‘THE ACT HUMAN RIGHTS ACT 2004: A NEW SCRUTINY CHALLENGE’ DR HELEN WATCHIRS, ACT HUMAN RIGHTS & DISCRIMINATION COMMISSIONER, 2 MARCH 2005

NINTH AUSTRALAISIAN & PACIFIC CONFERENCE ON DELEGATED LEGISLATION AND SIXTH AUSTRALAISIAN & PACIFIC CONFERENCE ON THE SCRUTINY OF BILLS, LEGISLATIVE ASSEMBLY FOR THE ACT

Introduction

The ACT is the first jurisdiction in Australia to enact a Bill of Rights, following an extensive community consultation process, including a deliberative poll. Professor Hilary Charlesworth chaired the ACT Bill of Rights Consultative Committee, which reported in May 2003 – it found that existing protections were piecemeal and that a Bill of Rights would provide an accessible statement of fundamental and inalienable rights. Scrutiny of bills using an explicit human rights framework, based on the UN International Covenant on Civil and Political Rights, is a new challenge in terms of ‘rights awareness’ for the ACT. It is especially important as the Asia Pacific lacks a regional human rights regime with regional conventions or decision-making bodies, such as courts (eg the European or Inter-American Courts of Human Rights).

Interpretative model

The Act is described as an ‘interpretative’ model, using several scrutiny mechanisms from UK and NZ precedents. The model respects constitutional boundaries of the Westminster system of democratic government – the legislature, enacts and amends laws; the judiciary, which interpret and enforce laws; and the executive, which administers and implements laws. Section 30 of the Act sets out a new principle of statutory interpretation: ‘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.’ There is no direct right of access to litigate under the Act, but human rights arguments and interpretations may be used in any legal proceedings, for example in criminal proceedings, or in civil cases under the *Administrative Decisions (Judicial Review) Act 1989* – in the UK half of its AD(JR) cases involve human rights arguments (despite a direct right of access to the courts, unlike the ACT).

A topical and ironic example is the Lord Chancellor’s (Lord Falconer) interpretation of the *Marriage Act 1949* and the *Registration Service Act 1953* – using a UK *Human Rights Act 1990* analysis (which requires legislation to be interpreted wherever possible in a way that is compatible with rights, such as marriage and equal protection of the law) it appears that Prince Charles (who I understand is not a human rights fan) is not excluded from marrying Camilla Parker Bowles in a civil ceremony.

Preamble and limitations

The Preamble to the Act is a moral compass – it states that ‘human rights are necessary for individuals to live lives of dignity and value.’ It also ‘encourages individuals to see themselves, and each other, as the holder of rights, and as responsible for upholding the human rights of others.’ Responsibilities are inherent in human rights. Section 28 sets out a proportionality test for placing restrictions on

rights – ‘human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.’ Is the objective is sufficiently important to justify a limitation & does the limitation meets this objective? The 3-part test in international jurisprudence is:

- the limitation adopted must achieve the **objective** at issue;
- the **means** should impair as little as possible the right/freedom in question; and
- there must be a proportionality between the **effects** of the limitation & the objective.

Parliamentary scrutiny – Compatibility Statement

Under section 37 the Attorney-General is required to prepare a compatibility statement about whether a government Bill is consistent with human rights – usually this is a one sentence statement. This is a centralised function (as is the case in NZ, where over thirty Bills have been said to be incompatible), rather than being devolved to other portfolio Ministers (as is the case in the UK, where only three Bills have been said to be incompatible). This obligation is also a positive one, and all government Bills must have a compatibility statement, rather than the lesser obligation to only alert the legislature in the case of incompatible Bills (the NZ model). There does not appear to be any obligation to report on the compatibility of amendments introduced on the floor of the Legislative Assembly, but human rights should be considered in practice.

In 2004, 80 Bills were introduced (60 government and 20 private member’s Bills) into the Legislative Assembly and 50 were passed - 2 are still current, 8 were negatived and 10 were discharged (i.e. lapsed). This number of Bills (compared to 233 Commonwealth Bills) is quite significant for a small jurisdiction, with only 17 Members of the Legislative Assembly.

