



# HUMAN RIGHTS & DISCRIMINATION COMMISSIONER

## ACT Human Rights Commission

Secretary  
Standing Committee on Administration and Procedure  
ACT Legislative Assembly  
GPO Box 1020  
CANBERRA ACT 2601

|                                                                                    |                                                    |
|------------------------------------------------------------------------------------|----------------------------------------------------|
|  | A.C.T. LEGISLATIVE<br>ASSEMBLY<br>COMMITTEE OFFICE |
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Dear Sir/Madam

**Inquiry into the appropriate mechanisms to coordinate and evaluate the implementation  
of the Latimer House Principles in the governance of the ACT**

I refer to the Inquiry of the Standing Committee on Administration and Procedure into the appropriate mechanisms to coordinate and evaluate the implementation of the Latimer House Principles in the governance of the ACT.

Many of the matters within the Latimer House Principles are relevant the work of the ACT Human Rights Commission.

Please find attached the Commission's comments on the matters within the Principles most relevant to the Commission's work. The contact officer for this issue at the Commission is Mr Sean Costello (ph: 6205 2222).

Yours sincerely

Dr Helen Watchirs  
Human Rights and Discrimination Commissioner  
5 June 2009

## **LATIMER HOUSE PRINCIPLES RELEVANT TO ACT HUMAN RIGHTS COMMISSION**

Below is a selection of the Endorsement of the Commonwealth (Latimer) House Principles on the Three Branches of Government<sup>1</sup> ('the Latimer House Principles'), most relevant to the work of the ACT Human Rights Commission.

### **About the Commission**

The Human Rights Commission (the Commission) is established under the *Human Rights Commission Act 2005* (the HRC Act). The objects of the HRC Act include:

- promotion of the human rights and welfare of people living in the ACT by making recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community,
- promotion of the rights of users of disability services, health services, services for children and young people and services for older people, and
- promotion of improvements in services for those groups.

The Commission's functions are detailed in section 14 of the HRC Act. In summary, the Commission has a statutory oversight role in respect of service provision to people with disabilities and their carers, older people, children and young people and their carers, and health consumers. The Commission also assists the ACT community in relation to discrimination complaints in a wide variety of public life on specified grounds, such as disability, race, age and sex.

The Commission has an interest in the development and management of legislation and policies that affect the human rights of the community, and the health and wellbeing of children and young people in the ACT.

### **Relevance to the Latimer House Principles**

The work of the ACT Human Rights and Discrimination Commissioner is most relevant to the Latimer House Principles.

The Human Rights and Discrimination Commissioner handles complaints of discrimination, provides information and community education about rights and promotes equality under discrimination and human rights law. She also reviews the effect of ACT laws on human rights, and advises the Attorney-General on the operation of the *Human Rights Act 2004* ('the HRA').

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<sup>1</sup> Extract from Hansard, 11 December 2008, pp 311-314.

This is consistent with the Objectives of the Latimer House Principles:

*The objective of these Principles is to provide, in accordance with the laws and customs of each Commonwealth country, an effective framework for the implementation by governments, parliaments and judiciaries of the Commonwealth's fundamental values.*

### **Further Commentary on Most Relevant Principles**

Below are further details of those Latimer House Principles most relevant to the work of the ACT Human Rights Commission, in particularly the Human Rights and Discrimination Commissioner.

In considering the rights protected under the HRA, s.28 of the Act must be considered. Section 28 states that human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society. Subsection 28(2) includes relevant factors which should be considered:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

In this way, almost all the rights protected in the HRA can be subjected to limitations in legislation, provided that such limitations are reasonable and proportionate. However, some rights, such as to be free from torture (s10), are considered under international law to be non-derogable, that is absolute and should not be limited.

### **Relevant Excerpts from the Latimer House Principles**

#### **(2) Objective**

##### ***(b) Parliament and the Judiciary***

*(i) Relations between parliament and the judiciary should be governed by respect for parliament's primary responsibility for law making on the one hand and for the judiciary's responsibility for the interpretation and application of the law on the other hand*

The ACT *Human Rights Act 2004* is based on a 'dialogue model' of human rights protection. That is, the three arms of Government are tasked with different obligations under this model. This is best represented in the below diagram:

| <u>Executive</u>                                                                                                                                                                                                                                                                                             | <u>Parliament</u>                                                                                                                                                                                                | <u>Courts</u>                                                                                                                                                                                                                                                                                            |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> <li>• Human rights built into laws and policies</li> <li>• Attorney-General: Assesses all new laws for compliance with human rights and reports to Parliament</li> <li>• Public Authorities required to act and make decisions in accordance with human rights</li> </ul> | <ul style="list-style-type: none"> <li>• Passes laws after assessing them for compliance with human rights</li> <li>• Debates human rights issues</li> <li>• Has the final say on all ACT legislation</li> </ul> | <ul style="list-style-type: none"> <li>• Where possible, interpret law to be compatible with the HR Act</li> <li>• Supreme Court can make a declaration that a law is not consistent with the HR Act</li> <li>• Supreme Court can determine violation applications against public authorities</li> </ul> |

The relationship most relevant to Principle 2(b) is that between the Courts and Parliament. Under s.37, the Attorney-General must prepare a written compatibility statement for all government Bills. Under s.32 of the HRA, rather than making a law invalid if it is found incompatible with human rights, the Supreme Court instead refers it back to the Legislative Assembly. Under s.33, the Attorney-General receives a copy of the declaration of incompatibility, and must present a copy of the declaration to the Legislative Assembly within 6 sitting days. The Attorney-General must prepare a written response to the declaration and present it to the Legislative Assembly within 6 months. If the Legislative Assembly believes the law should remain in its current form, after community debate, then a law inconsistent with human rights remains in force. In this way, the Legislative Assembly remains the primary 'law making' body, with ultimate decision making power about how to deal with laws incompatible with human rights. However, the dialogue model allows the community to have an opportunity to debate the appropriateness of that decision in the time between the declaration of incompatibility being made and the Assembly's consideration of the declaration.

