

**PRACTICING CRIMINAL LAW UNDER THE HUMAN
RIGHTS ACT - NO ROGUE'S CHARTER**

**CONFERENCE OF AUSTRALIAN PROSECUTORS
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Supreme Court of the Australian Capital Territory*

Justice Connolly was appointed a Judge in January 2003. He was Master of the Supreme Court of the Australian Capital Territory from 1996-2003, and had been a Member of the ACT Legislative Assembly from 1990-1996. He was Attorney-General from 1991-1995. He was educated at Adelaide University (BA, LLB (Hons) and the Australian National University (LLM). In 2001 he undertook mediation training at Harvard Law School.

The entry into force on 1 July 2004 of the *Human Rights Act 2004* (ACT) (the Human Rights Act) marked a significant point in Australian legal history as it is the first statutory Bill of Rights to be enacted by an Australian Parliament. The Act, as the Human Rights Commissioner has explained, is a statutory model, which requires all courts considering the appropriate interpretation to place on an ACT law to adopt an interpretation that is consistent with human rights. This is the model that has been in place for some years now in both New Zealand and the United Kingdom.

The enactment of a Bill of Rights in the ACT was, of course, not free of controversy. Many of the arguments that have surrounded this debate at the national level and in other States were again heard in the ACT Legislative Assembly. In particular, concerns were expressed that a Human Rights Act could become something of a “rogue’s charter”, and that it would lead both to a significant increase in litigation and to innumerable criminals escaping the consequences of their actions due to technical defences founded on human rights norms.

After 12 months of operation of the Act, it seems safe to observe that this has not come to pass. In a paper to a recent conference to mark the anniversary of the Act, the ACT Director of Public Prosecutions,

Mr Refshauge SC, observed that in the eight cases where judges of the ACT Supreme Court have made reference to the Human Rights Act in criminal proceedings “The decisions were all decisions which were made on the basis of principles of law or the exercise of a discretion that were unexceptionable applications of the common law and which were unaffected by or independent of the Human Rights Act though consistent with it.”¹

The experience in the United Kingdom seems to support the view that the enactment of a statutory interpretive Human Rights Act will not lead to a massive increase in litigation.²

In his paper to the anniversary conference, Mr Refshauge made the point that the level of awareness of the Human Rights Act remains relatively low within the legal profession, and this is, I think, a fair observation. It will take some time for an awareness to grow, and for Canberra practitioners to become familiar with the growing jurisprudence on the Human Rights Act. Lawyers of my generation and older were of course

¹ R Refshauge, *The Human Rights Act and the Criminal Law*, paper for Regulatory Institutions Network, Australian National University and Gilbert and Tobin Centre of Public Law, University of New South Wales joint conference, *Assessing the First Year of the ACT Human Rights Act*, Canberra, June 29 2005

² Rt Hon Lord Carswell, *Rights or Wrongs? The Human Rights Act in the courts*, (2005) 79 ALR 36 at 39. See, generally A. Ashworth, *Criminal Proceedings After the Human Rights Act: The First Year* (2001) Crim LR 855

familiar with keeping up to date with developments in the common law by reading the Appeals Cases. That is of course no longer a common practice, as the common law of Australia is whatever the High Court says it is. As a consequence I suspect that most of us have got out of the habit of perusing the English Appeals Cases. For Canberra practitioners seeking a better understanding of the Human Rights Act, much guidance can be obtained from re-acquainting ourselves with UK jurisprudence.

It is important to remember that the ACT Human Rights Act is an interpretive model. While there is a statutory remedy of a declaration of incompatibility, for most purposes this will be, not only a remedy of last resort, but a remedy that will be of little assistance to the individual litigant, be it in a criminal or civil matter. The result most litigants will be seeking will be for the particular statutory provision to be read down or read up in such a way as to be consistent with the rights enumerated in the Act, and in such a way that the litigant will obtain the relief sought. A declaration of incompatibility is in one sense an acknowledgment that it is not possible to interpret the provision in question in a manner consistent with the enumerated human right. The Court can so declare, but it then becomes a matter for the Legislative Assembly to determine whether the provision should be amended or not.

