

Paper for conference on
"Assessing the First Year of the ACT Human Rights Act"

REGNET
Australian National University
29 June 2005

Pre-enactment dialogue about proposed laws under the influence of the *Human Rights Act 2004 (ACT)*

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Pre-enactment dialogue and its virtues

What I have to say is based on my experience as the legal adviser to the Scrutiny of Bills and Subordinate Legislation Committee of the Legislative Assembly of the Australian Capital Territory. In the first place, this affects my understanding of "a human rights dialogue". This notion may have gained its current understanding in some of the academic literature as a way of justifying and explaining some of the consequences of the schemes of judicial review of legislation found in the Canadian, New Zealand and United Kingdom bills of rights.¹

In this paper, it is taken in another sense and used to refer to pre-enactment dialogue - or more simply to talk and debate - about how far proposed laws conflict with the HRA. I am moreover concerned only with the dialogue which takes place in public, or which becomes part of a publicly available record.² Of course, a great deal of debate and talk occurs within government. A legislative proposal might be addressed, in no particular order, by the proponent government agency, the Parliamentary Counsel's Office, the department of Justice and community Safety, and the Human Rights Office. No doubt this debate has an effect on the final form of a Bill, and probably in many cases in a way that enhances an HRA right.³

But this internal dialogue cannot have the beneficial effects of a public dialogue. First, a public dialogue may produce a rich legislative history which, in turn, might be brought into account in any curial assessment of whether a provision of an Act is HRA compliant, or, if is not, how it might be interpreted so as to be HRA compliant.

* The opinions expressed in this paper should not, of course, be ascribed to the Committee.

¹ Leighton McDonald, "New directions in the Australian bill of rights debate" [2004] *Public Law* 22 at 27-28.

² At times, there occurs quite significant public dialogue about the effect of the HRA on how government administers and implements the law; an instructive interchange involving the Chief Minister may be found in the transcript of a hearing of the Assembly Estimates Committee on 1 June 2005. I leave this exchange aside because it is not directed at a proposed law.

³ The fact that bill has been reviewed by JACS officers, or by the HRO, may be employed by the Executive in defence of objections or queries from bodies such as the Scrutiny Committee.

Secondly, to the extent that pressure groups and the wider public get involved in the debate, a rights focused culture will thereby be produced.

The HRA framework for pre-enactment dialogue

HRA Part 5 is headed "Scrutiny of proposed Territory laws", but the operative provisions apply only to bills (and not, thus, to proposed subordinate laws),⁴ and, furthermore, only to bills presented to the Legislative Assembly by a Minister. In respect such a bill, the Attorney "must prepare a written statement (the compatibility statement) about the bill for presentation to the Legislative Assembly": s 37(2). That statement must state "whether, in the Attorney-General's opinion, the bill is consistent with human rights" (s 37(3)(a)), and, "if it is not consistent, how it is not consistent with human rights" (s 37(3)(b)).

Section 38 deals with scrutiny of bills. It is obviously linked to s 37, but its scope of operation is not confined by it. Section 38(1) provides:

38 Consideration of bills by standing committee of Assembly

(1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

It will be noted that all bills are subject to a Committee review under HRA s 38. As matters stand in January 2005, the relevant Committee is the Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee). The relevant Committee is henceforth referred to as the 'Scrutiny Committee'.

When read with HRA s 5, s 38 refers only to those rights stated in the HRA. The Act states, however, that it is "not exhaustive of the rights an individual may have under domestic or international law": s 7. As it has been doing for some years, the Committee has regard to both domestic and international law in ascertaining whether a human rights issue arises from its consideration of a clause of a bill.

Section 38 has brought about a significant change in the task of the Committee. It must now assess clauses in bills from a rights perspective on a much broader basis than is the case under its terms of reference as provided for in a resolution of the Assembly.⁵ It requires the Committee to "report ... about human rights issues raised by bills". The word "about" should probably be understood in the sense of "in connection with, on the subject of" human rights issues. The notion of "human rights issues raised by bills" is also very broad. A report on a human rights issue is not confined to making a comment that some clause is, or even may be, in conflict with some rights standard. The Committee might report that a bill enhances rights protections. The Committee is aware that its reports may be consulted by members of the Assembly for the purposes of debate on a bill. A report may thus provide

⁴ This is not particularly significant. In Territory practice to date, by far the greater amount of material or significant statutory change to the law of the Territory has been made by Acts of the Assembly, and not by subordinate law.

