done that pretty well. We have done it pretty well in terms of rights, be they rights for the most disadvantaged in our community or general rights that affect everyone. These rights are set out in various acts.[108]

4.71 In addition, he quoted Bob Carr to this effect:

- that the 'respected American jurist Judge Hand once said, " … that a society so riven that the spirit of moderation is gone, no court can save; that a society where the spirit flourishes no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish"; [109]
- that the 'protection of rights lies in the good sense, tolerance and fairness of the community' and if 'we have this, then rights will be respected by individuals and governments, because this is expected behaviour and breaches would be considered unacceptable', however a 'bill of rights [would] turn community values into legal battlefields';[110]
- that a bill of rights would engender a 'culture of litigation and the abdication of responsibility';[111] and
- that the community's 'view of the importance and priority of rights changes over time', but a 'constitutionally entrenched bill of rights freezes those priorities'.[112]

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[106] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[107] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[108] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.451.

[109] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.446.

[110] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.446.

[111] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.445.

[112] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.446.

4.72 Speaking in a similar vein, Mrs Helen Cross MLA told the Assembly that:

> no proliferation of bits of paper will ever ensure rights. The only thing that can ensure rights is a community, and the level of rights enjoyed by a community depends on the quality of the community and of its leadership, on its commonly held traditions, values, beliefs, knowledge, wisdom and sense of equality and fairness, usually evolved over a long and sometimes arduous process. So far that is the system that has delivered the best for us. It is like a vibrant living thing that has grown with us over many centuries and is part of what we are. It has been created by the community itself in order to maintain the continuity and wellbeing of the community and, most significantly, it has not been imposed upon the community in the way this proposed legislation seems bent on imposing itself … [113]

4.73 Mrs Vicki Dunne MLA made similar arguments when she told the Assembly that:

> The protection of human rights relies on a consensus across society. One might say almost that where such a consensus exists no legislative protection is necessary, and where it does not none is possible. Certainly none would be effective.[114]

4.74 Moreover, she told the Assembly:

> If we go down this road of asserting rights by fiat without regard to the actual views of the community, we will end up with the Soviet constitution.[115]

4.75 Continuing this argument, she told the Assembly that:

> protection of human rights is not something that can be done by the stroke of a pen, by imperial fiat. It requires vigilance through the legislature, through the legal system and through the administrative structures. It needs accountability, it needs questions in estimates, it needs questions in legislatures, it needs people to read annual reports and it needs people to read committee reports. It requires bloody hard work.'[116]

4.76 Mrs Dunne went on to say that, rather, 'a prudent approach would dictate enacting rights which were the subject of broad consensus in society or in the legislature'. However, she told the Assembly, that was not the case in this instance.[117]

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[113] Mrs Helen Cross MLA, Debates, 2 March 2004, p.462.

[114] Mrs Vicki Dunne MLA, Debates 2 March 2004, p.502.

[115] Mrs Vicki Dunne MLA, Debates 2 March 2004, p.502.

[116] Mrs Vicki Dunne MLA, Debates 2 March 2004, pp.502-503.

[117] Mrs Vicki Dunne MLA, Debates 2 March 2004, p.502.

BILL WOULD DISTURB BALANCE BETWEEN LEGISLATURE AND JUDICIARY

4.77 Some Members speaking against the Bill argued that the Bill, if passed, would disturb the separation of powers between the Legislature and the Judiciary.

4.78 In making these arguments Mr Bill Stefaniak MLA quoted Bob Carr to the effect that:

- that Bills of Rights transferred 'decisions on major policy issues from the legislature to the judiciary';[118]
- that it was 'not possible to draft a bill of rights that gives clear- cut answers to every case';[119]
- that if 'a bill of rights were enacted, it would be up to a court to decide whether freedom of speech should be limited in relation to pornography, tobacco advertising, solicitation for prostitution or the publication of instructions on how to make bombs', and that these were 'issues that should be decided by an elected parliament, not by judges, who are not directly accountable to the people';[120]
- that 'courts operate within an adversarial process', so that matters 'only arise before them when there is a dispute and judgements are made on the basis of particular facts', and that as a result decisions 'are therefore piecemeal in nature and cannot take into account all issues relevant to determining policy', making 'a court … not an appropriate forum for making these decisions';[121]
- that 'the clauses of the United States Constitution that prohibit anyone from being deprived of life, liberty or property without due process of law have been used to invalidate laws limiting working hours, fixing minimum wages and standardising food quality';[122] and that:
- 'Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in any given case about whether the judgement is correct. If it is unacceptable, the community can make its views known at elections. A bill of rights is an admission of the failure of parliaments, governments and the people to behave reasonably, responsibly and respectfully.' [123]

4.79 Mr Stefaniak also raised these concerns in relation to a specific feature of the Bill, 'the power of the Supreme Court to make a declaration of incompatibility'.[124]

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[118] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.445.

