

ADMINISTRATIVE LAW AND AUSTRALIAN BILLS OF RIGHTS

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Over the last two years we have witnessed the beginning of what might well become something of a rights revolution in Australia. In 2004 the ACT's *Human Rights Act* came into force.¹ By itself, the introduction of a relatively modest bill of rights in a very small jurisdiction might not have been the cause of much excitement in most parts of the world. But in taking this step, the ACT became the first jurisdiction in Australia to attempt to set out in a single Act some sense of what human rights meant and what impact they should have on the legal system and the government.² What is more, within a year the Victorian government had announced that it would investigate the implementation of some type of bill of rights for Victoria³ and, as a result of that investigation and consultative process, has introduced a Charter of Rights and Responsibilities into the Victorian parliament.⁴ Western Australia and

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¹ *Human Rights Act 2004* (ACT)

² Carolyn Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32(2) *Federal Law Review* 292; Carolyn Evans, 'The Human Rights Act & Administrative Law' (2005) 197 *Ethos* 13; James Stellios, 'Federal Dimensions to the ACT Human Rights Act' (2005) 47 *ALAL Forum* 33; Bill Stefaniak, 'The need to balance a Bill of Rights' (2005) 86(3) *Parliamentarian* 251; Thomas Poole, 'Bills of Rights in Australia' (2004) 4(2) *Oxford University Commonwealth Law Journal* 197; Andrew Butler, 'The ACT human rights Act: A New Zealander's view' (2004) 194 *Ethos* 16; George Winterton, 'The ACT Bill of Rights' (2004) 7(2) *Constitutional Law and Policy Review* 47.

³ Office of the Attorney-General, Victoria, *Victoria on Track for Human Rights Promotion* (Press Release, 2 May 2006) <<http://www.dpc.vic.gov.au/pressrel>> at 12 May 2006; Office of the Attorney-General, Victoria, *Victoria Leads the Way on Human Rights* (Press Release, 20 December 2005) <<http://www.dpc.vic.gov.au/pressrel>> at 12 May 2005; Department of Justice, Victoria, *Attorney-General's Justice Statement: New Directions for the Victorian Justice System 2004–2014* (2004) <<http://www.justice.vic.gov.au/CA2569020010922A/page/Resources-Publications-Attorney-General%27s+Justice+Statement>> at 4 July 2005; Department of Justice, Victoria, *Human Rights in Victoria: Statement of Intent, May 2005* (2005) <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Consultation_project/\\$file/statement_intent.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Consultation_project/$file/statement_intent.pdf)> at 4 July 2005.

⁴ See *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) Department of Justice, Victoria <[http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Report/\\$file/HumanRightsFinal_FULL.pdf](http://www.justice.vic.gov.au/CA256902000FE154/Lookup/HR_Report/$file/HumanRightsFinal_FULL.pdf)>, at 22 May 2006; *Charter of Human Rights and Responsibilities Bill 2006* (Vic)

Tasmania are keeping a close watch on the Victorian process and will consider introducing their own legislation to protect rights. Even in New South Wales, where Premier Bob Carr was a staunch and vocal critic of bills of rights,⁵ the Attorney-General has suggested that (in the post-Carr era) the time might have come to consider whether a statutory bill of rights would be useful for the State.⁶ This conversion to bills of rights is, of course, far from universal or entrenched. The Commonwealth government remains firmly opposed to a constitutional or statutory bill of rights⁷ and, with respect to the States, it is generally sensible in Australia not to bank too heavily on proposals regarding rights until they are through the parliamentary process.⁸

That being said, the ACT does have an Act that has been in operation for just over two years and the Victorian government, which has a clear majority in both houses of parliament, has introduced a Charter that is highly likely to become law.

The form of the bill of rights in the ACT and Victoria is not the constitutionally entrenched model used in most parts of the world and that is well known here thanks to its role in the American constitution. Instead, the rights are protected in an ordinary statute that may be amended or repealed in the same way as any other statute. This model, sometimes known as the Commonwealth model,⁹ is based on similar Acts in New Zealand¹⁰ and the

⁵ Bob Carr, 'How a bill of rights lays a trap', *The Canberra Times*, (Canberra), 20 August 2001.

⁶ Jonathan Pearlman, 'Charter of rights plan to be put to cabinet' *The Sydney Morning Herald*, (Sydney) 20 March 2006, 5.