⁵ The terms of reference in the resolution require the Committee to "consider" whether clauses of Bills have one or more of a number of effects, including whether a clause "unduly trespasses on personal rights and liberties".

explanation, and outline different points of view, in a way that will facilitate a debate about rights.

Once the Committee reports to the Assembly, the relevant Minister will usually write a response. The Committee will then attach this response to a later report, sometimes with additional comment. In theory, the report and the response are then available to the Assembly when debate on the Bill takes place. In practice, Assembly debate sometimes concludes before the response is made available, and, in rare cases, before the report is available.

Account must also be taken of the role of the Human Rights Commissioner.⁶ This office and its function are established and defined in *HRA* Part 6. In particular, the Commissioner has a function “to review the effect of Territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review”: s 41(1)(a). The Attorney must present a copy of such a report to the Assembly within 6 sitting days of its receipt by the Attorney.⁷

This function does not enable the commissioner to make any report about a Bill, or some other form of proposal for a law. It appears that the commissioner has, however, understood that such a report may be at least a component of an exercise of the function “to advise the Attorney-General on anything relevant to the operation of this Act”: s 41(3)(c).

The stages of pre-enactment dialogue

Without trying to be exhaustive, various stages of pre-enactment review may be identified.

1. Given that a significant amount of legislative proposals originate in the reports of inquiries, the inquiry process might be the first point at which the HRA might be brought into focus.
2. The public disclosure of an “exposure draft” for a proposed law may also promote some pre-enactment dialogue. These drafts are made available on the Legislation Register,⁸ and are usually accompanied by a statement of the period within which comments may be made, and of how persons may make comments. Sometimes there may be an Explanatory Statement, and sometimes this may address the question of compatibility with the HRA.⁹

⁶ The current Human Rights and Discrimination Commissioner is Dr Helen Watchirs; see generally, <http://www.hro.act.gov.au/index.html>.

⁷ The Attorney may, to protect defined private and public interests, omit matter from the report; ss 41(3) and (4).

⁸ <http://www.legislation.act.gov.au/>

⁹ See for example, the Explanatory Statement accompanying the exposure draft for a Mental Health (Treatment and Care) Amendment Bill 2005. This did not, however, address the question of compatibility with the HRA. On the face of it, this was called for, given that the object of the bill was to “allow for the Mental Health Tribunal to make an involuntary emergency electroconvulsive therapy (ECT) order”. The exposure period was one month, and persons were invited to send comments to a nominated public servant.

3. The first point at which the public may be aware of a legislative proposal is on the tabling of the relevant Bill, its Explanatory Statement, and the accompanying compatibility statement. The compatibility statements contribute nothing to dialogue, at least where they merely state that the Bill is compatible. The Explanatory Statement may address HRA issues, sometimes at a relatively sophisticated level. Often the issue identified is whether a provision of the Bill can be justified under HRA s 28.¹⁰ Other than saying that practice varies, there is little to be said by way of a useful generalisation about the quality of the HRA discussion in the Explanatory Statements.

4. Scrutiny Committee review of bills against the HRA statement of rights, and more broadly, produces a publicly available document that does focus, sometimes in depth, on the human rights issues thrown up by bills. In this process, the Committee has addressed many of the HRA rights, and identified a number of key issues involved in their interpretation.¹¹ The response of the relevant Minister will often take analysis of the HRA further, often by way of a justification in HRA terms of the relevant provisions of the Bill. Sometimes the Committee will follow up the Executive response with a reply.

The Committee has not yet held any hearings on a Bill.

5. The final point of pre-enactment dialogue may be the debate in the Assembly on a Bill. At times, human rights issues are at the forefront, and conducted with reference to the work of the Scrutiny Committee and the Executive response.

A case-study of the scrutiny process

The exchanges between the Committee and the Executive concerning the compatibility of strict and absolute offences and the HRA illustrates

- the ways in which this dialogue occurs;
- the complexity of the legal issues thrown up when the compatibility question is faced; and
- the effects of this dialogue.

Section 22 of the *Criminal Code Act 2002* reflects the principle – long regarded by the common law – that a person should not be found guilty of a criminal offence unless they are proved to have intended (or to have the *mens rea*) to commit the acts that constitute the physical elements of the offence. Quite often, however, a Bill will propose the creation of offences of strict liability, or of absolute liability, or of offences containing an element of strict or absolute liability. In such cases, the principle in s 22 is displaced.¹² In terms of the *HRA*, the Committee sees the rights issue as being whether such an offence is compatible with *HRA* s 22(1): "Every one

¹⁰ The derogation clause has a lot of work to do. Section 28 provides: "Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society".

