Speech by Renée Leon, CEO Department of Justice and Community Safety [*♣]
Australian Bills of Rights – The ACT And Beyond
Australian National University, Wednesday 21 June 2006

I would like to thank the Regulatory Institutions Network at the Australian National University and the Gilbert and Tobin Centre of Public Law at University of New South Wales for inviting me to speak to you. It is a pleasure to address such a forum from the perspective of a jurisdiction that has built up a unique experience of bills of rights in Australia.

I would first like to acknowledge that we are meeting on Ngunnawal land, and to express my respect for their elders and for the continuing contribution they make to the Canberra community and culture.

For two years we have been pioneers in the quest to 'bring rights home' in Australia. Now we are on the inside, looking out at a wider debate on the introduction of bills of rights in Victoria, New South Wales, Tasmania and, one day we hope, the Commonwealth. It is only a matter of time before we get to share our experiences of building a culture of human rights within the judiciary, the legislature and the executive.

Shortly, the Attorney-General will table a report on the operation of the ACT Human Rights Act, drawing on these experiences. The

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report reflects a review requirement established in the legislation itself. Under the Act, the Attorney is required to review the first year of its operation, including specific issues relating to the protection of economic, social and cultural rights. He is required to table a report in the Assembly by 1 July 2006. However, as the Assembly does not sit in July, the Attorney has indicated he will table a report when the Assembly next sits, in August.

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The Department's approach to the review and some of the key issues were telegraphed in detail a year ago at the second Human Rights Office Community Forum. At the forum we released a 'Framework Document' which explored the statutory terms of reference and canvassed issues surrounding economic, social and cultural rights.

The Framework Document also canvassed issues related to key aspects of the human rights 'dialogue model': the obligation of public authorities to comply with human rights and the nature of the compatibility statements issued by the Attorney-General.

The analysis of these issues was expanded to form a Discussion Paper released by the Chief Minister at the start of April this year.

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The statutory review requirement was the product of amendments to the Human Rights Bill in 2004. The amendments were moved by the ACT Greens and were accepted by the Assembly without

extensive debate. They reflected some issues about certain departures from the model originally proposed by the ACT Bill of Rights Consultative Committee.

The statutory terms of reference require, *first*, that the Attorney General review the operation of the Human Rights Act over the course of the year ending 1 July 2005.

Second, that the review consider whether, taking into account this first year of operation, the Act should include economic, social and cultural rights.

Lastly, that the review consider whether environment-related rights would be better protected if they were overseen under statute by an environmental expert.

In this way, the terms of reference prescribe a cascading focus for the review, starting from the operation of the Act, its impact on the judiciary, the legislature and the executive and its effect in developing a human rights dialogue and culture in the ACT.

My theme today, and the point of the review, is to examine the performance of the Human Rights Act, to look inside its engine room and to assess its impact on the rights dialogue, against past and present expectations in government and beyond.

As the terms of reference suggest, a sound performance against realistic expectations will only build the case for the recognition of economic, social and cultural rights.

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So, how has the legislation performed?

By all accounts, the Human Rights Act has had a major impact on the business of government at least in relation to the process of policy and legislative development.
At the twelve-month stage we reported the existence of a robust dialogue in which the will of the executive is brought to rest within the reasonable limits permitted by the Human Rights Act. It continues to be a vigorous and engaging process that teaches in its own way the sorts of inevitable lessons learned by other human rights jurisdictions.

One of the obvious lessons is that few people warm to the seemingly alien landscape of human rights law until they are confronted with issues at the core of their business. The tension dissolves with the realisation that the Human Rights Act establishes a mechanism to articulate the policy rationale in an empirical and objective manner. In this sense, the human rights imperative becomes a principle about good government.

We do not necessarily espouse a view of rights as trumps but as a set of standards and a methodology to gauge the appropriate limits and practical implications of our laws. But we are prepared to hold agencies to principles that have been grounded in human rights jurisprudence and are capable of defining the limits of lawful decision-making.

For example,

We regularly test proposals for strict liability against the presumption of innocence.

We have tested statutory secrecy provisions against the right to equality of arms in court proceedings.

And, we have tempered preventative detention laws to protect the right to liberty.

Over the last two years, we have developed consistent views about threshold human rights requirements and have widely communicated those views to agencies.

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By comparison, the Human Rights Act may have had less effect on the judiciary.