[119] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.445.

[120] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.445.

[121] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.445.

[122] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.446.

[123] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.447.

[124] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.450.

4.80 He went on to say that:

> When this occurs, the Attorney-General must table a written response in the Assembly. It is then up to the Assembly to decide whether or not the law should be changed so as to make it compatible with human rights. This procedure is designed to overcome the common objection that a Bill of Rights subverts the democratic process by transferring to the unelected judiciary the ultimate power to decide controversial human rights-issues that are better left in the hands of elected politicians. [125]

4.81 He told the Assembly that while 'the Bill could achieve this in part', he saw 'considerable danger' of 'the judges becoming politicised and of the authority of the court being potentially weakened',[126] and that this may:

> lead to demands for a change in the manner in which judges are appointed, with persons nominated for appointments being subjected to searching questioning as to their personal views on contentious socio-political issues.[127]

4.82 He went on to suggest an example:

> the Supreme Court could be called on to decide … whether legislation permitting abortion is compatible with the "inherent right to life". In my view, the judge would be in danger of being drawn into public controversy, whichever way he or she were to decide the case. If the judge made a declaration of incompatibility, expectations might be generated that the bill would be changed. If the Assembly was not prepared to do so, the principle of parliamentary supremacy might have been upheld, but at the risk of weakening respect for the court and its decision-making authority.[128]

4.83 In his comments on the Bill, Mr Brendan Smyth MLA put a similar view. He told the Assembly that:

> we are going to create a law that allows it to be referred to or commented upon by the Supreme Court, to come back to the territory, to the Assembly, to the Attorney-General, with absolutely no cause of action. But in doing so, in asking the courts to comment on the laws we pass in this way, in a non-judicial way, we actually erode the separation of powers and the confidence that the public generally have in the court system. What will happen is that the courts will make a comment and that comment will come back to the Assembly. The Assembly can then choose to do what it wants

[125] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.450.

[126] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.450.

[127] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.450.

[128] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.450.

> with the comment, but in the process you have destroyed the degree of respect that I think most people hold for the court system.[129]

4.84 Mr Smyth went on to say that:

> The bill erodes the ability of the judiciary to make decisions, because the Attorney-General and the Human Rights Commissioner can enter the court and have their say, and it erodes the confidence that people have in those that they have elected to make decisions on their behalf because we are now subject to another body and its interpretation of the laws that we made.[130]

THREAT OF UNDUE LITIGATION

4.85 Members arguing against the Bill asserted that if passed it would lead to a significant and unwarranted increase in litigation.

4.86 Mr Bill Stefaniak MLA quoted Bob Carr in support of this argument, to the effect that:

- that 'law reports of Canada and NZ show the extensive use of their bills of rights in litigation, and that the primary use of a bill of rights is in relation to criminal appeals', and that in New Zealand 'NZ, in the first seven years after the Bill of Rights Act was enacted, it was invoked by the accused in thousands of criminal cases';[131] and
- that in New Zealand the 'Bill of Rights continues to be routinely used as grounds for trying to overturn the admissibility of evidence, including confessions, evidence obtained under search warrants and breath-testing of drink drivers'.[132]

4.87 Mrs Dunne MLA put a similar view, telling the Assembly that:

> What will happen … will be that these rights will be fought out and extended to people who have given up some of their rights to be treated equally because they are criminals, offenders, who have been sent to jail by juries of their peers. They will use these provisions to try and get out of jail, to try and winkle out of the law, to try and winkle out of facing justice.[133]

BILL RIGHTS AS INDIVIDUALISTIC RIGHTS

4.88 Some Members speaking against the Bill asserted that the Bill placed too great an emphasis on individual rights at the expense of the rights and protections of the collective.

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[129] Mr Smyth MLA, Debates, 2 March 2004, p.520.

[130] Mr Smyth MLA, Debates, 2 March 2004, p.527.

[131] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.447.

[132] Mr Bill Stefaniak MLA, quoting Bob Carr (2002) *Thoughtlines,* Debates, 2 March 2004, p.447.