¹¹ A review of the work of the Committee up to early 2005 is in Peter Bayne, "The Human Rights Act 2004 (ACT) – Developments in 2004" in (2005) 8 *Canberra Law Review* 135.

¹² In *Report No 2 of the Sixth Assembly*, the Committee explained the ways in which the Code contemplates qualification of s 22.

charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law".¹³ Alternatively, or in addition, a rights objection may be founded on a person's "right to liberty and security of the person": s 24(1).¹⁴ On whatever basis, the Committee has taken the view that a significant rights issue is raised, and it is fair to say that the most frequently recurring point of disagreement between the Scrutiny Committee and the Executive in the course of the Fifth Assembly concerned proposal in bills for offences of strict or absolute liability. Early in the Sixth Assembly, a large measure of agreement may have been attained, at least at the level of general approach in terms of rights analysis. Some issues remain unresolved.

The Committee had raised rights concerns prior to the operation of the HRA. It considered that they were significant enough to warrant the Explanatory Statement to the relevant Bill providing some justification for displacement of the *mens rea* principle. In *Report No 38 of the Fifth Assembly*,¹⁵ it said that where a provision of a bill (or of a subordinate law) proposed to create an offence of strict or absolute liability, (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why the *mens rea* principle was displaced, and, if it be the case, why absolute rather than strict liability was prescribed; and
- why provision was not made (if that be the case) for a potential defendant to the charge to be able to rely on some defence – in particular, such as having taken reasonable steps to avoid committing the physical elements of the offence.

The Committee expressed a particular concern with offences of strict or absolute liability in respect of which imprisonment was a possible punishment. It suggested that such clauses were liable to be found by the Supreme Court to be incompatible with the HRA.¹⁶

The Committee did not attempt to spell out a framework according to which it might be determined whether an offence of strict or absolute liability was HRA compatible. It invited the Executive to do so.¹⁷ It said:

The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases

¹³ New Zealand case-law suggests this approach; P Rishworth et al, *The New Zealand Bill of Rights* (2003) at 666 and 684.

¹⁴ Canadian courts have tended to approach the issue in this way; see for example *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

¹⁵ <http://www.parliament.act.gov.au/committees/reports/Scrutiny38.pdf>

¹⁶ Pointing to *Re B.C. Motor Vehicle Act* [1985] 2 SCR 486.

¹⁷ Compare to the valuable guidance given to Commonwealth instructing officers in *A Guide to Framing Commonwealth Offences, Civil penalties and Enforcement Powers*, February 2004, (Minister for Justice and Customs), 12-34.

where a particular justification is called for, such as where imprisonment is a possible penalty.

Report No 38 was intended as a general statement of the Committee's position, and was also related specifically to the Workers Compensation Amendment Bill 2003 (No 2). In her response,¹⁸ the Minister stated:

I refer to the Scrutiny Report No 38 – 14 October 2003, and the Committee's comments on the Workers Compensation Amendment Bill 2003 (No 2) relating to the use of strict liability offences in Bill and the absence of the reasonable excuse defence.

The Committee has commented that the explanatory statement has not explained why each offence is or is not a strict liability offence. I understand that the Chief Minister has previously written to the Committee to set out the Government's approach to explanatory statements, which is that they explain the meaning of provisions of a Bill rather than the Government's policy approach. These matters are more appropriately dealt with during debate in the Assembly.

Imprisonment for strict liability offences

The inclusion of the imprisonment in relation to the strict liability was an oversight during the drafting of the Bill, which included amending offence provisions in line with implementation of the Criminal Code. In response to the Committee's comments, I will bring forward Government amendments to remove imprisonment as a penalty under proposed new subsections 191 (5) and (5A) and 210 (1) and (3).

The Minister's response appeared to reject the Committee's key recommendation in *Report No 38* that the Explanatory Statement justify and explain why the Bill proposed that some offences be ones of strict liability.

The Committee nevertheless continued to report, where appropriate, that the relevant Explanatory Statement did not offer an appropriate justification and explanation. Notwithstanding the response concerning the Workers Compensation Amendment Bill 2003 (No 2), the Executive did on occasions provide a justification in its response. In this way, the legislative history was enriched in a way that not only explained to those interested why there was provision for an offence of strict or absolute liability, but which might, in time, assist any consideration of the issue by the Supreme Court.