Pre-enactment scrutiny process

Pre-enactment scrutiny of Government Bills work for the Attorney-General’s compatibility statement is centralised in the Bill of Rights unit in the Department of Justice and Community Safety (JACS). The Unit is responsible for scrutinising all Government Bills, regardless of what agency is proposing the law. This is important as support for the *Human Rights Act 2004* was uneven with several agencies seeking their own legal advice to oppose the Bill – this has been in part addressed within the Executive by:

- improved coordination through the Inter-Departmental Committee convened by DJACS;
- requiring all agencies to report on measures taken to respect, protect and promote human rights in their Annual Report;
- including a section in Cabinet Submission cover sheets on human rights impact; and
- the release of a Plain English Guide to the Act and expected publication of Scrutiny Guidelines by DJACS.

To properly scrutinise all Bills (and subordinate legislation) will be a challenge given the current resources of the Bill of Rights Unit and the LA Standing Committee.

Parliamentary scrutiny – LA Standing Committee

Under section 38 the relevant ACT Legislative Assembly standing committee must report to the Assembly about human rights issues raised by Bills (including private member's Bills) – this is the Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) chaired by your host, Mr Bill Stefaniak, and whose part-time legal advisor, Peter Bayne, will be speaking about his work tomorrow. The Committee operates at a technical level and its role is to 'examine all Bills and Subordinate legislation presented to the Assembly.' The Committee's terms of reference contain principles of scrutiny that enable it to operate in the best traditions of non-partisan scrutiny, with multi-party membership of three people (one member each from the opposition, the government and the Greens). It is important to note that section 39 of the HR Act provides an 'opt out' measure by ensuring that the validity, operation or enforcement of a Territory law is not affected if sections 37 (compatibility statement) or 38 (Scrutiny Committee) are not complied with.

Human Rights and Discrimination Commissioner's role

My role as Commissioner under section 41 is to review the effect of Territory laws on human rights and report in writing to the Attorney-General, who is then required to present a copy of the report to the Legislative Assembly within six sitting days. My first report under the Human Rights Act will be on the length and conditions of detention at the Belconnen Remand Centre, following an advice I prepared for the Attorney-General in 2004. On 2 July 2004 ACT Corrections held a seminar on implications of the Human Rights Act – relevant issues discussed then, and that will be considered in my Report include:

- objects of new Prison/Sentencing laws – aim rehabilitate
- loss of liberty, not all human rights, eg dignity
- restrictions on the right to vote breach right to take part in public life? (*ACT Electoral Act 1992* tied to *Commonwealth Act 1918*)
- segregation of accused/convicted (ACT prisoners in NSW – detain in BRC), adults/children (s.19 & 20)
- Behavioural Management Regime unlawful (NZ: *Taunoa)*
- freedom of expression (s.16) - journalist interviews
- inhuman & degrading treatment (s.10) – isolation
- right to life (s.9) – violence/racism by cellmates (UK: *Edwards, Amin*)
- privacy (s.12) – strip searching visitors and surveillance

Another role of the Commissioner as an independent statutory office-holder is to advise the Attorney-General about human rights. I have provided five advices in 2004:

1.delays in BRC (fair trial)
2.Federal Anti-terrorism Bill 2004 (association)
3.Prisoners' right to freedom of expression
4.Gungahlin Drive Extension Bill 2004 (judicial review)
5.Indigenous shared responsibility agreements - welfare (race discrimination)

The number of Cabinet Submissions in the ACT is high, including not only Bills, but also policy proposals that may lead to legislative implementation. Unlike most other human rights agencies in Australia I am given access to relevant draft Cabinet Submissions and in some cases my opinion on human rights compatibility issues in draft Bills, such as enabling emergency ECT, may support the Bill being released as an exposure draft to enable further community consultation. This follows the growing trend in the UK towards releasing draft Bills for public consultation before finalizing them and introducing them to Parliament, which increases the possibility of making influential contributions on the protection of human rights.