In contrast, in Victoria, the *Charter of Rights and Responsibilities Act 2006* provides that a court cannot issue a declaration of incompatibility in respect of laws made under 5 years ago where Ministers have tabled compatibility statements.

### **(c) Independence of Parliamentarians**

*(i) Parliamentarians must be able to carry out their legislative and constitutional functions in accordance with the Constitution, free from unlawful interference.*

*(ii) Criminal and defamation laws should not be used to restrict legitimate criticism of parliament; the offence of contempt of parliament should be narrowly drawn and reporting of the proceedings of parliament should not be unduly restricted by narrow application of the defence of qualified privilege.*

These principles are consistent with three rights enshrined in the ACT HRA:

- Right to Freedom of expression (s.16) – everyone has the right to hold opinions without interference. Under s.16(2) everyone also has the right to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds. Freedom of expression covers a wide range of activities such as industrial action, artistic expression, political demonstrations, publications and whistle blowing.
- Taking part in public life (s.17) – under which every citizen has the right and opportunity to:
  - (a) take part in the conduct of public affairs, directly or through freely chosen representatives;
  - (b) vote and be elected a periodic elections
  - (c) have access, on general terms of equality, for appointment to the public service and public office.

### **(d) Independence of the Judiciary**

*An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation, consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.*

*To secure these aims:*

*(i) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:*

*(A) equality of opportunity for all who are eligible for judicial office;*

*(B) appointment on merit; and*

*(C) that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination.*

*(ii) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place.*

*(iii) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought.*

*(iv) Interaction, if any, between the executive and the judiciary should not compromise judicial independence. Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties. Court proceedings should, unless the law or overriding public interest otherwise dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner. An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary.*

These principles are consistent with the objects of the *Discrimination Act 1991*. Also, the Human Rights Act protections (although not technically applicable to judicial appointments, as opposed to general employment):

- Equality before the law (s.8) – under which everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- Right to Fair Trial (s.21) – under which everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal. Like the Latimer House Principles, this is based on the Westminster principle of separation of powers and independence of the judiciary from the executive government.

***'(e) Public Office Holders***

*(i) Merit and proven integrity, should be the criteria of eligibility for appointment to public office.*

*(ii) Subject to (i), measures may be taken, where possible and appropriate, to ensure that the holders of all public offices generally reflect the composition of the community in terms of gender, ethnicity, social and religious groups and regional balance.'*

Again, these principles are consistent with the intent and content of the *Discrimination Act*, and the protection of equality before the law and right to Fair Trial under the *Human Rights Act*, as set out above.

#### ***'(h) The law-making process***

*In order to enhance the effectiveness of law making as an essential element of the good governance agenda:*

*(i) there should be adequate parliamentary examination of proposed legislation;*

*(ii) where appropriate, opportunity should be given for public input into the legislative process; and*

*(iii) parliaments should, where relevant, be given the opportunity to consider international instruments or regional conventions agreed to by governments.'*

The Human Rights Act, which applies to all ACT laws, expressly states international instruments may be referred to in interpreting human rights (s.31).

As set out above, s.37 of the HRA requires that the Attorney-General prepare a written statement, known as a compatibility statement, regarding all government bills presented to the Legislative Assembly, which states whether, in the Attorney-General's opinion, the bill is consistent with human rights. If it is not consistent, the Attorney-General must detail how.

However, the Commission notes that following the recent ACT Election, ACT Labor's agreement with the ACT Greens requires that all compatibility statements are prepared with detailed reasons for the Attorney-General's opinion that a Bill is compatible. This has provided another useful scrutiny tool of new legislation.

The Commission notes that increasingly compatibility statements are being prepared with reasons for the Attorney-General's opinion that a Bill is compatible, a step we believe aids in the proper scrutiny of legislation. Section 38 also provides that the Standing Committee on Justice and Community Safety, performing the duties of a Scrutiny of Bills & Subordinate Legislation Committee, reports to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. In practice this Committee has provided detailed scrutiny of all Bills, notifiable instruments and disallowable instruments presented to the Assembly.

### ***(i) Oversight of Government***

*The promotion of zero-tolerance for corruption is vital to good governance. A transparent and accountable government, together with freedom of expression, encourages the full participation of its citizens in the democratic process. Steps which may be taken to encourage public sector accountability include:*

*(i) The establishment of scrutiny bodies and mechanisms to oversee government, enhances public confidence in the integrity and acceptability of government's activities. Independent bodies such as public accounts committees, ombudsmen, human rights commissions, auditors-general, anti-corruption commissions, information commissioners and similar oversight institutions can play a key role in enhancing public awareness of good governance and rule of law issues. Governments are encouraged to establish or enhance appropriate oversight bodies in accordance with national circumstances*

The Human Rights Commission was established as an independent agency under the *Human Rights Commission 2005*, consistent with this principle. In International law the 'Paris Principles' are also relevant<sup>2</sup>. These are a set of principles endorsed by the United Nations about the way national institutions protecting and promoting human rights should be governed and function.

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<sup>2</sup> See 'Principles relating to the status and functioning of national institutions for protection and promotion of human rights', endorsed by the United Nations Commission on Human Rights in March 1992 (resolution 1992/54) and by the General Assembly in its resolution A/RES/48/134 of 20 December 1993