⁷ Malcolm Farr, 'PM will fight states' push for bill of rights', *The Daily Telegraph*, (Sydney) 27 March 2006, 13; *Transcript of the Prime Minister The Hon John Howard MP Address at Ceremonial Sitting to Mark the Centenary of the High Court of Australia, Supreme Court of Victoria, Melbourne* (2003) Prime Minister of Australia: News Room <<http://www.pm.gov.au/news/speeches/speech514.html>> at 22 May 2006.

⁸ See generally G. Williams, *Human Rights Under the Australian Constitution* (Oxford University Press, 1999), pp.250–257, and Hilary Charlesworth, 'The Australian Reluctance About Rights' in Philip Alston (ed), *Towards an Australian Bill of Rights* (1994) 21.

⁹ S. Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of*

United Kingdom,¹¹ although, as I will discuss, there are some important differences between them.

One of the key differences between these statutory bills of rights and constitutional bills, is that the statutory bills do not give courts the power to invalidate legislation. A parliament may pass an Act that is clearly and unambiguously in breach of quite fundamental human rights and that Act will stand. The ACT Human Rights Act would have no effect on the legal validity of a hypothetical Torture of Innocent Opponents of the Government Act for example. In the United Kingdom, subordinate legislation is in a different position with subordinate legislation that violates rights being void unless the violation was required by the terms of the authorising legislation.¹² I will come back to how this operates in Australia later. For now, let me merely note that the current and proposed human rights acts in Australia do not permit legislation to be invalidated and do not directly lead to the invalidation of subordinate legislation. Instead, all that the appropriate court may do when legislation is in violation of one of the rights set out is to grant a declaration setting out this incompatibility.¹³

So what do the Acts have to offer to people who believe that the rights that they are said to possess under these Acts have been violated? And how might an administrative lawyer assist such people? First, there is no direct right to a remedy under either the ACT or Victorian Acts. The ACT Act is silent on the issue of remedies except for a right to compensation for wrongful criminal

Comparative Law 707, see also Hiebert, Janet L. 'New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?' (2004) 82(7) *Texas Law Review* 1963

¹⁰ *New Zealand Bill of Rights Act 1990* (NZ)

¹¹ *Human Rights Act 1998* (UK)

¹² *Human Rights Act 1998* (UK), ss 3 and 4.

¹³ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 36 'Declaration of inconsistent interpretation'; *Human Rights Act 2004* (ACT), s 32 'Declaration of incompatibility'; and *Human Rights Act 1998* (UK), s 4 'Declaration of incompatibility'.

conviction.¹⁴ This silence in relation to remedies is something that it shares with its New Zealand equivalent. Victoria, on the other hand, has a more detailed, if rather convoluted set of provisions on remedies.¹⁵ A couple of points emerge from the Victorian Act. The first is that there is no freestanding claim to a remedy in the Act. Unlike the UK where a person may claim a remedy under section 8 if a public official violates one of the rights set out in the Human Rights Act, the Victorian Act does not create a new, stand alone statutory remedy for breach of rights. Second, the right to damages *for breach of the Act alone* is specifically excluded. Thirdly, if there is a pre-existing action that allows a person to seek a remedy or relief for unlawful conduct, then unlawful conduct under the Act can constitute unlawfulness for this purpose. Finally, the Charter does not ‘affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority’, including judicial review. So there is no new remedy for breach of the Charter, but it is clear under the Victorian Act and, I would argue, is implicit in the terms of the ACT Act that there is scope for certain types of administrative law arguments to be made that might give rise to a remedy where no remedy would have existed in the absence of such Acts. There will, however, continue to be no legal remedy for breach of rights in a number of circumstances.

I will first examine the types of cases in which a combination of the interpretative provisions of the Acts and ordinary legal actions can give rise to effective remedies that would not previously have been available. I will then move to examine two types of cases where such remedies would not be effective: when the executive acts other than in reliance upon statutory powers,

¹⁴ *Human Rights Act 2004* (ACT), s 23.

¹⁵ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 39.

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 be available under Australian rights Acts that would not have been available before. This will primarily occur through the use of the interpretative provisions. In the ACT these are sections 30 and 31 of the *Human Rights Act* and in Victoria the relevant provision is section 32 of the *Charter of Human Rights and Responsibilities Bill*. Section 32 of the Victorian Charter relevantly reads as follows:

32. Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

These provisions are the key to the expanded circumstances in which remedies may be available in light of the human rights Acts. I will first consider their impact on primary legislation and then on subordinate legislation.