It seems to me that it is in the area of statutory discretions that much of the impact of the Human Rights Act will emerge. The enumerated human rights set out in Part 3 - Civil and Political Rights of the Human Rights Act are based on those set out in the International Covenant on Civil and Political Rights. The concept that one may look to those Covenant rights in the exercise of a statutory discretion is not new, and indeed is, or should be, familiar to those practitioners who work under the Uniform Evidence Law. Section 138 of the *Evidence Act 1995* (the Evidence Act) of both the Commonwealth and New South Wales codifies the discretion to exclude improperly or illegally obtained evidence. Section 138(3) sets out a non-exhaustive list of factors that may be taken into account by a court in the exercise of this discretion, such as the probative value of the evidence, the nature of the offence, whether the impropriety was deliberate or reckless and, in s 138(3)(f) “whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights”.

Interestingly, this provision seems to have been rarely examined by the courts, other than in Canberra. Odgers does not refer to any judicial consideration of the provision (S Odgers, *Uniform Evidence Law*, 6th ed, p 588) but Cross (*Cross on Evidence* [27315]) takes readers to the

remarks of Miles CJ in *Truong* (1996) 86 A Crim R 188 at 195 where his

Honour said:

Section 138(3) lays down a non-exclusive list of matters which must be taken into account, leaving it to the court to decide how such matters are to be taken into account and what weight is to be given to each. The subsection does not state whether the relative weight of any such matters favours admission or non-admission. It may be implied that the weight of some matters favours admission. For instance, if the probative value was high, that would tend to favour admitting the evidence. If the impropriety or contravention were deliberate that would tend to favour not admitting the evidence. On the other hand, it is far from clear whether the “importance” of the evidence favours admission or non-admission. Behaviour contrary to the *International Covenant on Civil and Political Rights* would appear to favour non-admission.

(See also *R v Haughbro*, (1997) 135 ACTR 15 per Miles CJ at 25.)

The United Kingdom and New Zealand experiences would suggest that the area of police practices may become significant. The ACT Bill of Rights Consultative Committee recognised this in its 2003 Report

“Towards an ACT Human Rights Act” where it states:

Experience elsewhere suggests bills of rights have a significant impact on the criminal law, particularly in so far as police are required to act in conformity with the bill of rights. The ability of the ACT to require its police force to act consistently with the proposed ACT Human Rights Act is unclear because of the unusual relationship between the ACT government and the police force. Policing services in the ACT are provided by ACT Policing which is part of the Australian Federal Police (AFP) under a purchase agreement with the ACT government. The AFP is a Commonwealth agency established under Commonwealth legislation whose officers draw their powers primarily from Commonwealth legislation.³

³ Report of the ACT Bill of Rights Consultative Committee May 2002 4.66

While it is undoubtedly the case that, insofar as police are exercising a power granted by Commonwealth law, the scope of that power is not subject to the interpretive provisions of the ACT Human Rights Act, it should not be assumed that this means that the Human Rights Act, and the jurisprudence developed in the UK and New Zealand, have no bearing on police procedures. There are two reasons for this.

The first is that, even where it is clear that the police conduct in question is solely an exercise of a power or discretion conferred by Commonwealth law (primarily the *Australian Federal Police Act 1979* and regulations made under that Act), the disputed use of the power or discretion, if it has led to evidence which is sought to be adduced in a criminal proceeding may enliven the discretion under s 138(3)(f) of the Evidence Act.

The second is that, although it is often assumed that because ACT Policing is performed by the Australian Federal Police it follows that police conduct will be a matter for Commonwealth law, in fact most relevant powers are exercised by ACT police pursuant to Part 10 of the *Crimes Act 1900* (ACT). This deals with police powers of entry, search warrants, stop and search powers, arrest and identification parades and procedures.

I would like to focus attention on two areas where the Human Rights Act has, it seems to me, had an impact on criminal procedure in Canberra, being the question of delay affecting the right to a fair trial, and the question of the grant of bail. I would also like to discuss an issue yet to arise, but likely to, being the impact of the Human Rights Act on regulatory offences.

Delay and a fair trial

It has clearly long been the law that a court has the power to stay criminal proceedings if those proceedings will result in an unfair trial. As the High Court said in *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and Mc Hugh J at 298):

The courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system.

Dietrich, of course, turned on the question of the unavailability of legal representation to an accused facing a serious criminal charge. But undue delay in finalising criminal proceedings has also been held to amount to sufficient ground for a stay at common law. Such orders have been made in this Court in the past (*Emanuele v Dau* (1995) 78 A Crim R 242). In

Jago v District Court (NSW) (1989) 168 CLR 23, Mason CJ endorsed (at 26):

... the proposition that, at least in cases of undue delay, the courts possess power to stay criminal proceedings in order to prevent “injustice” to the accused. Indeed, that view seems to have been accepted as long ago as 1844 in *R v Robbins* (1844) 1 Cox CC 114 ...

