

HUMAN RIGHTS ACT AND ADMINISTRATIVE LAW TALK

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Part 3 of the *Human Rights Act 2004* (ACT) sets out a wide variety of rights derived from the *International Covenant on Civil and Political Rights* ('ICCPR').¹ These rights, according to the Preamble of the Act, are 'necessary for individuals to live lives of dignity and value'. Yet not all of the rights set out in the ICCPR are replicated in the Act. One very important one that is missing is that set out in Article 2 of the Covenant. In Article 2(3) all State parties commit themselves to ensuring that any person whose rights or freedoms are violated 'shall have an effective remedy' and that any claims to such a remedy shall be determined by 'competent judicial, administrative or legislative authorities'. Despite a wide-spread recognition in the international human rights community of the importance of this right to a remedy, it was excluded from the list of human rights set out in Part 3 of the Act.

Similarly, two recommendations of the Consultative Committee regarding remedies were removed from the Act in its final form. The recommendations were that

- delegated legislation that was incompatible with the rights set out in the *Human Rights Act* be invalidated;² and
- that all public authorities be under a legally enforceable duty to act compatibly with human rights.³

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¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 85 available at <www.jcs.act.gov.au/prd/rights/documents/report/BORreport.pdf> at 1 July 2005.

³ *Ibid.*

The reason given for this by the Chief Minister in the second reading speech was that ‘questions of statutory interpretation can already be brought before the courts and tribunals in the course of existing actions such as judicial and merits review’.⁴ The Chief Minister also noted that the Courts would bring to the Assembly’s attention any inconsistency between rights and particular pieces of legislation.⁵

Does this mean that there are effective remedies for all breaches of rights in the ACT – that such remedies will simply be accessed using pre-existing forms of remedy rather than through the creation of a new remedy such as that in the United Kingdom’s *Human Rights Act 1998*? I argue that it does not. While some breaches of human rights will be remediable through ordinary legal actions, other types of breaches will remain without effective legal remedy.⁶

I will first examine the types of cases in which a combination of the interpretative provisions of the *Human Rights Act 2004* {ACT} and ordinary legal actions can give rise to effective remedies that would not previously have been available in the ACT. I will then move to examine two types of cases where such remedies would not be effective: when the executive acts outside statutory powers, and when the actions of the executive do not give rise to a remedy in common law.

Let us first consider the cases in which legal remedies will have become available since the coming into effect of the *Human Rights Act* that would not have been available before. These will primarily be actions that arise through the use of the interpretative provisions of the *Human Rights Act* – ss 30 and 31.

⁴ ACT, *Parliamentary Debates*, Legislative Assembly, 23 October 2003, 4030 (Jon Stanhope, Chief Minister).

⁵ *Ibid.*

⁶ Goodwill on the part of the Assembly and the Executive assisted by investigation or recommendation by officials such as the Human Rights Commissioner or Ombudsman may mean that other effective ways of preventing rights abuses exist. Nonetheless I will proceed on the not unreasonable assumption that there will be neither the political nor the bureaucratic willingness to institute remedies in *all* cases of breach.

There are two scenarios that are worthy of consideration in this case. The first deals with primary legislation. In this scenario, some public authority acts in a way that would ordinarily be tortious, a breach of contract or even a crime. But in taking this action the public authority claims the protection of a particular statute or other legal right. So the police officer who forcibly detains a person uses his or her powers of lawful arrest as protection against a claim of false imprisonment and assault. The intelligence service that enters a private residence uses the warrant granted by a court to protect themselves against claims of trespass. And the children services workers who take children from their home argue their powers under child protection statutes against what would otherwise be kidnapping. And, even with the advent of the *Human Rights Act*, most of these actions would continue to be justified by statute.

But the effect of the interpretative provisions on statutes or delegated legislation that authorises such actions now needs to be taken into account. It is clear from the Act, that any unambiguous legislation that gives a power to a public authority to do an act that may result in a breach of rights will not be affected by the Act except to the extent that a declaration of incompatibility may be made by the Supreme Court.⁷ But in some cases, a statutory provision that the public authority uses to protect itself from claims will be read down so that it is consistent with rights. An example of this type of interpretative reasoning and outcome – although outside the *Human Rights Act* context – can be seen in *Coco v R*⁸ where provisions in the Queensland statute that allowed for the implantation of secret listening devices was interpreted as not allowing for the entry on to a property in order to plant such devices. The statute was interpreted narrowly in light of the common law regard for property rights and the approval of that the judge purported to give under the *Invasion of Privacy Act*

