

1995

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY**

BILL OF RIGHTS BILL 1995

EXPLANATORY MEMORANDUM

(CIRCULATED BY AUTHORITY OF MR TERRY CONNOLLY M.L.A.)

INTRODUCTION

This Bill of Rights is intended to set out the rights of the people of the ACT. It will provide a clear and accessible statement of rights, which can be used to guide the Government, the bureaucracy, and members of the ACT Assembly in making and interpreting laws. It will also provide clear guidelines to the police and the courts, as well as to people who are arrested or charged, of their rights and responsibilities. It will give members of our community the ability to have existing and new laws interpreted in line with this statement of rights and freedoms. The Bill of Rights will encourage a recognition in the community of the balance which must be struck between the rights of the individual and the interests of society as a whole.

CONSULTATION PROCESS

The Issues Paper A Bill of Rights for the ACT? was tabled in the Legislative Assembly and released to the public in December 1993. Since then, the Attorney-General's Department has received both written and oral submissions from the public. Interested schools and community groups have been addressed, and both government and non-government groups were consulted. A public seminar on this topic was held in May 1994 as part of the consultation process. The majority of submissions received were in favour of a Bill of Rights.

I released a draft Bill in December 1994 so that members of the Canberra community could comment on it. The Bill as introduced takes into account submissions made to me up until the change of Government in

the Australian Capital Territory. I would hope that the Government will make available to the Assembly the benefit of the full consultation.

EXPLANATORY NOTES

These notes are intended to clarify the Bill of Rights Bill 1994 and to explain the effect some sections could have.

Part 1 - Preliminary

The first two sections of the Bill deal with technical legal matters and do not affect the substance of the Bill.

Part II - Application and General Effect of Act.

Application

A Bill of Rights sets out the rights which citizens can enforce against the government. If the government or one of its agencies infringes people's rights, they can take it to court. The Bill of Rights Bill will not apply between citizens of the ACT. The effect of clause 3 is that the Act only applies to the Government: the ACT Executive (which consists of the Chief Minister and the other Ministers), the Legislative Assembly, the judges of the Supreme Court and the ACT bureaucracy, as well as the police. It also applies to people who perform functions they have been given by legislation or regulations such as the ACT Discrimination Commissioner or the Director of Family Services.

Ambit of rights and freedoms

Clause 4 sets out how far each person's rights and freedoms can extend. In theory every person possesses all the rights set out in this Bill, and can exercise them to their fullest extent, all the time. In reality, however, because we live in a society with many other people, the rights of each individual person must be balanced against the rights of other individuals, and sometimes against the interests of society as a whole.

This clause states that the rights and freedoms discussed below can be restricted by reasonable limits set out in laws, which can be justified in our free and democratic society. This means that where a right is limited by a law, a court interpreting the law must first decide:

- (a) whether the limitation is reasonable; and
- (b) whether it is justifiable.

Interpretation of the Bill of Rights Bill

Clause 5 describes the way in which judges can use the Bill of Rights Bill. The section states that if an Act or regulation can be interpreted consistently with the Bill, it should be interpreted that way. The Act (or regulation) is not invalid if it conflicts with this Bill, but if it can be interpreted to ensure the rights set out in the Bill are met, it should be.

Attorney-General to report on inconsistent Bills.

Clause 6 requires the Attorney-General to tell the Legislative Assembly if any Bill which is introduced is inconsistent with the Bill of Rights Bill. This is intended to alert Members of the Assembly to the fact that

propose legislation may encroach on people's rights. This is intended to apply to both Government and non-Government Bills.

Part III Enforcement of Rights and Freedoms

Application to Supreme Court.

Clause 7 sets out the ways in which a person (or group of people) can apply for relief under the Bill of Rights Bill. If any right or freedom of a person is infringed (or may be infringed), that person can apply to the Supreme Court. When the court has considered that matter, it will make a declaration of the rights of a person. This declaration will be binding on the ACT Government.

There are a number of ways applications can be made to the Supreme Court. Firstly, a person whose rights have been (or may be) infringed can apply to the court himself or herself. Secondly, a person may act as a representative of another person who is unable to seek relief in his or her own interest. This could include a person who, because of a physical or mental impairment, is unable to represent themselves. Thirdly, a person may act as a member of a class of persons, or in the interests of that class. An example of this could be where an Act of the Legislative Assembly infringed the rights of a group of people (such as an act which limited what teachers could say in the classroom) and one person brought an action on behalf of that group. Finally, a person may bring an action in the public interest.