[133] Mrs Vicki Dunne MLA, Debates 2 March 2004, p.504.

4.89 Mr Bill Stefaniak MLA argued in this way when he stated that, far from there being inadequate protection of rights, there were:

> probably many people in our society who feel that our laws put far too much emphasis on the rights of individuals and not enough emphasis on the responsibilities of individuals. People, for example, often say that there is too much emphasis on the rights of the criminal and not enough regard to the rights of society and the victim. [134]

SECURITY CONCERNS

4.90 Mrs Cross MLA also told the Assembly that the Bill raised concerns over security:

> The introduction of a bill of rights such as that being proposed would … introduce a frustrating obstacle to the performance of basic security functions designed to enable the responsible authorities, on behalf of the community that tasks and sustains them, to do the utmost to protect the community from menace.[135]

THAT RIGHTS WERE REMOVED OR REDUCED UNDER THE BILL

4.91 Mrs Dunne told the Assembly that the Bill, contrary to its stated intention, removed or reduced rights in one important respect: a provision relating to statute law on abortion.

4.92 She told the Assembly that:

> the first substantive provision addressed in this most divisive of bills is perhaps one of the most divisive issues that has ever come before this legislature or its predecessors pre self government. That is the issue of life and when it applies. It is an issue on which the views of this Assembly and its predecessors, if you can judge by the various debates over the years, would appear to be finely balanced and nuanced. But this bill baldly asserts the most extreme position, that held by the current Chief Minister. So much for the rights of conscience! When I read this provision, I was struck by the juxtaposition in clause 9(1), which states that everyone has a right to life, with clause 9(2) which says, "This section applies to a person from the time of birth." [136]

4.93 Mr Brendan Smyth MLA also made comment on this aspect of the Bill. He told the Assembly that:

> what is happening here is not a protection of human rights; it is the start of the downgrading of human rights in the ACT. Clause 9 (2) reads: "This section applies to a person from the time of birth." That single line abandons the International Covenant

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[134] Mr Bill Stefaniak MLA, Debates, 2 March 2004, p.444.

[135] Mrs Helen Cross MLA, Debates, 2 March 2004, pp.462-463.

[136] Mrs Vicki Dunne MLA, Debates 2 March 2004, p.502.

> on Civil and Political Rights and absolutely abandons the Universal Declaration of Human Rights, which recognises children's rights.[137]

4.94 He went on to say that if the Bill were passed in its present form:

> We are going to exclude the unborn from the protection afforded by at least three international covenants to which this country has signed up to.[138]

COMMITTEE COMMENT

4.95 The Committee notes arguments put by proponents and opponents of the Human Rights Bill 2003 in debate in the Legislative Assembly.

4.96 While there were many matters at issue, in the Committee's view a significant part of the debate can be characterised as a difference of opinion over whether rights should be stated, explicitly, by way of a 'master document' (that is, a Human Rights Act), or whether rights should be provided for under the then-existing combination of common law protections and rights protections provided for in individual Acts such as the *Discrimination Act 1991*.

4.97 Many of the consequences claimed for the Human Rights Bill 2003, if passed into law, stemmed from this basic difference in view.

4.98 Those in favour of the Bill put the view that making rights explicit in a single piece of legislation would promote awareness of rights, make them more accessible, promote debate, and make departures from rights principles more transparent.

4.99 Those against the Bill put the view that creating explicit rights in one piece of legislation would lead to unintended consequences (in the form of undue litigation), and the weakening of already-present 'organic' processes inhering in civil society.

4.100 It is evident that these differences of opinion reflect deeper traditions within the progressive and conservative strands of modern politics, with one placing trust in deliberate shaping of society by means of legislation, and the other placing greater trust in custom and agreed truths and values accrued over time.

4.101 At a more practical and self-evident level, the Committee notes that predictions of the emergence of undue litigation as a result of the passing of the Human Rights Bill 2003 have not come to pass, at least in part due to features of the Bill that appear to have been designed to anticipate and respond to these concerns.

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[137] Mr Smyth MLA, Debates, 2 March 2004, p.524.

[138] Mr Smyth MLA, Debates, 2 March 2004, p.525.