The common law position in relation to a stay on the grounds of undue delay seems to require the person seeking the stay to point to some actual prejudice. Gaudron J stated (at 78) that:

There is no power to grant a stay of proceedings on the indictment in vindication merely of a claimed “right to a speedy trial”.

That proposition may no longer reflect the law in the Australian Capital Territory, where the Human Rights Act provides in express form what Gaudron J described as a “claimed right to a speedy trial”. The Human Rights Act sets out in s 22(2) that:

- (2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else:
 - ...
 - (c) to be tried without unreasonable delay;
 - ...

The equivalent provision in the *New Zealand Bill of Rights Act 1990* has been given effect to by the New Zealand Court of Appeal in *Martin v Tauranga District Court* [1995] 2 NZLR 419 where it was held that a 19 month delay from charge to trial date resulting from inappropriate action by a prosecutor amounted to undue delay, and a permanent stay was

granted. This decision seems to have had an impact on government resourcing to both courts and prosecution authorities, and in subsequent matters the New Zealand Courts have observed and taken into account steps being taken to reduce trial backlogs.

In a case subsequent to *Martin's* case the New Zealand Court of Appeal declined to order a stay based on claimed delay due to the time police took to bring a matter to court, stating that the history of that matter showed one of “complexities and difficulties, yet steady progress” (*R v Coghill* (1995) 2 HRNZ 125 at 137-138). Moreover, the Court of Appeal saw fit to make the observation that :

This Court is aware that in New Zealand at present there is a fashionable wave of applications in criminal cases based on alleged breach of the Bill of Rights provision against undue delay. Many of these, as illustrated by the present case and the last before this Court (*R v Lewis* (1995) 2 HRNZ 45), prove to be without substance. Possibly counsel advising clients charged with crimes have felt duty-bound to raise such objections, but no encouragement to do so should be derived from the special facts of *Martin's* case, as was stressed in the judgments there delivered. Counsel should consider very carefully whether in any given case a claim of undue delay has true substance, before consuming Court time and causing further delay by objections which may have negligible prospects of success.

Appellate courts in both New Zealand and the United Kingdom have noted that the right to a fair trial involves a consideration of both the interests of the accused person and the interests of the community in bringing criminal conduct before the courts for appropriate determination.

In *Attorney-General's Reference (No 2)* [2004] 1 All ER 1049, the House of Lords was asked to rule on whether criminal proceedings may be stayed on the ground that there had been a violation of the reasonable time requirement in Art 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the *Human Rights Act 1988* (UK) in circumstances where the accused cannot demonstrate any actual prejudice arising from the delay.

The question was answered, in the leading judgment of Lord Bingham, in the following passage (at 1061):

If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's convention rights under art 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s 8(1) of the *Human Rights Act 1988*) or (in convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceeding unless (a) there can no longer be a fair hearing, or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and appropriate in all the circumstances.

The availability of a lesser remedy particularly going to compensation for lost trial costs, was expressly considered by the New Zealand Court of Appeal in *Martin's* case, where Richardson J said (at 427):

Where the delay has not affected the fairness of any ensuing trial through, for example, the unavailability of witnesses or the dimming of memories of witnesses ... it is arguable that the vindication of the appellant's rights does not require the abandonment of the trial processes; that the trial should be expedited rather than aborted and the breach ... should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders.

In considering whether any prejudice can be shown due to delay in proceedings, any Australian court would of course have to be mindful of the observations of McHugh J in the context of a civil hearing that delay inevitably creates prejudice as memories fail, and that "Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* (1972) 407 US 514 at 532 'what has been forgotten can rarely be shown'".

In two matters that have come before me this year I have issued a stay of criminal proceedings conditional upon the Director of Public Prosecutions reimbursing the accused for costs incurred to the point where a trial was vacated on the Crown's application. In both cases the accused was funding his own defence out of his own pocket. The circumstances of each case were somewhat unusual and both are set out in the decisions - *R v Martiniello* [2005] ACTSC 9 and *R v Upton* [2005] ACTSC 52. I am not going to fall into the trap of providing a commentary on my own judgments. Suffice it to say, however, that the

remedy adopted in each case allows the prosecution to continue if, in the Director's view, the public interest so requires, provided that the accused person is not financially disadvantaged.

Bail

The other area of criminal practice to which I wish to make reference is that of bail. In the Australian Capital Territory, as in some other jurisdictions, the power to grant bail has now been codified, and is to be found in the *Bail Act 1992*. As originally enacted, the Act provided that there was to be a general presumption in favour of bail. Subsequent amendments have now resulted in there being a presumption against bail in respect of certain specified offences, and where the alleged offence occurred while the person was on bail for other matters. In such cases, a court is not to grant bail unless there are special or exceptional circumstances.