For example, in *Report No 43 of the Fifth Assembly*, the Committee noted that that while the Dangerous Substances Bill 2003 created offences of absolute liability, (or, more strictly, offences containing an element of absolute liability), the Explanatory Statement did not explain why that was desirable. The Minister's response then provided a justification:¹⁹

¹⁸ See attachment to *Report No 39 of the Fifth Assembly*.

¹⁹ See attachment to *Report No 46 of the Fifth Assembly*.

The Committee has noted that the Bill contains a number of strict liability offences, not all of which have been identified as such in the Explanatory Statement. As the Bill itself identifies when strict liability attaches to an offence or to an element of an offence, the Explanatory Statement has noted in particular cases that strict liability applies to an offence to draw particular attention to this aspect of the proposed offence so as to stress the importance of compliance with the relevant provision.

The justification for the inclusion of strict liability offences in the Bill is, in essence, the need to ensure that persons dealing with dangerous substances at all times act appropriately to minimise as far as possible the risk of harm to people, property and the environment from the hazards associated with dangerous substances. The Government considers that the public interest is best served by ensuring that these risks are minimised, by establishing a regulatory regime that encourages people dealing with dangerous substances to develop a "safety culture" or run the risk of being found in breach of the legislation. The fostering of this safety culture would be more difficult to accomplish without the use of strict liability offences. It should be noted in several instances the Bill contains a cascade of offences, with the strict liability version of the offence having the lowest penalty. Where an offence involves acts or omissions that are done negligently or deliberately, the penalty is higher to reflect the great degree of culpability.

Early in the Sixth Assembly, the Executive provided a statement of general approach in the Explanatory Statement to the Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2004. This Bill was considered by the Committee in *Report No 2 of the Sixth Assembly*.²⁰ The Explanatory Statement said:

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in producing or distributing films, videos or publications as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations. The provisions are drafted so that, if a particular set of circumstances exists, a specified person is guilty of an offence. Unless some knowledge or intention ought be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

The Committee accepted this framework as appropriate, and in addition noted that the Scrutiny of Bills Committee of the Senate of the Commonwealth Parliament, in its *Sixth Report of 2002*,²¹ endorsed as relevant principles the propositions that:

strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation; [or] where its application is necessary to protect the general revenue;

²⁰ <http://www.legassembly.act.gov.au/committees/reports/6scrutiny02.pdf>. The Government response is attached to *Report No 5 of the Sixth Assembly*.

²¹ <http://www.aph.gov.au/Senate/committee/scrutiny/bills/2002/b06.pdf>.

strict liability may be appropriate to overcome the “knowledge of law” problem, where a physical element of the offence expressly incorporates a reference to a legislative provision;

strict liability may be appropriate where it has proved difficult to prosecute fault provisions, particularly those involving intent; as with other criteria, however, all the circumstances of each case should be taken into account; [and]

strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum.²²

The Committee also noted, however, that cutting across these the policies in support of the strict or absolute liability offence were the values stated in the *HRA*: of the presumption of innocence (s 22(1)); of the “right to liberty” (s18(1)); and the principle of proportionate punishment which may be located in s 10. Of course, the policies to support offences of strict or absolute liability may be advanced under *HRA* s 28.

In subsequent reports on Bills which provide for offences of strict or absolute liability, the Committee has referred the Assembly to the consideration of general policy by both the Executive and the Committee in *Report No 2 of the Sixth Assembly*, often to supplement the more justification offered in the relevant Explanatory Statement. The Committee continues to draw to the attention of the Assembly the absence of any justification.

While the key recommendation in *Report No 38 of the Fifth Assembly* has been largely accommodated, some issues of contention remain.

First, the Committee sees an *HRA* issue where strict or absolute liability attaches to only one of the elements of the proposed offence. In *Report No 43 of the Fifth Assembly*, concerning the Dangerous Substances Bill 2003, the Committee observed that:

In no respect does the Explanatory Statement attempt to justify the imposition of absolute liability in [clauses 42 to 46]. The Committee considers that there is a more compelling need for some justification where the offence is one of absolute liability [for,] as the Explanatory Statement acknowledges, there is in relation to such offences less opportunity than exists in relation to strict liability offences for a defendant to escape liability for merely performing the physical elements of an offence. In other words, there is greater intrusion on the right to be found liable only upon the showing by the prosecution that the defendant intended to perform the physical elements (or, in simpler words, that the defendant had a guilty mind).