⁷ See *Human Rights Act 2004* (ACT) s 32(2).

was held to be beyond the scope of the Act. Chief Justice Mason with Justices Brennan, Gaudron and McHugh held that

‘The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose.’⁹

Thus in certain areas, the common law can serve a similar purpose to the interpretative provisions of the *Human Rights Act*. The rights of property owners against even the Crown has been recognized in the common law at least since *Entick v Carrington*¹⁰ and the High Court described these rights as fundamental.¹¹ The operation of the *Human Rights Act* may have the same effect on interpretation as these fundamental common law rights did, but over a much wider range of rights than the fairly narrow range traditionally recognized by the rather property focused common law. *Coco v R* demonstrates how significant such interpretative presumptions may be in practice.

The second area in which the *Human Rights Act* could have an important effect is in administrative law challenges to delegated legislation. Again, it is clear that the Legislative Assembly can delegate power to breach rights set out in the Act if it does so clearly. But for legislation that delegates power in wide or ambiguous terms (regrettably a far from rare phenomenon in such legislation) the courts have their instruction in s 30. In working out the meaning of such provisions they are ‘as far as it is possible’ to prefer an interpretation that is ‘consistent with human rights’. This may lead to a narrower interpretation of legislation than may have occurred without the *Human Rights Act*. It may also ultimately lead to the invalidation of some

⁸ (1994) 179 CLR 427.

⁹ Ibid 437.

¹⁰ (1765) 19 State Tr 1030.

delegated legislation – one of the recommendations of the Committee that was excluded by the government and an effect of the Act that the Chief Minister expressly claimed could not occur.

The type of scenario in which it might occur may be found in the first case heard by the ACT Administrative Appeals Tribunal – the case of *Merritt and the Commissioner for Housing*.¹² This case was brought by Mrs Merritt, who had been waiting for suitable public housing for two and a half years. She was classed under determination made by the Commissioner for Housing as being a Category 2 applicant because she had public housing at the time of her application – although it was housing in which she and her children had every reason to feel unsafe – and Category 1 categorization was reserved for people who were homeless or in imminent likelihood of homelessness or domestic violence. She argued, amongst other things, that the regulation did not properly take into account the rights of her children, in particular s 11(2) of the *Human Rights Act* which states that every ‘child has the right to the protection needed by the child because of being a child without distinction or discrimination of any kind’ and s 11(1) that identified the family as the natural unit of society needing special protection.¹³ The determinations made by the Commissioner as to who was entitled to what type of category gave no particular priority or protection to the rights of the Merritt children. The member dismissed this claim on the basis, arguably, of a mistaken understanding of the operation of the Act. He stated – probably correctly – that the regulations were clear and had been previously interpreted and applied in a consistent and clear manner and that this meant that the *Human Rights Act* had no role to play here.¹⁴

¹¹ (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹² [2004] ACTAAT 37.

¹³ *Ibid* [37].

¹⁴ *Ibid* [53].

I think that this reasoning is mistaken on two grounds. First, ambiguity is not required before s 30 of the *Human Rights Act* comes into play. It is admittedly a very poorly drafted section, but the term ‘working out the law’ under s 30 extends beyond resolving the meaning of an ambiguous or obscure provision (s 30(3)(a)) and includes the other three sub-ss of 30(3), for example ‘confirming or displacing the apparent meaning of the law’ and ‘finding the meaning of the law in any other case’. Thus even a provision that has an established meaning may have to be looked at again in light of the *Human Rights Act* to see if another interpretation that is consistent with human rights is possible – if it is possible and also consistent with a purposive interpretation of the legislation in question – then that interpretation is to be preferred even if there is established case-law to the contrary. This is the approach to the interpretative provision in the UK *Human Rights Act 1998* taken by the British courts in cases such as *R v Offen*¹⁵ where a decision of the Queen’s Bench in *R v Kelly*¹⁶ just a year earlier was held no longer be good law and the interpretation of the *Crime (Sentences) Act 1997* (UK) requirement that life sentences be imposed in all but ‘exceptional circumstances’ now required a broader understanding of what circumstances might be considered exceptional so as to ensure that the provisions complied with the *Human Rights Act*.