The various surveys of human rights cases, and the database established by the research project here at the university, suggest there has been limited engagement with the principles or the machinery established by the Human Rights Act.

As Dr Helen Watchirs, the Human Rights and Discrimination Commissioner, has noted, the Act has only had 'a small impact in a handful of cases where parties have specifically argued human rights issues'. The consensus, expressed by Gabrielle MacKinnon, is that there has 'not yet been a flood of litigation as a result of the Act'.

The most significant case to date was the one last year in which the Legal Aid Office sought a declaration of incompatibility against the domestic violence legislation.

It involved both the Attorney-General and the Human Rights Office as intervenors. But, despite detailed submissions on the human rights issues, and the operation of the HRA, the judgment is notable for its relative silence on these issues.

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One possible conclusion from the outcomes to date is that the basic machinery within the Human Rights Act is not engaging the legal profession and advocacy bodies.

When the legislation was being prepared, the government was given a template by the ACT Bill of Rights Consultative Committee which included an orthodox interpretive provision and application clause, a direct right of action and a declaration of various rights covering different aspects of social, economic, civil and political life.

When the legislation was introduced, the Assembly was given a bill which included a fairly sophisticated interpretive provision and a core set of civil and political rights. The bill was silent on the duty of public authorities to comply with human rights.
It was silent on any direct right of action for failures to comply with such a duty.
And it was silent on the range of appropriate remedies to address such breaches.

To casual observers, the direct right of action would have been a significant omission. Human rights lawyers would have been surprised, and potential litigants disappointed, not to find some trace of the classic trinity: public authority, conduct and remedy.

So, it was to be expected that, in the partial shadow cast by the Human Rights Act, there would develop a substantial body of opinion and conjecture about these issues.

For example, within days of the Act commencing, some were speculating about a derivative duty to comply with human rights, arising from the interpretive provision or from an implied application clause, thought to be found in the Legislation Act.

We have also seen arguments that the duty could apply with horizontal effect to the private actions of private entities, such as the commercial activities of companies, or the private actions of public entities, such as the business of government contracting.

Drawing on the notion of a derivative or implied duty to comply with human rights, we have been invited to contemplate a sea change in the growth of administrative law. The outlook is for a more refined process of judicial review, with a more sophisticated integration of human rights principles such as reasonable limits and proportionality.

Generally, the Act was expected to apply to the conduct of public authorities. And the efforts to explore this application are to be encouraged and commended. But, the truth is, not all of these wider expectations coincide with the drafting intention.

The direct duty and right of action were not incorporated on the basis that agencies required time to adapt policies and practices. There was thought to be a need to protect the Territory from the risk of substantial claims in the early days of the Act.

The alternative approach taken was to rely on the interpretive provision. This is the requirement for decision makers, tribunals and courts to interpret Territory Acts and Instruments 'as far as possible' in a way that is consistent with human rights.

Subsection 30(1) of the Human Rights Act states that '[i]n working out the meaning of a … law, an interpretation that is consistent with human rights is to be preferred *as far as possible*'. Subsection 30(2) makes this rule subject to the 'purposive test' or the requirement that '[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.

From the outset, these two provisions were thought to form one simple proposition:

> *Where there is a choice between two valid interpretations, the human rights one must prevail, unless this would defeat the obvious purpose of the legislation*.

It was envisaged that the 'interpretive provision' would have a direct effect on the conduct of government officials through its effect on legislation. They would be required to consider human rights in their decision-making processes. They would have to exercise statutory discretions consistently with human rights

unless the legislation clearly authorised action that was inconsistent with those rights.

The previous papers to this forum, and the submissions to the review, confirm that there is a broad acceptance of these propositions among key stakeholders in the ACT.

However, the challenge is to bring those propositions home to wider audiences.

A number of submissions to the review express disappointment over the lack of a clear and definitive body of caselaw on the operation of the interpretive provision.
I could suggest that this is not for want of trying, at least on the part of the Attorney-General, the Human Rights Office and the Legal Aid Commission.

But, in fairness, it reflects the fact that these principles have a long gestation.

In reality, we have only witnessed one contest over these issues in the Supreme Court. It may be too early to lament the lack of a coherent human rights jurisprudence and it may be premature to begin trying to sketch in the gaps within existing caselaw.

It will take time for the human rights discourse to produce a human rights dialogue. We may just have to adjust our expectations to accommodate a longer process.