The key issue that arises with primary legislation is how it should be interpreted in light of the human rights Acts. This interpretation can be crucial as there are many scenarios in which some public authority acts in a way that would ordinarily be tortious, a breach of contract or even a crime. Basic rule of law principles require that public authorities require legal authorisation to do things that would otherwise be unlawful. 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. 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, as you would expect, even with the advent of rights Acts 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 Acts 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.¹⁶ I would just pause to make the brief point that, although such declarations may appear to be toothless tigers and hardly worth recommending to a client in search of a real remedy, the experience in the UK suggests that they can put considerable pressure on the government to change laws, even in areas as sensitive as national security. As yet, there have been no declarations of incompatibility made under the ACT *Human Rights Act* so we do not know the extent of their political impact in Australia.

In other cases, however, there may be a statute in place that does not unambiguously authorise a violation of rights – a statute that can be read in a manner that is more or less compatible with human rights. In those circumstances, the rights Acts require that so far as possible the legislation should be interpreted so that it “is compatible with human rights.” Both Acts in somewhat different ways require the courts to also take into account the purposes of the legislation when considering whether a human rights

¹⁶ See *Human Rights Act 2004* (ACT) s 32(2).

compatible interpretation is possible. This was reflective of the concern that in the United Kingdom some judges have suggested that the very purpose of the Act can and should be ignored in giving robust effect to the interpretative rights provisions.¹⁷ The interpretative power is, therefore, not a power of judicial amendment of legislation and indeed there will often be an overlap between the use of the rights Acts' interpretative powers and common law techniques such as requiring abrogation of fundamental rights to be made in clear and express language or using Australia's human rights treaties obligations to interpret statutory provisions. But these techniques were only one set of interpretative principles among many and many judges were disinclined to use them for a variety of reasons. With the rights Acts, the requirement to interpret legislation consistently with human rights becomes a higher interpretative norm, subject only to an overriding requirement to take into account the purpose of the legislation. Judges are required to search for meanings that are consistent with human rights rather than simply relying on existing precedent or conventional understandings of particular words in legislation.

The interpretative provisions have already been used to some effect in the ACT, although their impact is not yet as fully realised as it is in the UK or New Zealand. The ACT cases also demonstrate the way in which the use of these interpretative provisions in ordinary legal proceedings can give rise to effective remedies – without violating the prohibition on giving compensation for breach of rights.

¹⁷ For a good overview see chapter by Hilary Charlesworth, 'Human Rights and Statutory Interpretation' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (2005)

In *R v Harold Scott Upton*,¹⁸ the prosecution alleged that Mr. Upton had assaulted two people and damaged a motor vehicle in January 2002. However, owing to a number of factors unrelated to the accused, his trial was delayed until 2006. The Supreme Court ordered that the proceedings be stayed.

Connolly J held that the *Human Rights Act* is relevant in construing the scope of the legislative power to grant stays in criminal proceedings. Section 22(2)(c) of the Act - which gives a right to be tried without unreasonable delay - supports a more generous conferral of power than the common law. On the basis of this expanded interpretation, Connolly J found that “a stay of proceedings may be an appropriate remedy”¹⁹ in cases involving unreasonable trial delay, depending upon whether a stay is a proportional response to the purported human rights breach.

The interpretive provisions should have been important in *SI bhnf CC v KS bhnf IS*.²⁰ That case concerned the issuing by a Deputy Registrar of the ACT Magistrate’s Court of a final personal protection order against the respondent. It was argued that the Act that permitted such orders to be made required that an interim order became final despite being heard in the absence of the respondent and without the option for such orders to be reviewed. Chief Justice Higgins referred to the applicant’s rights to a fair trial under s 21(1) in explaining his interpreting of the Act (although he did not refer to the interpretation provisions explicitly – a pity in a case that arguably strained those provisions past their reasonable limit). He set aside the original order thus opening the way for a rehearing, this time with the respondent present.