The second mistake in approach in the *Merritt* case is that the member treated regulations (in this case the determinations as to criteria for categories of housing applicants) as though they were in precisely the same position as primary legislation. But the first step that needed to be taken was to ask the crucial first question for any form of delegated law-making – were the regulations authorised by the primary legislation? The first question is not whether the regulations themselves were clear, but whether the primary

¹⁵ [2001] 2 All ER 154.

legislation should properly be interpreted as allowing for such regulations to be made in the first place. Was the delegation of regulation making power to the Commissioner so clear that the power delegated should be understood to include the power to ignore the rights of children when setting priorities for housing? This was not a question that the member turned his mind to and, if he had, complex question still would have remained – the problems of distributive justice and the competing rights claims of homeless adults compared with inadequately housed children which the member does briefly discuss in making a brief finding that the children’s rights were not infringed. The regulations may well have been valid. Nonetheless, the question of the extent to which delegated legislation can be said to be authorised by primary legislation – properly interpreted in light of the *Human Rights Act* - is one that the courts in the ACT are likely to have to deal with in coming years. And in some cases this might well lead to the invalidation of delegated legislation.

Therefore if lawyers and courts are prepared to re-think their traditional understandings of statutory interpretation and issues of the validity of delegated legislation then remedies will become available for breaches of rights that were not available a year ago. But that does not mean that there will be a remedy for all violations. In examining this issue I will focus on two types of cases where no remedy will be available – the first is where the executive acts without statutory powers and the second when no common law remedy is available for the breach of a right.

To start with executive action outside statute. Judicial control over executive action is only given through the interpretative provisions of the *Human Rights Act*. And the interpretative provisions only extend to working out the meaning of a Territory law – that is working out the meaning of a statute or

¹⁶ [2000] 1 QB 198.

statutory instrument. Much of the modern power of the executive – including many of the more coercive powers – are now based in statute. But the executive has both the prerogative powers and the powers of an ordinary person. There are complications with the notion of the prerogative power here in the ACT which are beyond the scope of this paper, however this issue would certainly arise if a jurisdiction such as Victoria follows the direction of the ACT. While some may think that the prerogative is just an antiquated relic of little practical import, it is important to recall that the initial actions taken with respect to the exclusion of the Tampa were accepted by the Full Federal Court to be a lawful exercise of the prerogative of the Commonwealth executive.¹⁷

In the ACT the issue of rights abuse is more likely to arise in the context of the powers that the executive can exercise as a legal person – the powers as a landowner to exclude certain types of protesters from government land, for example, or the power to enter into contracts for the operation of detention facilities or jails with corporations that have poor human rights records, or the power as an employer to make working life intolerable for a whistleblower. Sometimes these powers are limited by statute, but many of the everyday activities of government are carried out using non-statutory powers.

It is worth noting in this context also the importance of governmental or departmental policies that may be developed wholly outside the legislative context. In the United Kingdom, for example, a series of cases have challenged the regulation of prisons. Many of the rule governing important issues such as when and how cell and strip searches would be carried out, whether prisoners could be present when their cells were searched, and the extent of legal privilege attaching to prisoners' correspondence were set out in policy rather than specifically in delegated legislation. While prisons are more directly

¹⁷ *Ruddock v Vadarlis (Tampa)* (2001) 110 FCR 491, 543.

regulated in Australia, the use of the non-binding, non-regulatory Immigration Detention Standards for migration detention have been criticized as too vague and dominated by policy in the Australian context. Spending decisions made under broad appropriations too can have human rights implications even in the civil and political rights area. For example, governments may subsidise textbooks that produce a particular version of history or may only give funding to groups that do not criticize government too often or too loudly. Policy decisions too can have a profound impact on human rights without bringing ss 30 and 31 *Human Rights Act* into play.

In an analysis of the first year of the operation of the United Kingdom *Human Rights Act*, Klug and Starmer gave an overview of the types of actions brought under the *Human Rights Act*.¹⁸ The UK *Human Rights Act* affected the outcome, reasoning or procedure in 85 of the 149 cases in which it was substantively considered (a significant increase, incidentally, on the pre-Act impact of the principles in the *European Convention on Human Rights and Fundamental Freedoms*¹⁹). The study concluded that the claim made under the Act was only upheld in 24 cases.²⁰ Of these 16 were brought under the s 6 duty to act compatibly with the Convention and only six used the interpretative provisions with the remaining two resulting in declarations of incompatibility.²¹ It may be that some of these more direct actions could have been brought in a round about fashion through a use of the interpretative provisions but these figures at least indicate that a right to a direct action against a public authority could have an important role to play in ensuring a remedy for breach of rights. Mere interpretation is insufficient by itself.

¹⁸ Francesca Klug and Keir Starmer, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] *Public Law* 654.

¹⁹ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

²⁰ Klug and Starmer, above n 20, 655.