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Elsewhere, however, it does seem many of us had greater expectations for change.

One of the key aspects of our dialogue model is the compatibility statement.

Under the Human Rights Act the Attorney-General must table for every government bill a statement as to whether he or she thinks the bill is consistent with human rights. If the bill is not consistent, the statement must identify or explain the inconsistencies.

In most cases, a one-page statement is issued as evidence of the conversation between the sponsoring agency for a bill and the Human Rights Unit in the Justice Department.
The approach of the department has been to conduct compatibility assessment through consultation between the department and the agency responsible for the relevant bill.

We aim to define the questions for agencies to ask themselves, and assist them to explore those questions rather than to receive the definitive answer to their problem. We cannot be a closed shop or a black box if we are to build a human rights culture.

Over the past two years, and particularly in the submissions to the review, there has been strong interest in expanding the contents of these compatibility statements.

They cite inconsistencies in the quality and depth of the Explanatory Statements and argue that the process is inaccessible for the Assembly and for the wider community. They make a case

for a targeted approach in which we provide a summary of reasons, of varying length or depth as appropriate, for bills that raise significant human rights.

While we acknowledge the case for greater content in the compatibility statements, it is worth remembering the local and comparative context in which they are written.

- First, the Act only requires the Attorney-General to explain the *inconsistencies*. There is no requirement for him or her to explain the human rights consistency.

- Second, the Act only requires the Attorney-General to *certify* compatibility.
  There is no requirement for him or her to make the case for compatibility.

- Third, the Act only sets up a dialogue between the Executive and the Legislature.
  There is no requirement for the Attorney-General to address a wider audience.

While it may have its critics, the model has an unmistakable focus on the Assembly. So, it is significant that some of the criticism has come from the Assembly itself.
For example, the legal adviser to the local scrutiny of bills committee has suggested that the current practice contributes little to the dialogue in the Assembly or beyond.

While Explanatory Statements sometimes make a sophisticated case for compatibility, we do not seem to have developed a

consistent or reliable practice across government. This has been, and will continue to be, an important project for my department.

However, we must continue to resist becoming a black box on compatibility issues.

The Consultative Committee acknowledged that the compatibility statement was 'not a fail safe' mechanism and could not determine or dispose of the human rights issues.

As a minimum, it must trigger, and provide evidence of, dialogue within government. It does serve a 'crucial purpose' in ensuring that we all engage in the scrutiny process.

And, while it is important to inform the Assembly, we should be reluctant to abandon our focus on stating the case for compatibility within the Explanatory Statement.
The justice department does have expertise in the analysis of human rights law, but the agency responsible for a bill really should have the capacity to make the case.

Provided we can deliver clear thinking on the threshold human rights principles, and we are satisfied that a bill is compatible with our thinking on the rights issues, other agencies should be encouraged to engage in the human rights dialogue themselves.

Our challenge is to communicate our thinking on those principles to the Assembly.

Where possible, we should try to communicate that thinking to the wider community. Some of the submissions appropriately identify exposure drafts as a practical vehicle for engaging the community in the pre-legislative scrutiny of human rights issues.

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As most of you will be aware, the Human Rights Bill did not incorporate the various economic, social and cultural rights recommended by the Consultative Committee.

A casual observer may have been disappointed by the omission, but not surprised.

It is difficult to measure the impact of this approach, but several submissions to the review suggested that it has reduced the relevance of human rights to disadvantaged groups in the community.

As the Government has argued, and as the submissions attest, nobody would disagree with the value of recognising social, economic and cultural rights in some form.

Around 70 percent of submissions on the Discussion Paper addressed the protection of these rights and over 80 percent of those supported their inclusion in the HRA.

However, few submissions addressed the threshold issues associated with these rights. So, while we have a clear appreciation of the sorts of rights that would be encouraged, we

still do not have a clear direction about the way in which they would be recognised or enforced.

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In summary, it seems, the particular mechanisms chosen to establish the dialogue model in the ACT have proven to be fertile ground for academics and commentators.

For our part, we will continue to maintain our focus on developing a human rights culture within government, in the hope that the dialogue will become more meaningful amongst a wider set of commentators, participants and stakeholders.

As a broader objective, I hope we all continue to think critically about the scope and effect of the Human Rights Act and to maintain its relevance to the community.