In her response, the Minister Executive took issue with the description of such an offence as one of “strict or absolute liability”. On closer analysis, however, the

²² The Committee also referred to observations of Dickson J in *R v The Corporation of The City of Sault Ste. Marie* [1978] 2 S.C.R. 1299 at 1310-1311.

response offered a justification for the imposition of absolute liability in the relevant clauses:

The Committee is incorrect in identifying clauses 42 to 46 as absolute liability offences. Absolute liability applies to only one of the elements in the offences contained in clauses 42 to 46. As it does not apply to each offence as a whole, these offences cannot be categorised as "absolute liability offences". As similar approach to drafting was taken in clause 311 of the Criminal Code (Theft, Fraud, Bribery and Related Offences) Amendment Bill 2003. Page 24 of the Explanatory Statement for that Bill contains a useful explanation of the effect of providing that absolute liability applied to one element of an offence, usually the existence of a fact or circumstance, where the accused's state of mind about that fact or circumstance has no logical bearing on his or her culpability for that offence. I note that this approach is consistent with the comments by the Committee in its Scrutiny Report No38 of 2003, which recognises at page 14 that "absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the offender is not relevant".

The issue of HRA compliance is more likely to be acute where the offence is one of absolute liability, and this exchange between the Committee and the Executive may assist in its resolution in a particular case.

Secondly, the Committee has had no success with its suggestion that the Explanatory Statement should explain whether consideration was given to the inclusion of a defence of due diligence (or "reasonable excuse"). The *Criminal Code* does not make such provision, (it not being encompassed within the Code defence of mistake of fact which can be invoked where the offence of one of strict liability²³). On occasions, the Committee has suggested that the Assembly give consideration to insertion of a defence of due diligence. In *Report No 52 of the Fifth Assembly*, concerning the Auditor-General Amendment Bill 2004, the Committee said:

The Committee notes that the physical element in the strict liability offences is described in terms such as that the person "fails to comply" (subsection 14B(1)); or "fails to attend" (subsection 14B(2)); or "fails to swear" (paragraph 14C(1)(c)); or "fails to answer" (paragraph 14C(2)(d)); or "fails to continue to attend" (paragraph 14C(3)(c)); or "fails to comply" (paragraph 15A(1)(c)).

The Committee notes, as did the Explanatory Statement, that an accused could invoke the defence of mistake of fact (*Criminal Code 2002*, section 36). That defence does not, however, permit an accused to argue that he or she had a reasonable excuse for committing the acts that make up the physical elements of the offence, including, in particular, that they exercised due diligence in seeking to avoid committing the acts.

To illustrate, a person may have "fail[ed] to continue to attend" before the Auditor-General, and thus committed the physical elements of the offence in paragraph 14C(3)(c), yet be able to adduce evidence that they exercised due diligence in seeking to attend. But this line of defence would not necessarily be such as to show "mistake of fact" under section 36 of the *Criminal Code 2002*. For example, the person may have been injured while making their way back to the inquiry after an adjournment.

The Minister's response²⁴ indicated that as a matter of legal policy, the Executive did not favour the provision for such a defence.

²³ See the discussion by the Committee in *Report No 38 of the Fifth Assembly*.

²⁴ See attachment to *Report No 54 of the Fifth Assembly*.

Strict Liability Offences - Defences

The Committee appears to raise for the Assembly's consideration the inclusion of a defence of reasonable excuse or due diligence, with the focus ultimately falling on the inclusion of due diligence.

I am advised that a due diligence defence, in this case, would import unnecessary uncertainty into the offence and thereby reduce the effectiveness of the offences. In particular, at what point can it be said that a person has exercised due diligence to attend, comply or swear?

In addition, criminal law policy is not to apply reasonable excuse or due diligence to cover defences that are already allowable under the Criminal Code. For instance, I understand that in the example used by the Committee, where a person may have been injured while making their way back to an inquiry after an adjournment, Section 15 of the Criminal Code would apply if the conduct was not voluntary (the person may be incapacitated on the road) and the defences of intervening conduct or event (s 39 of the Code) and sudden or extraordinary emergency (s 41 of the Code) may also apply. Relevant extracts of the Criminal Code are attached.