²¹ *Ibid.*

This is particularly so as common law remedies will often be inadequate. If victims of rights abuses are to rely on ordinary actions – most commonly in tort or administrative law – to remedy their wrongs they will often find that the common law is not attuned to rights. There are many situations in which someone’s rights can be abused and no remedy is available for a variety of reasons. Take the factual scenario that was said to occur in the famous *Baigent’s Case* from New Zealand.²² The case involved the execution of a search warrant in a house that the police wrongly identified as being the dwelling of a serious criminal. The cause of action based on alleged negligence in procuring the arrest warrant (and the warrant did seem to be procured on the basis of pretty limited evidence and with little regard to the rights of the Baigents who lived in the house) was struck out and this striking out was upheld by the Court of Appeal.²³ The required test in this case was not whether the procuring of the warrant had been an interference with the property and privacy rights of the Baigents. The test was whether the warrant had been obtained maliciously without reasonable and probable cause.²⁴ The high standard required by the common law meant that no remedy was available in tort and several of the other actions of the police were protected by statutory immunity or through the high standards required by the common law for particular breaches. In this case, however, the Court of Appeal went on to discover – or some might say invent – a remedy for breach of the *Bill of Rights Act 1990* (NZ). It is worth noting that one of the justifications used by Cooke P in his judgment for so doing was that the Bill of Rights affirmed New Zealand’s commitment to the ICCPR, particularly to Article 2(3) the right to a remedy.²⁵

²² *Simpson v Attorney-General [Baigent’s Case]* [1994] 3 NZLR 667.

²³ *Ibid* 673 (Cooke P); 685 (Casey J); 693 (Hardie Boys J); 714 (Gault J); 715 (McKay J).

²⁴ *Ibid* 673 (Cooke P).

In administrative law as well, the current state of the Australian law means that judicial review will not always provide an effective remedy for rights. The administrative law of the United Kingdom and Australia are beginning to depart from one another, with the UK focusing more on the substance of claims and Australia on process. The substantive approach can be more open to the protection of human rights. One example of this can be seen in the change in approach to unreasonableness in the UK. In the United Kingdom the reach of administrative law remedies was held by the European Court of Human Rights to be inadequate for the protection of rights in *Smith and Grady v The United Kingdom*.²⁶ The Wednesbury test for unreasonableness set the bar for judicial review of executive action very high and the House of Lords in the case of the *R v Secretary of State for the Home Department; Ex parte Daly*²⁷ held in 2001 that a new test based more on European notions of proportionality was needed to bring its administrative law into line with human rights requirements. Lord Steyn noted that, while the majority of cases would be decided in the same way, there were at least three differences between the new approach and the traditional common law approach:

‘First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the traditional range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny

²⁵ Ibid 673. See also ibid 690 (Casey J).

²⁶ [2000] 29 EHRR 493.

²⁷ [2001] 3 All ER 433.

test developed in *R v Ministry of Defence* is not necessarily appropriate to the protection of human rights.²⁸

Hence in these three ways the traditional administrative law test of reasonableness was held to be insufficient given the institution of the *Human Rights Act* in the UK and the same argument might well apply here.

There is certainly scope for similar arguments to be made to ACT courts but they are less likely to succeed here than they were in the United Kingdom. To begin with, the UK Act specifically includes courts within the definition of a public authority²⁹ something that the ACT Act does not. The only directions to the courts are with respect to the interpretative provisions and declarations of incompatibility. The development of the common law or the other actions of courts are not directly included in the Act. Second, there is no external scrutiny body like the European Court to help keep Australian courts honest in their assessment of the compatibility of long cherished doctrines and human rights traditions. Finally, and perhaps most importantly, the ACT as a single, small jurisdiction bound by the decisions of the High Court in administrative law and part of the single Australian common law that is not amenable to jurisdiction by jurisdiction change. If an administrative law remedy for rights violations is to be effective in the ACT it will have to come via statute rather than through administrative common law.

Thus those whose rights are violated cannot confidently rely on the common law or administrative remedies to come to their assistance. Administrative law is no guarantee of a remedy in these cases. When the Victorian Consultative Committee comes to consider the extent to which actions of the executive should be open to review under a proposed Victorian Bill of Rights, the ACT Act stands both as a demonstration that an Act without

²⁸ Ibid 446.

direct remedies can still be effective in assisting those who are victims of a rights abuse. But it also demonstrates that interpretative provisions alone are inadequate to ensure that the international law right to a remedy is being upheld in Australia.

²⁹ *Human Rights Act 1998* (UK) s 6(3)(a).