Part IV Rights and Freedoms

Fundamental Freedoms

Freedom of thought, conscience and religion.

This is the freedom to hold opinions and beliefs without interference or discrimination from others.

In international law, this freedom also includes the liberty to express one's religion or belief by worship, teaching, practice and observance. This freedom is already provided for by the Commonwealth Constitution, but including a provision in the Act Bill of Rights will offer additional protection for it.

Freedom of expression

Clause 9 provides for freedom of expression. This allows people to express, through speech or some other form, their opinions or beliefs, regardless of how outlandish those views may seem to others. This freedom, however, like all rights and freedoms in this Bill, is not absolute. It must be balanced against the interests of society as a whole and against the other rights and freedoms in this Bill. For example, even though censorship laws strictly speaking, restrict freedom of expression, this restriction could be permitted under the Bill provided it was shown that there are benefits to society in limiting the type of material available to the public.

Freedom of peaceful assembly

This freedom includes the right to hold public meetings, protests or marches and to meet and exchange ideas and beliefs. Freedom of peaceful assembly is also the right to show dissent from existing policies and practices. It has been said that

*"[T]he basic problem is one of compromise between public order and convenience on one hand and individual liberty on the other."*¹

Freedom of association

This right applies to unions, clubs, societies and professional bodies. The basic principle involved is that people may associate with whom they wish.

There has been debate in recent years as to whether freedom of association includes the freedom not to associate, which would be contrary to compulsory union arrangements in certain industries. The better view seems to be that freedom to associate does not imply its opposite, so this clause in the ACT Bill of Rights Bill would not affect the current arrangements for compulsory unionism or other similar arrangements.

Democratic rights

Democratic rights are rights to participate in public affairs and to vote in free and fair elections. Clauses 12, 13, 14 and 15 set out the minimum

¹M.G Abernathy The Right of Assembly and Association 2nd edition, University of South Carolina Press, 1981, p4.

standards necessary to ensure this. Clause 12 sets out the minimum qualifications of electors to participate in Legislative Assembly elections. Clause 13 states that the right to vote includes the right to vote in a secret ballot. Clause 14 affirms that Legislative Assembly elections shall be by equal suffrage. This means that each vote shall have the same value. Finally, clause 15 provides that every person has the right to participate in political activity by

- forming a political party
- recruiting members for a political party
- campaigning for a political party
- freely making political choices.

Legal rights

Right to life, liberty and security

Clause 16 states that every person has the right to life, liberty and security of the person. The right to life, as it has been interpreted by the courts, means the right, once born, to remain alive. It does not include the right to life of the unborn child, nor does it include the right to death (eg euthanasia). The community is deeply divided on the issues of abortion and euthanasia, and a Bill of Rights is not the appropriate means to resolve this dispute. This Bill is not intended to address questions of abortion or euthanasia.

The right to liberty deals with physical liberty, and the right to security of the person protects against violations of bodily integrity and psychological trauma.

Torture or cruel treatment

Clause 17 states that everyone has the right to freedom from torture and from cruel, inhumane or degrading treatment or punishment.

Unreasonable search or seizure

Under clause 18, everyone has the right to be secure against unreasonable search or seizure of their person or property. This would not apply, for example, to police officers with a search warrant searching a property.

Rights of persons arrested or detained

Rights of persons charged

Standards of criminal procedure

These provisions, which are set out in clauses 19, 20 and 21, are the basic minimum standards for the treatment of people who are arrested (or detained), charged, and defendants. In many cases they reflect the existing common law position in our criminal justice system.

Clause 19 sets out these rights of people who are arrested or detained:

- to be told immediately why they have been arrested or detained;
- to consult a lawyer and to be informed of that right;
- to have the lawfulness of their arrest or detention determined, and to be released if it is unlawful;

- to be treated with respect and humanity;
- to be charged quickly or else released; and
- to remain silent, and to be informed of that right.