I also have a role to provide education to the community, and activities include:

- convening a Human Rights Community Forum 10 December 2004 (International Human Rights Day) with stakeholders;
- speaking at relevant conferences, such as today's;
- implementing an education strategy, e.g. artwork award in primary schools; and
- developing and holding HRO training programs (general & legal).

I have not appeared before the Legislative Assembly Standing Committee, but the Committee considers my Annual Report like other statutory office-holders in the JACS portfolio, and I can be called to its hearings. On 11 February 2004 the Director of Public Prosecutions, Richard Refshauge, commented to the Committee that the Human Rights Act had not caused a deluge of litigation, nor was it a criminals' charter, but that its influence was 'pervasive' in his work, eg bail.

<u>Judicial Scrutiny</u>

The Supreme Court has the power under section 32 to issue a Declaration of Incompatibility where a Territory law is inconsistent with human rights, but it does not affect the validity of the legislation in question. No declaration has yet been issued by the Court. Where the Court is considering making a Declaration, it must notify the Attorney-General and the Human Rights Commissioner, who respectively have the power to intervene, or seek leave to intervene. The Attorney-General must table the Declaration in the Legislative Assembly within six sitting days, and the government is required to respond within six months.

In the ACT there have been four cases in the Supreme Court where the Human Rights Act has been referred to:
•*R v O'Neil:* double jeopardy (common law))
•*Firestone v ANU:* Workplace Protection Order (restrict rights movement/association)
•*Szuty v Smythe*: defamation (freedom of expression)
•*R v YL*: Crispin J would not coerce 7-year-old child to give evidence against his stepmother and referred to the rights of the child (s.11). He refused a nolle prosequi (decline to proceed) on the basis of the rights to a fair trial, and avoiding unreasonable delay (s.21-22).
One Administrative Appeals Tribunal case, *Merritt & Commissioner for Housing* referred to the rights of family and children in considering access to priority housing.

I expect that much more common than Declarations of Incompatibility will be the court's process of 'reading down' or 'reading in' words when interpreting legislation.

For example in the House of Lords case *Mendoza v Godin-Ghaidan* (2004) the terms 'husband and wife' were amended to read 'as if they were husband and wife' to include same-sex partnerships. In the case of incompatible subordinate legislation, the courts may strike them down if the principal Act (under which they are authorised) is human rights compliant – the regulations could easily be found to be *ultra vires* using administrative law principles. Lord Carswell in the latest issue of the *Australian Law Journal* described the impact of the *Human Rights Act 1998* on the UK judiciary and profession as 'seamless', and that the avalanche of litigation expected did not occur.

International models

It is useful to consider the different scrutiny procedures in other common law jurisdictions with Bills of Rights, and the main issues that have arisen in the process. In particular, since the ACT model draws on the UK and NZ laws, the UK Joint Committee on Human Rights and the New Zealand's scrutiny processes for their Bill of Rights are of interest. The New Zealand experience is of special value as it has a unicameral legislature, similar to the ACT.

The UK Human Rights Act 1998

Ministers responsible for introducing government Bills to either House of Parliament (Commons or Lords) are required under section 19 to provide a written statement before the second reading, on whether the Bill is compatible with the European Convention on Human Rights. The Convention is similar to the ICCPR, but also contains one economic/social right (education). When a Bill passes from one house to another, a second statement is required, taking into account any amendments made. It is important to note that there is no specialist independent monitor of the UK *Human Rights Act*, which came into force in 2000 – however, a government commitment in the White Paper of 2004, *Fairness for All: A New Commission for Equality and Human Rights* has been made to establish a Commission in 2006. The British Institute of Right's Report *Something for Everyone: The Impact of the Human Rights Act and the Need for Human Rights Commission* recommended establishing as Commission as a centre of expertise to monitor, champion, promote human rights, and provide education about the principles behind the Act and attempt to achieve systemic change

UK Joint Committee on Human Rights

The Joint Committee on Human Rights was established in January 2001 to evaluate human rights implications of Bills. Its role is to advise both Houses about whether rights have been fully respected in Bills, and to point out any legislative provisions where doubts about compatibility remain. The Committee is composed of 12 members who are drawn from both Houses of Parliament, and with representatives from the three main political parties and beyond. This composition is designed to make the Committee independent from government influence and to act in a collegiate way that transcends party politics.