¹⁸ [2005] ACTSC 52

¹⁹ *Ibid*, [19]

²⁰ [2005] ACTSC 125

The second area in which interpretation of legislation gives rise to potential remedy is through a relevant considerations approach. One could now make a plausible claim that human rights become a mandatory relevant consideration in all decisions made pursuant to statutory authorisation. Indeed the ACT courts appear to be occasionally using a rather vague form of this test already. For example, in the 2006 Supreme Court case of *A v Chief Executive of the Department of Community Services*,²¹ Justice Crispin adjusted an order severely limiting contact between an allegedly abusive father and his five children. In his judgment, his honour referred to section 11(1) of the *Human Rights Act* that refers to the family as the natural and basic unit of society and in need of special protection.²² While his honour did not use, and in this case did not need to use, the language of relevant consideration, one could envisage a similar case in which a departmental decision is set aside because it failed to take into account the rights set out in the human rights Acts. In Victoria, the relevant considerations argument is spelt out in the Charter which provides “It is unlawful for a public authority ...in making a decision, to fail to give proper consideration to a relevant human right”. Some have argued that the relevant considerations doctrine alone is sufficient to provide protection for human rights under the Act. However, the relatively easy test currently used by the courts for relevant considerations suggests that this is not the case. One could envisage a tick a box approach to considering human rights that could be adopted by some departments without any profound change in their human rights culture and which might withstand scrutiny under the *Peko-Wallsend* test for relevant considerations where the courts have little scope to consider the

²¹ *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 (10 May 2006)

²² *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 (10 May 2006), at para [48]

weight given to each consideration²³ (given the constraints of time I will only note in passing that under the Victorian Charter it appears that a more serious scrutiny will be required for relevant considerations). None the less, relevant considerations arguments might in places allow people to access a useful administrative law remedy where none previously existed.

The third 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 ACT and Victorian parliaments can delegate power to breach rights set out in the Act if they do so clearly.²⁴ 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 the interpretative provisions. 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 delegated legislation. Again, this is envisaged in the Victorian legislation when it says that the interpretation provision does not affect the validity of a subordinate instrument ‘that is incompatible with a human right *and is empowered to be so by the Act under which it is made.*’²⁵ The implication of this rider is that a regulation that is incompatible with human rights and not clearly empowered to be so by the authorising legislation is invalid.

The type of scenario in which such invalidation might occur is found in the first case heard by the ACT Administrative Appeals Tribunal – the case of *Merritt v the Commissioner for Housing*.²⁶ This case was brought by Mrs Merritt, who had been waiting for suitable public housing for two and a half years while

²³ *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 – 43 per Mason J.

²⁴ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 32(3)(b);

²⁵ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 32(3)(b). Emphasis added.

living in unsafe housing. She challenged the regulations by which applicants were categorised in order of priority, saying that they paid insufficient attention to 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.²⁷ 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. He then went on to reason - mistakenly - that this meant that the *Human Rights Act* had no role to play here.²⁸

I think that this reasoning is mistaken on two grounds. First, ambiguity is not required before s 30 of the *Human Rights Act* or its Victorian equivalent comes into play. 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*²⁹ where a

²⁶ [2004] ACTAAT 37.

²⁷ Ibid [37].

²⁸ Ibid [53].

²⁹ [2001] 2 All ER 154.

decision of the Queen's Bench in *R v Kelly*³⁰ just a year earlier was held to no longer be good law. The court ruled that 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 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 questions still would have remained. One can sympathise with the member who would have had to consider 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 probably were valid, the outcome of the case appropriate and the member was not particularly assisted by the rather vague submissions by counsel about the relevance of the Act. Nonetheless, even if the outcome was sensible, the

³⁰ [2000] 1 QB 198.

reasoning was inadequate. 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 are likely to have to deal with in coming years. And in some cases this might well lead to the invalidation of subordinate legislation and thus create a real remedy for those who are affected by such regulations.

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 short time ago. But that does not mean that there will be a remedy for all violations. In examining this issue of cases where remedies are not available I will focus on two types of cases – the first is where the executive acts other than in reliance on 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 rights Acts. And the interpretative provisions only extend to working out the meaning of a Victorian or Territory law – that is working out the meaning of a statute or statutory instrument. Much of the modern powers of the executive – including many of the more coercive powers – are now based in statute. But the executive has both the prerogative powers (or in the case of the Commonwealth the general s.61 powers) and the powers of an ordinary person. There are complications with the notion of the prerogative power in the ACT which are beyond the scope of this paper, however this is certainly an issue in Victoria or other States.

The issue of violation of rights by the executive, however, 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 powers that are not referable to a particular statute.

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 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 the *Human Rights Acts* into play. This is partly recognised in the Victorian – but not ACT - Act by section 38 which says that 'it is unlawful for a public authority to act in a way that is incompatible with a human right.' The definition of public authority is wide and includes ministers and would

presumably cover many exercises of non-statutory executive powers.

Nonetheless, there is no new remedy set out in the Act against a public official who acts unlawfully in this way (although other actions, for example in tort, that require proof of unlawfulness, may now be open).