This type of provision will not be unfamiliar to practitioners in other jurisdictions, and one would generally expect that ACT courts would be able to obtain guidance from decisions of intermediate courts of appeal in other jurisdictions with similar legislative provisions. The New South Wales Bail Act provisions which in certain circumstances provide a

presumption against bail have been considered by that State's Court of Appeal (*Chau v DPP* (1995) 37 NSWLR 639).

The Human Rights Act reinforces a general presumption in favour of a right to apply for bail. Section 18, Right to liberty and security of person, provides in subs (5) that:

- (5) 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.

It seems to me that this provision may mean that the question as to whether a person is able to satisfy the statutory requirement to overcome a presumption against bail in the Australian Capital Territory may require more than a consideration of equivalent provisions in other States. Moreover, the right to a trial without undue delay will also impact on the bail decision. The House of Lords acknowledged in *Attorney-General's Reference (No 2)* that release of a person otherwise on remand to bail may be an appropriate remedy where there has been undue delay.

It seems to me that this must always be borne in mind in considering bail applications, and that, with the passage of time, a person otherwise denied bail may become eligible to apply for and be granted bail. Such a result may, of course have been reached absent a Human Rights Act. In

Cain (No 1) (2001) 121 A Crim R 365, Sperling J was considering a bail application in late February 2001 from a person who had been held in custody since January 2000 for a serious drug offence where there was a presumption under the New South Wales *Bail Act 1978* against the grant of bail. His Honour granted bail under quite strict conditions, stating (at 367):

He has been in custody for over a year. I am told by the Crown that the present charges might not come to trial (for) a further year. The prospect that a private citizen who has not been convicted of any offence might be imprisoned for as long as two years pending trial is, absent exceptional circumstances, not consistent with modern concepts of civil rights.

Practitioners and courts in Canberra will need to exercise care in seeking to apply decisions of courts in other jurisdictions to matters where the Human Rights Act may be relevant. While there are sound reasons why interstate intermediate court of appeal decisions on uniform or common form legislation ought be afforded great respect (*Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485), we must remember that, in working out the meaning of a provision in the Bail Act 1992, the interpretive effect of the Human Rights Act must be considered. No such consideration would concern a court in another State, and so it may follow that, although the statutory words are the same or similar, a different interpretation may be placed on a presumption against bail by a court required to apply the Human Rights Act. An

approach settled by the New South Wales Court of Appeal may not conclude the matter. An approach adopted by this Court before the Human Rights Act came into force may also need to be reconsidered. This has been the UK experience. The UK Court of Appeal in *R v Offen* [2001] 2 All ER 154 held that the passage of the Human Rights Act 1998 made it necessary to reconsider a previously settled view of what amounted to “exceptional circumstances” to avoid life imprisonment for a second serious offence.⁴

Regulatory offences

One area where the Human Rights Act may have a significant impact on the work of prosecutors and courts is in the area of what may be described as regulatory offences - offences created by delegated legislation such as, regulations, rules or codes of practice. It is frequently observed that, while Parliaments and Parliamentary scrutiny of bills committees tend to watch very carefully when enhanced powers are given to police, or new statutory offences created, sometimes less attention is given to delegated legislation. Indeed, it is commonly observed, both here and, I suspect, throughout Australia, that wider search, entry and seizure powers are frequently given to regulatory inspectors exercising

⁴ cf. *R v Kelly* [1999] 2 All ER 13

powers under health, occupational safety or municipal government-type functions than are given to sworn police officers.

It is in the area of regulatory offences that, it seems to me, the Human Rights Act may have real teeth. As the Human Rights Commissioner has set out in her presentation, it was never the intention that the Human Rights Act would allow a court to strike down a law made by Parliament. The Act is an interpretive model, with the courts required to read a statutory provision up or down so as to be consistent with the enumerated human rights, and empowered to issue a declaration of incompatibility if it is not possible to interpret the provision in a manner consistent with human rights. Under such a model, in common with New Zealand and the United Kingdom, the final determination as to the form of the law lies with the elected members of the Parliament.

But the courts do have power under the Human Rights Act to strike down delegated legislation. Confronted with a provision in delegated legislation that seems to conflict with a human right, the starting point would be to look to the rule or regulation making power, and apply the requirement in s 30 of the Act that:

in working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.”