The Committee questions Ministers, either orally or more usually in writing, before publishing its report to both Houses of Parliament, on subjects ranging from homelessness to police reform. Its report on the *Anti-Terrorism, Crime and Security Bill 2001* prompted the Home Secretary to make a number of changes to the Bill.

The Government's guidance to Departments about these statements of compatibility makes it clear that statements are not to be made unless the Minister is satisfied that the balance of arguments favours the view that the Bill is likely to survive Convention scrutiny in the courts. A statement of compatibility has been withheld on only three occasions. The most recent occasion was in connection with the *Civil Partnership Bill 2004,* which makes provision for same-sex couples to enter into civil partnerships with each other, a status with rights and responsibilities akin to civil marriage. In June 2004, an amendment was made in the House of Lords that extended civil partnerships to close relatives over 30 years of age who have lived together for 12 years. This introduced discriminatory provisions and manifest anomalies, and therefore the responsible Minister changed the statement of compatibility. The Explanatory Notes to the Bill explain in detail why it does not now meet Convention rights. It is expected that the House of Commons will remove the incompatibility.

The Committee's work covers subordinate as well as primary legislation, and includes Private Members' Bills, eg the *Patient (Assisted Dying) Bill.* In the UK only 15 Declarations of Incompatibility have been made in five years, but they have been described as a rare 'booby prize'– the person litigating does not get a remedy and the government or other respondent can be embarrassed by deficient laws. Three Declarations of Incompatibility has been issued in the area of mental health. For example when the UK Joint Committee on Human Rights examined a draft remedial order to amend the *Mental Health Act 1983* in the light of a declaration of incompatibility made by the Court of Appeal in respect of a reverse onus of proof for fitness to discharge involuntary patients, (*R (on the application of H) v. MHRT, North and East London Region* [2001]) the Committee wrote to stakeholders and experts asking for their views, which were taken into account by the Committee in its report to the Minister for Health. The draft order was withdrawn and the Minister instead made an order with immediate effect, using the 'urgent' procedure for such cases.

The first legal advisor to the Committee, Professor David Feldman, in his article 'The Impact of Human Rights on the UK Legislative Process' identified seven crucial factors affecting the likelihood of human rights standards impacting on legislation:

1. The varying approaches to human rights in Government Departments – especially in discussing the human rights issues arising from Bills outside of government;
2. The stage in the process at which human rights points are made – the earlier the better;
3. The time available for scrutiny of particular provisions – when amendments are introduced during the passage of a Bill, the time for scrutiny is reduced;
4. The centrality of a proposal to a Department's policy – a human rights challenge that attacks a central aim of a policy is less likely to produce a change in legislation than a critique that accepts the central aim is capable of being achieved in a human rights compatible way, but suggests additional safeguards to ensure that it can be implemented in a focused, proportionate and non-arbitrary way;
5. The nature and quality of the arguments advanced – a critique that identifies a particular provision as engaging a specified human right, and

explains why the provision is unlikely to be compatible with the right in the light of relevant case-law on the subject, is more likely to influence opinion in the Department than a broad-brush appeal to the values inherent in human rights or a particular right;
6. The source of human rights critique – criticism from groups with vested interests may be less influential than the view of well-informed and respected NGOs and experts in a field, but criticism from within Parliament is particularly likely to attract a reasoned and, often, reasonable response; and
7. the quality of the design of Parliament's institutions for dealing with human rights – the UK Joint Committee has been very active in its approach to legislation and has extended Parliament's awareness of human rights issues, beyond just Convention rights to include other human rights treaties as well.