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 *Act*.³¹ 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*³²). The study concluded that the claim made under the Act was only upheld in 24 cases.³³ 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.³⁴ 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.

Without a specific remedy, those whose rights are violated have to find other statutory or common law remedies that can work with the human rights Acts to create a new remedy. But 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

³¹ Francesca Klug and Keir Starmer, 'Incorporation through the "Front Door": The First Year of the Human Rights Act' [2001] *Public Law* 654.

³² Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³³ Klug and Starmer, above n 34, 655.

³⁴ *Ibid.*

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.³⁵ 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.³⁶ If the case had been brought under the UK Human Rights Act, the Baigents could have made a direct claim about the interference with their property and privacy rights. In New Zealand, they instead had to bring a range of statutory and common law claims where a high test was set that made it difficult for them to succeed. The test regarding procurement of a warrant, for example, was whether the warrant had been obtained maliciously without reasonable and probable cause.³⁷ 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).

Now it is possible that this will also be the approach taken in the ACT. The courts may well consider that, in the absence of a remedies provision, they should hold that the executive is bound by the rights set out in the Act and that remedies are available for its breach. They may be bolstered in this analysis by

³⁵ *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667.

³⁶ *Ibid* 673 (Cooke P); 685 (Casey J); 693 (Hardie Boys J); 714 (Gault J); 715 (McKay J).

³⁷ *Ibid* 673 (Cooke P).

the *Legislation Act 2001* which says that everyone, including all governments, is bound by ACT law.³⁸ This is certainly a very plausible interpretation of the ACT Act, but there are problems with it. The first is that the draft of the Act presented by the Consultation Committee included a right to a remedy that was then excluded by the parliament. This might well be evidence that the parliament did not intend there to be a remedy against public authorities for breach or might at least be interpreted by the courts in that way. Secondly, the rights set out in the ACT Act are not freestanding obligations, but rather they are definitional. There is no obligation in the Act for any particular person or institution to respect rights. Rather there are particular obligations placed on particular institutions – on courts when interpreting legislation,³⁹ or on the Attorney-General when introducing legislation to parliament.⁴⁰ In contrast, in Victoria, there is an obligation on a public authority to respect rights,⁴¹ but the express exclusion of remedies, particularly damages, means that a *Baigent* argument is unlikely to succeed in Victoria either.

In addition to the limitations in common law actions such as tort, 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*

³⁸ *Legislation Act 2001* (ACT), s121.

³⁹ *Human Rights Act 2004* (ACT) s 30

⁴⁰ *Human Rights Act 2004* (ACT) s 37

The United Kingdom.⁴² 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*⁴³ 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 test developed in *R v Ministry of Defence* is not necessarily appropriate to the protection of human rights.’⁴⁴

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 and Victorian 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 authority⁴⁵ something that the ACT and Victorian

⁴¹ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 38

⁴² [2000] 29 EHRR 493.

⁴³ [2001] 3 All ER 433.

⁴⁴ *Ibid* 446.

⁴⁵ *Human Rights Act 1998* (UK) s 6(3)(a).

Acts do not.⁴⁶ 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 Acts. 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 High Court has made clear that there is a single Australian common law.⁴⁷ It may be that, if rights Acts become widespread across Australia, the common law will begin to change in response as judges become more used to applying rights standards. But while only one or two jurisdictions have such Acts, it will be impossible for them to develop a common law specific to those jurisdictions that, for example, introduced more proportionality into unreasonableness claims or required a higher standard of scrutiny of relevant considerations when human rights were at stake. 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. To conclude then, it would be wrong to assume that simply because the new rights Acts do not give a right to a remedy – or in Victoria’s case expressly exclude such a remedy – that they will be ineffective in litigation. There may well be rights to remedies that would not have been available before the Acts through the use of a combination of the interpretative provisions and ordinary actions including administrative law actions. Those representing clients whose rights have been breached need to think creatively about the options that are now open to them to create a case based on the Acts. But politicians in

⁴⁶ *Charter of Human Rights and Responsibilities Bill 2006* (Vic), s 4(1)(j).

Australia still appear very reluctant to allow for simple, clear remedies for breaches of rights by the executive - the sort of remedy that has been used so effectively in the UK. Until such time as they do, the human rights acts will continue to be seen by many as window dressing rather than a real commitment to implementing rights.

⁴⁷ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 - 564. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112 - 113, 137 - 138 and *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.