This may well mean that a general form of rule making power may need to be read down so as to be consistent with the enumerated rights found in provisions such as s 12 Privacy and reputation, s 13 Freedom of movement, s 15 Peaceful assembly and freedom of association, s 16 Freedom of expression, s 18 Right to liberty and security of person, and s 22 Rights in criminal proceedings.

By giving effect to the statutory command to interpret a Territory law, in this case the rule or regulation making power, in a manner consistent with human rights, a court may well conclude, applying conventional administrative law doctrines, that the delegated legislation is invalid, as being beyond the rule making power, when properly read consistently with the Human Rights Act. The rule or regulation would then be held to be invalid as being ultra vires.

It seems to me that there could be real issues concerning broadly drafted regulatory offences or broadly drafted powers of search, seizure and inspection contained in delegated legislation, particularly older and less frequently used provisions. It would be prudent for any prosecutor considering such an offence, and any defence counsel representing a person charged with such an offence, to carefully consider the source of

the delegated law, which has either created the offence or created the power to search, enter and seize evidence.

Some of these regulatory provisions contain requirements to furnish information that may amount to self-incrimination.⁵

Although perhaps not so directly connected with the work of prosecutors, it seems to me that all ACT government agencies would be well advised to remind themselves of the doctrine set down by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273. This case held that, as a matter of administrative law, there was a legitimate expectation that Commonwealth decision makers exercising power under enactments would take into account rights set down in treaties to which Australia was a party. The decision was controversial at the time, and various statutory regimes have been adopted by the Commonwealth Parliament to seek to lessen its impact on Commonwealth administration. But in the ACT, the human rights that in *Teoh's* case were set out in treaties ratified by Australia but not implemented by statute, have been set out in Part 3 of the Human Rights Act. It seems to me that this would, on the clear authority of *Teoh*, give rise to a legitimate expectation that whenever any officer of an ACT

⁵ cf. *Brown v Stott* [2001] 2All ER 97

agency exercises a statutory power, human rights would be considered, and failure to do so could amount to a breach of procedural fairness, and the setting aside of the decision. Again, this seems to me to be a fertile area for exploration.

Conclusion

The Human Rights Act has certainly not had a revolutionary impact on the practice of the criminal law in Canberra. There has not been a flood of litigation, and magistrates and judges have not been overwhelmed by masses of English, New Zealand or European jurisprudence on equivalent human rights statutes. As one commentator noted in her paper at the anniversary conference, “the critics who before the Act became law were predicting that the Act would become a lawyer’s picnic and that courts would be overwhelmed with unmeritorious claims now seem to have changed tack, and have begun to deride the Act as ineffective”.⁶

The Human Rights Act is, however, beginning to have an impact. In the first year of its operation, it has been cited in seven decisions of single judges of our Court⁷ and one decision of the Court of Appeal.⁸ As

⁶ Gabrielle McKinnon, *The ACT Human Rights Act, the First Year*, paper at conference cited above in footnote 1

⁷ *R v O’Neill* [2004] ACTSC 64, *Szuty v Smyth* [2004] ACTSC 77, *Firestone v Australian National University* [2004] ACTSC 76, *R v YL* [2004] ACTSC 115, *R v Martiniello* [2005] ACTSC 9, *Fletcher v Harris* [2005] ACTSC 27, *Robertson v ACT* [2005] ACTSC 35

⁸ *Buzzacott v The Queen* [2005] ACTCA 7

awareness of the Act increases, and practitioners become more familiar with its provisions and the impact of the English and New Zealand schemes, we can expect that the impact will grow. A noted English academic has observed that, in the first year of operation of the UK Act:

prosecutors have been heard to claim that defence advocates refer to the Convention and particularly to *Teixeira de Castro v Portugal* (1999) 28 EHRR 101 (pronounced in a more or less exotic manner) whenever the going becomes difficult, whereas defence lawyers sometimes claim that prosecutors have been trained to assure courts that the substance of Art 6 corresponds with the common law, and that no reconsideration of English law is needed.⁹

Perhaps for a while vague references to the Human Rights Act might be a bit like “the vibe” of Mabo and the Constitution made famous by Dennis Denuto in *The Castle*.¹⁰ In time, however, the full impact of the legislation will emerge.

⁹ A Ashworth, *Criminal Proceedings After the Human Rights Act: The First Year*, op cit note 1.

¹⁰ (and believe it to not, the subject of an entry in T Blackshield, M Coper and G Williams, *The Oxford Companion to the High Court of Australia* (Oxford VP 2001, 82-83) – found between Canberra and Causation).