New Zealand

Section 7 of the *Bill of Rights 1990* requires the Attorney-General to alert the House to apparent inconsistency with the BOR on the introduction of Government Bills. For non-government Bills, the Attorney-General is required to report as soon as possible after introduction (this may be the practice in the ACT without being a requirement). Parliamentary Counsel are directed to send copies of all Government Bills to the Ministry of Justice to be vetted by an officer in the Legal Services Group. Bills promoted by the Ministry of Justice are sent to the Crown Law Office for vetting, which avoids any perception of conflict of interest. In the case of Member's Bills, the Ministry of Justice is required to examine it for consistency as soon as possible. The officer conducting the examination is required to report to the Attorney-General and the Chief Parliamentary Counsel on whether or not the Bill contains any provisions, which appear to be inconsistent. Reports of apparent inconsistency issued by the Attorney-General are publicly available documents, tabled in the House of Representatives and later published. Failure to report an inconsistency would have potentially serious political consequences. All Bills must be referred to a Select Committee for consideration. Also the NZ Law Commission when recommending reform proposals to Government is required to test them against the provisions of the BOR.

Conclusion

As the Human Rights Commissioner I am extremely supportive of having an early public consultation process. Given that this Act is primarily a 'dialogue' model in civil society, which does not have a direct right of access to the courts for individuals (which would be much easier to provide human rights education to the public), it is important that the public does have an opportunity to voice their concerns over proposed laws which affect them. Government departments in instructing Parliamentary Counsel and the Standing Committee in examining Bills need to explore and consider any apparent inconsistency with standards and must be receptive to representations from stakeholders. The scrutiny process should be interactive in order to improve the transparency of the reasoning supporting the proposed legislation, and satisfying the proportionality test. Some issues appear to be recurrent ones, such as: search and seizure powers; involuntary detention and treament; reverse

onuses of proof; and strict liability offences (as the ACT implements the model Criminal Code)

In the UK (and increasingly in the ACT) there is a the growing trend towards public consultation, and particularly publishing Bills in draft for consultation before finalizing them and introducing them to Parliament, which increases the possibility of making influential contributions on the protection of human rights. However, when members move amendments during the passage of a Bill to introduce new clauses in order to give effect to what are essentially new policies, the time for scrutiny and consultation, and so for reasoned assessment of the human rights implications, is reduced. The later the amendments are moved, the less chance there is to scrutinize them. By the same token, it seems that the Government may be less willing to listen to arguments at that stage, mainly due to the time pressure to get the Bill through its stages. Yet these amendments may have a significant impact on human rights, and are not covered by the compatibility statement to the Bill as introduced.

The scrutiny mechanisms in the *Human Rights Act* respect parliamentary sovereignty, and stimulate informed public debate about whether inconsistent legislation should be amended or repealed. The Act is not litigation driven and aims to create a human rights culture in the community. The ACT is the most well educated jurisdiction with a higher average income than others. Not surprisingly, the ACT and Victoria had the highest numbers supporting the 1999 referendum to establish a Republic. Victoria's Justice Statement 2004 commits the government to a consultation process for considering whether to enact a Charter of Rights and Responsibilities, and its Department of Justice has sent staff to some ACT human rights conferences. I understand that the Attorney-General Rob Hulls has a strong interest in the area, as is the case with judges in other jurisdictions, such as David Malcolm, CJ of the WA Supreme Court (also Vice President of the National Committee on Human Rights Education). A private member's Bill was been introduced in SA, but I understand did not succeed.

The lack of a national human rights frame of reference has resulted in recent High Court decisions authorising the indefinite detention of stateless persons, i.e. *Al Khafaji* and *Al-Kateb*. At the International Criminal Congress in Canberra in 2004 CJ Spiegelman (NSW) favourably referred to our ACT Human Rights Act, and Julian Burnside, QC (winner of the 2004 HREOC Human Rights Medal) called it a 'beacon' of hope.

Through a thorough and inconclusive scrutiny process, the Human Rights Act is more likely to be woven into the fabric of law and society in the ACT. Over time it will infuse public debate, influence public attitudes, shape legislation and improve the conduct of service providers. In this way the vision of building a human rights culture as outlined in the Canberra Social Plan has more chance of success. In concluding I would like to thank Victoria Coakley who provided essential research for this paper.