Clause 20 sets out these rights (many of which are similar) for people who have been charged:

- to be told of the type of charge and the reasons why they have been charged;
- to be released unless there is a good reason that they be detained;
- to consult a lawyer, and to be given enough time and the facilities to prepare a defence;
- to be given legal assistance where this is necessary for justice and the person is unable to pay for it;
- to be tried only for an offence which existed in law when the act was committed; and
- to be tried for each offence once only.

Clause 21 sets out the minimum standards of criminal procedure. These are the minimum standards of procedure which are needed to ensure a fair trial. These include:

- the right to be tried in public by an independent and unbiased court;
- if the offence has a penalty of imprisonment for more than one year, the right to trial by jury;
- the right to be tried without extensive delays;
- the right to be presumed to be innocent until it is proven that a person is guilty;
- the right of a person not to be forced to incriminate himself or herself;

- the right to be present at the trial, and to defend the charges;
- the right to examine witnesses for the prosecution and witnesses for the defence under the same conditions;
- the right to appeal against the conviction or the penalty in a higher court; and
- the right, if the person being tried is a child, to be dealt with according to their age.

Interpreter and assistance for the hearing impaired

Clause 22 gives the right to an interpreter in criminal proceedings for persons who are hearing impaired or who do not understand the proceedings because of language difficulties. This applies whether these persons are parties to the proceedings or are witnesses.

Equality before the law

Clause 23 protects three different kinds of equality:

- equality under the law
- equal protection of the law
- equal benefit of the law.

This allows the courts to look behind laws which appear to treat people equally, and to look to the effect of legislation. These equality guarantees are intended to ensure that people are equally protected by and benefit equally from legislation.

Freedom from discrimination

Clause 24 states that every person has a right to be free from discrimination on the following grounds:

- race,
- colour
- ethnic or racial origin
- religious or ethical beliefs
- sex
- age
- impairment
- marital status, or
- status as a parent or carer

This list need not be exclusive. This right will complement the existing protection from discrimination contained in the ACT *Discrimination Act 1991*.

The clause contains a proviso that ensures that special measures to address special needs does not amount to discrimination

Right to education

Clause 25 notes that every person has the right to reasonable access to the Territory education system. This right is aimed at giving everyone the opportunity to participate fully in society and to develop their talents and skills.

Rights of indigenous inhabitants

Rights particular to indigenous peoples

Clause 26 sets out a number of rights which will apply to Aboriginal persons and to Torres Strait Islanders.

Aboriginal persons and Torres Strait Islanders have the right to revive, maintain and develop their cultural characteristics and identities in two areas:

- their religion and spiritual beliefs; and
- their languages and educational institutions;

They will also have the right to maintain and develop their relationships with lands and natural resources which they have traditional ties with.

Aboriginal persons and Torres Strait Islanders will have the rights to have their social, cultural, religious and spiritual values treated with respect, to determine their own priorities for cultural development, and to be consulted on decisions which affect them as Aboriginal persons and Torres Strait Islanders. They will have the right to have regard given to their special needs as Aboriginal persons and Torres Strait Islanders.

Other rights

Right to privacy

The right to privacy covers a number of aspects of people's lives.

Firstly, it protects an individual's right to personal privacy: a person's bodily integrity, his or her personal life, and his or her sexual behaviour fall within this category. Secondly, a person's private communications with others are protected: their letters and phone calls, their financial

affairs and medical history for example. And thirdly, in the public arena, a person's right to privacy can also protect their honour and reputation from unjustified attacks.

Rights particular to children

Clause 28 sets out the rights in this Bill which only apply to children. Children are vulnerable to exploitation and need particular protection because of their dependence on adults. Every child has the right to live with his or her parents (or with one of them if the parents do not live together). It is assumed that the child's parents are the most appropriate people to do this unless this is not in the best interests of the child. The Territory has an obligation to care for a child if there is no other appropriate person to do this. Clause 28 also provides for other specific rights for children:

- shelter, health care and recreation;
- not to be neglected;
- not to be exposed to an unreasonable risk of injury or harm;
- not to be subject to forced labour;
- to be treated with respect for their inherent dignity; and
- to express views on all matters affecting their wellbeing, and to have those views taken into account.

Other rights and freedoms not affected

Other rights and freedoms which are not mentioned in this Bill are not affected simply because they are not mentioned.

Application to legal persons

Where possible the rights set out in this Bill will apply to companies as well as to individuals.