

## What rights are covered in the ACT Human Rights Act?

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Elizabeth Kelly has helpfully explained the structure of the HRA and I will focus on the actual rights that are protected by these structures. The ACT HRA translates many of the rights contained in the ICCPR, one of the central human rights treaties of the international community and a treaty to which Australia has been a party for 24 years. In this sense, the HRA offers a limited account of human rights: it makes clear that the human rights set out in Part 3 of the HRA are civil and political rights alone.<sup>1</sup>

The legislation makes its debt to the ICCPR explicit – for example through a note to Part 3 and Schedule 1 contains a useful table indicating the links between specified rights in the HRA and articles in the ICCPR. Thus, we find in Part 3 (in order) rights to recognition and equality before the law, the right to life, protection from torture and cruel, inhuman or degrading treatment, protection of the family and children, the right to privacy and reputation, freedom of movement, freedom of thought, conscience and belief, and freedom of assembly and expression, the right to take part in public life, rights to liberty and security of the person, a series of rights to due process and fair trial and rights in criminal proceedings; the list ends with the right to be free from slavery and servitude and the rights of minorities.

It's clear however if you compare the wording of the ICCPR and the HRA that the translation from the international to the domestic sphere is not a literal one. The ICCPR rights have been adapted for local circumstances – this approach follows that of the Canadian Charter of Rights and Freedoms of 1982 and the NZ Bill of Rights of 1990, which both incorporated many of the ICCPR rights, but which defined them in slightly different ways. It is distinct from the approach of the UK HRA of 1998, which simply adopts the language of the ECHR and some of its protocols.

For a start, there is a reordering of the treaty rights into what the Explanatory Memorandum to the HRA describes as a 'more logical sequence'. So, the rights in Part 3 begin with the right to recognition as a person before the law and to equality and end with the rights of minorities. The logic of this sequence is not readily apparent (for example, why aren't the rights to equality and protection of minorities linked in some way?) but it's certainly useful to have collected the rights relating to the criminal process together.

A second feature of the local translation of the international rights is a modernization of their language. In many cases, this is a welcome development – for example, the tiresome and outmoded use of the male pronoun in the ICCPR is replaced by more neutral references to 'everyone'. It is not clear however how some aspects of the change of language will affect interpretation of the provisions. For example, section 8 collapses together a number of ICCPR rights relating to equality and non-discrimination and uses

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<sup>1</sup> Section 5.

the words ‘distinction’ and ‘discrimination’ as synonyms, unlike the original ICCPR provisions. It will be interesting to see whether this has any effect on interpretation.

A third feature of the ACT translation of the ICCPR rights is additional text to clarify their meaning. The most striking example of this is in section 9’s definition of the right to life which states that it applies ‘to a person from the time of birth’. Although the right to life has been generally interpreted internationally as applying only after birth, this qualification was included, I understand, because of a fear that the HRA may be used to wind back the relatively progressive abortion laws here in the ACT.

A fourth feature of the HRA is the dropping of ICCPR text in some cases. One example of this editing is in the way that the right to a fair trial has been translated in the ACT HRA. Article 14 begins with the words ‘All persons shall be equal before the courts and tribunals.’ This sentence does not make it into section 21 of the ACT HRA, although it is an important guarantee. The Human Rights Committee, the main interpreter of the ICCPR, has held it to preclude the use of special courts to determine cases that would be otherwise heard in the regular judicial system; it has also found a violation of this right in an Austrian case when a prosecutor was able to appeal a decision while the defendant was not. The Committee has also indicated that this sentence would preclude total immunity from suit.<sup>2</sup> It may be that this is not a significant omission because of the broad right to equality in section 8, but it would be useful to know more about the reasons for the change. In this respect, there may be a need for more documentation of the drafting process, and I’m delighted that Andrew Byrnes and I will have a chance to work with the ACT government on such a project through an ARC Linkage Grant.