4.102 On the other hand, the Committee considers that impact of the *Human Rights Act 2004* may not be quite as pronounced as that claimed by proponents. It appears, for example, that the 'dialogue model' envisaged in drafting the Bill, in which the Courts and the Legislature would be interlocutors in a dialogue on human rights, has largely not come to pass. The exception is the one case in which an ACT court has made a declaration of incompatibility.[139]

4.103 In practice, the 'dialogue' which was intended has taken place for the most part between the Executive and the Legislature, in that the Executive has made statements about the human rights compatibility of legislation it introduces to the Assembly, and the relevant parliamentary committee—currently the Standing Committee on Justice and Community Safety (Legislative Scrutiny Role)—provides comment on this legislation, on human rights and other grounds.

4.104 Of course the influence of the *Human Rights Act 2004* is not only felt by way of the legislation alone. The palpable manifestation of the Act is, for many purposes, the Human Rights Commission, which plays a part in the degree to which the Act influences conduct by way of its education and public information functions, and by virtue of it accepting complaints under the *Discrimination Act* and the *Human Rights Commission Act*.

4.105 Less easy to discern is the influence the Human Rights Act—and the ACT Human Rights Commission—may have had in deterring actions by public authorities, or in discouraging aspects of legislation that may otherwise have been proposed in the Assembly.

[139] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147.

Appendix A

IN THE MATTER OF AN APPLICATION FOR BAIL BY ISA ISLAM [2010] ACTSC 147

4.106 As noted above, the *Human Rights Act 2004* s 32(2) makes provision for the ACT Supreme Court to make a 'declaration of incompatibility' where it finds that ACT legislation cannot be interpreted consistently with the Act under s 30, which reads 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.[140]

4.107 *Islam* is the only case at time of writing in which the Supreme Court issued such a declaration.

4.108 In this instance Islam was charged with attempted murder and had applied for bail.

4.109 The Court considered s 9C of the *Bail Act 1992* (ACT), 'Bail for murder and certain serious drug offences', which in subsection (2) provides for a presumption against bail:

> A court or authorised officer must not grant bail to the person unless satisfied that special or exceptional circumstances exist favouring the grant of bail.[141]

4.110 The Court noted a tension between this and s 18(5) of the *Human Rights Act*, which sets out a presumption in favour of bail, and reads:

> Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.[142]

4.111 In considering the matter, the Court stated that 'the language of the Human Rights Act [was] not itself particularly careful' in the relevant section, s 30.[143] It also considered the implications of s 28 of the Act, which provides for limitations of human rights,[144] and provisions regarding statutory interpretation set out in s 139 the *Legislation Act 2001,* since s 30 of the *Human Rights Act* sets out a principle of statutory interpretation.[145]

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[140] *Human Rights Act 2004* (ACTG), s 30.

[141] *Bail Act 1992* (ACT), s 9C (2).

[142] *Human Rights Act 2004* (ACTG), s 18(5).

[143] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [26].

[144] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [36].

[145] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [126].

4.112 This led to the court considering how the indications on statutory interpretation in the *Legislation Act* and the *Human Rights Act* could both be applied.[146] The court described the difference in this way:

> s 30 [of the *Human Rights Act*] requires only that a human rights-compatible meaning be sought, whereas s 139 [of the *Legislation Act*]requires that one particular meaning be preferred, namely the one that best achieves the legislative purpose.[147]

4.113 An important consideration, the Court suggested, was at which stage either of these two provisions should be applied to the matter at hand, and stated that:

> In summary, having regard to both the authorities and to the explanatory material about the Human Rights Act, I have concluded that the only sensible way to deal with s 30 of that Act is to apply it at an early stage in the process of interpreting legislation, rather than at the end and only after an unsuccessful justification inquiry.[148]

4.114 The Court stated that there was:

> In particular … is a real difficulty in the ACT in reconciling the operation of s 30 of the *Human Rights Act* with s 139 of the *Legislation Act* if those two provisions are not applied in a single exercise in which s 30 takes priority over s 139.[149]

4.115 To respond to this difficulty the Court then set out a five-step process to be used to determine whether a legislation provision was compatible with the *Human Rights Act*.[150]

4.116 Having applied that process, the Court found that s 9C of the *Bail Act* was incompatible with the *Human Rights Act* and made the following declaration:

> Under s 32(2) of the *Human Rights Act 2004* (ACT), the Court is satisfied, for the reasons set out in *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147, that s 9C of the *Bail Act 1992* is not consistent with the human right recognised in s 18(5) of the *Human Rights Act*, being that "Anyone who is awaiting trial must not be detained in custody as a general rule".[151]

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[146] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [208-232].

[147] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [208].

[148] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [232].

[149] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [235].

[150] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [236].

[151] *In the matter of an application for bail by Isa Islam* [2010] ACTSC 147 [403].