The example given by the Committee might indeed be covered by the Code provisions referred to in the Minister's response, (although not necessarily). But the Code defences would not pick up some situations where a person had taken reasonable steps to comply with the law. It remains to see whether the Supreme Court will hold that in some such cases HRA incompatibility can be avoided only if there is provision for a due diligence defence.

Thirdly, the Committee's point that an acute HRA issue arises in respect of an offence of strict or absolute liability punishable by has on some occasions been accommodated by an amendment to the relevant Bill.²⁵ But on other occasions, the Committee's point has not been addressed in a response.²⁶

This brief history illustrates the way in which a dialogue between the Scrutiny Committee and the government may be played out. Other points of difference exist, and others are in prospect.

This kind of dialogue is not new. Absent a bill of rights, the Senate Scrutiny of Bills Committee has exercised a significant influence on the way laws are drafted.²⁷ It is debateable whether the enactment of a bill of rights enhances this process. On the one hand, a legislative statement of rights accompanied by a qualified power of judicial review does give a higher law status to the rights stated, and thus somewhat more weight to the concerns of a Scrutiny Committee that a right may have been infringed. On the other hand, there is a danger that the Committee might come to focus its attention on those rights, at the expense of those common law rights (or rights derived from some other source) not recognised in the bill of rights. Alternatively, or also, the government might tend to justify infringement of rights not stated in the bill of rights simply on that basis. In these ways (and others) "a bill of rights ... may create an imbalance in the way our institutions protect rights".²⁸

²⁵ See above

²⁶ As with respect to the Dangerous Substances Bill 2003 - compare *Report No 43 of the Fifth Assembly* to the response attached to *Report No 46 of the Fifth Assembly*).

²⁷ *The Guide to Framing Commonwealth Offences, ...* (above, note 17), makes frequent reference to the reports of the Senate Committee. See too Peter Bayne, "The protection of rights - an intersection of judicial, legislative and executive action" (1992) 66 *Australian Law Journal* 844.

²⁸ McDonald, above note 1, at 24.

The *Human Rights Act 2004* does give explicit recognition to rights not stated in the Act,²⁹ but the dangers just noted remain.

Enhancing pre-enactment dialogue

Speaking of the prospect of a dialogue between the legislature and the courts in the ACT, Leighton McDonald observes that

one might also wonder about the influence of institutional size on the contours of any dialogue over rights. Limited parliamentary resources and a small judiciary are not the only issues here, as the quality of the “dialogue” between these institutions is likely to depend upon the breadth and depth of the surrounding legal/human rights culture, including, for example, the capacities of interest groups, the level of academic interest in any local experiment, and the orientations and expertise of the local legal profession.³⁰

The same general points may be made about the contours of any pre-enactment dialogue, although with more emphasis on the limits of parliamentary resources, and the capacities of and opportunities available to interest groups.

Critical to the latter is the amount of information that is publicly available about the pre-enactment dialogue that occurs within government and between government and other bodies. To the extent that this dialogue finds its way into documents, it may be amenable to disclosure under the *Freedom of Information Act 1989*, but this is a costly, time consuming and very uncertain process should the government agency in possession of the document decide to resist disclosure. The matter lies in the hands of the government to address,³¹ and it might find inspiration in the practice of the New Zealand Ministry of Justice of disclosing its advice on the compatibility of proposed laws with the *New Zealand Bill of Rights Act 1990*.

It is within the powers of the Scrutiny Committee to hold public hearings, but at this point its resources limits impinge severely on what is possible.

Finally, and I hope this will not be seen as mischievous, there is I think a question about whether the *Human Rights Act 2004* is based on an inappropriate model – inappropriate, that is, to enhancing promotion of a culture of rights, as well as its application as a legal instrument.

The model chosen was the *International Covenant on Civil and Political Rights* (ICCPR).³² This document was adopted by the General Assembly of the United

²⁹ Section 7 provides: “This Act is not exhaustive of the rights an individual may have under domestic or international law”.

³⁰ McDonald, above note 1, at 30 (footnote omitted).

³¹ At Scrutiny Meeting No. 11, held on 2 May 2005, the Committee resolved that “where Government receives written advice from the Criminal Law and Justice Office, and/or from the Human Rights Commissioner, in relation to the human rights issues raised by a bill, and whether or not that advice was received before or after the bill was put into final form, that advice should be provided to this Committee, in order to assist it in its tasks, and to provide the Legislative Assembly with a more complete discussion of the human rights issues raised by the bill”. It remains to be seen whether this bears fruit.