One of the most perceptible changes in the ICCPR rights as they appear in the ACT HRA is the fact that they have been largely stripped of their limitations. For example the rights to freedom of thought, conscience, assembly and expression are all qualified in the ICCPR by various statements to the effect that these rights can be limited as is necessary to protect public safety, order, health, morals or the rights and freedoms of others. In place of the specific limitation clauses of the ICCPR, the HRA offers a general limitation clause in section 28: this section borrows the language of the Canadian Charter of Rights and Freedoms and states that ‘HR may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.’ This will be a very interesting and important provision and will require the ACT government to present evidence of the necessity of limitations to the broadly expressed rights. It will be important for the judiciary to insist that the government present detailed arguments for limitations and not to accept without scrutiny bland assurances that curtailing rights are necessary.

An exception to the absolute expression of the rights is section 21, which sets out the ICCPR article 14 right to a fair trial and includes the treaty’s recognition that trials may be closed in certain circumstances. It is not clear why these limitations were expressly included. The limitations clause in section 28 also raises the question whether any of the rights protected in the HRA can be understood to be absolute. For example, the right to

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<sup>2</sup> See Joseph et al *Cases and Materials on the ICCPR* 2<sup>nd</sup> ed 2004, p 395.

be free from torture and other cruel, inhuman and degrading treatment is accepted as an absolute right in international law. Article 4 of the ICCPR confirms this absolute status by making clear that no derogation from this right is ever permitted even in times of national emergency.

The ICCPR also recognizes other rights such as the right to life, the right to be free from slavery, the right not to be imprisoned for failure to fulfill a contractual obligation, and the non-retrospectivity of criminal law to bind governments at all times. It is not clear how this absolute nature will be recognized by ACT courts. The preamble recognizes that 'Few rights are absolute' and goes on to recognize the possibility of balancing rights in the name of democracy and in the name of competing claims of rights. It remains to be seen how adequate these signposts are if the government seeks to justify placing restrictions on these rights.

In the translation process from the international to the local level, we can observe that some of the international rights have been excluded. Most prominent perhaps is the right of self-determination, contained in article 1 of the ICCPR. The EM tells us that this is a group right, rather than an individual right, but this does not explain why the right of self-determination could not be included in an interpretative bill of rights. I note that the Chief Minister's press release yesterday mentions the right of self-determination as it applies to Indigenous peoples. He referred 'the persistent and irrational denial of self-determination for indigenous people' as one reason why we should welcome the ACT HRA. I agree with this sentiment, and it makes the omission of the right of self-determination more surprising.

Other rights that did not make the cut from the international to the domestic include the prohibition on propaganda for war and national, racial or religious hatred contained in article 20 of the ICCPR and the right to form trade unions in article 22, presumably because these are matters for federal jurisdiction. Given the interpretative nature of the HRA and its dialogue philosophy, it may have been more coherent to include these rights.

I understand that others today will deal with the ACT HRA's failure to include economic, social and cultural rights and I will not address this issue now. I might be thought to be rather unobjective on this issue as the Bill of Rights Consultative Committee recommended that these rights, drawn from the partner treaty to the ICCPR, the ICESCR, be included. To me, the failure to include these rights leaves the HRA relevant to a limited part of the lives of ordinary residents of the ACT. For example, the rights to health, housing and education are as integral to human dignity as the right to vote. The distinction between the two types of rights is a largely artificial one, the product of the cold war drafting context of the two treaties. For this reason, I welcome the promise in section 43 of the HRA that the A-G will review the HRA within a year to reconsider this issue.

## **Conclusion**

I've tried to show how the ACT HRA offers a modern translation of the ICCPR and that we need to be aware both of what has been gained and of what has been lost in translation. I think the ACT's translation offers great clarity of language in many areas, although it fails to translate some aspects of the international human rights canon.

Despite these gaps, we should celebrate this first Australian attempt to directly incorporate a system of human rights norms into our law and judge it on its own terms. This is a really significant step in the protection of human rights in Australia and will allow the development of an Australian (or at least an ACT) jurisprudence of human rights that will in turn contribute to international interpretations of rights. After all, international human rights law is, as the well-known Australian human rights expert, Philip Alston, once said, one percent about the international and 99 percent about the local.

In this sense, as Jorge Luis Borges, the great Argentinian poet, wrote about a translation of an English play into Spanish, it may turn out that 'The original is unfaithful to the translation'. In other words, the ACT translation of the international human rights guarantees may turn out to be more progressive and effective than the original on which it is based.