³² HRA Schedule 1 usefully indicates precisely how the ICCPR was a source.

Nations in December 1966, and no doubt drafts of its provisions reflect ideas about the content of rights of an earlier time. Moreover, and particularly problematic, those involved in the drafting came from very different legal cultures. The lawyer trained in the civil law tradition of Europe may have a very different understanding of what is conveyed by the words of the ICCPR than a common lawyer. Moreover, at points the document reads as if alternative formulations of the same basic idea were inserted.

The problem may be illustrated by reference to HRA s 21(1):³³

- (1) 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 after a fair and public hearing.

It must strike the common lawyer as curious that in respect of a person accused of a crime, he or she has a *right* only to a trial before a “tribunal”. The only way this aspect of s 21(1) makes sense in our common law culture is by reading the words “or tribunal” as unnecessary and thus to be ignored. This may well be the result of Supreme Court interpretation, but it will render the text of s 21(1) incomprehensible to the lay reader.

Much more problematic is what s 21(1) is meant to convey by its statement that “Everyone has the right to have ... rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing”. Section 21(1) derives from Article 14(1) of the ICCPR, which in part provides: “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. In the rulings of the Human Rights Committee of the United Nations concerning ICCPR Article 14, there emerges the notion that a “suit at law” embraces a determination by an administrative decision-maker, where that determination is of a claim “of a kind subject to judicial supervision and control”,³⁴ (although one suspects that some civil lawyers would think that Article 14 has nothing to say about what common lawyers think of as an administrative law remedy). But must those decisions be final decisions,

³³ If, as is suggested below, s 21(1) impinges on how administrative powers may be conferred, it is of considerable practical significance to the average member of the public. The first occasion on which it appears the Supreme Court will be called upon to make a declaration of incompatibility concerns s 21, although not in an administrative law context.

³⁴ S Joseph et al, *The International Covenant on Civil and Political Rights* (2nd ed, 2004) [14.07]. Commentary on s 27 of the New Zealand Bill of Rights sees this language as confirmatory of the scope of judicial review of administrative action; see G Guscroft, “The Right to Justice”, in P Rishworth, et al, *The New Zealand Bill of Rights* (2003) 760-765, and noting citations at footnote 67. The analogous provision of the European Convention (Article 6(1)) initially received a quite limited construction, but this has been overtaken. In *Alconbury* [2001] UKHL 23, at [78]-[79], Lord Hoffman said that while “as a matter of history it seems likely that the phrase “civil rights and obligations” [in Article 6(1)] was intended by the framers of the Convention to refer to rights created by private rather than by public law ... the European court has not restricted article 6(1) to the determination of rights in private law”. It is clear that many kinds of administrative decision are affected, but its application to administrative decision-making is still problematic; see the critique in P Craig, “The Human Rights Act, Article 6 and Procedural Rights” [2003] *Public Law* 753 at 756ff.

or are interim decisions included?³⁵ The language of Article 14 ICCPR (“determination”) suggests that the reference is to a final disposition of the matter, but HRA s 21(1) omits this language.³⁶

What then does s 21(1) prescribe in relation to decisions of the kinds described in s 21(1)? It says is that a person has the right to have a decision of the kind described made by a “court or tribunal”, and only “after a fair and public hearing”.³⁷ It might be thought that this produces an absurd result. On its face, a law that reposed the power of making an administrative decision, of a kind referred to in s 21(1), in a body other than a court or tribunal, would be in conflict with s 21(1).³⁸ Yet, of course, thousands of administrative powers are conferred on decision-makers who could not characterised as a court or a tribunal. Conflict with s 21(1) would arise without getting to the question of whether the decision-maker made its decision fairly, or after a public hearing.

Taking account of HRA s 28, and applying it in the way the United Kingdom courts have applied Article 6 of the European Convention, might avoid absurd results. That is, a scheme might be found, under s 28, to be a justifiable derogation of s 21(1) if, to use the rubric of the UK case-law, “the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires”.³⁹ In this way, s 21(1) states a requirement that administrative decision-making accord natural justice, and sets limits to the permissible reach of privative clauses.

Section 21(1) is a quite unsatisfactory way to state principles to govern the exercise of administrative power. Its potential effect is very difficult to grasp, and if it is interpreted in the way just suggested, will be very difficult to explain. This is likely to inhibit human rights dialogue.

An alternative formulation of the principles which may be inherent in s 21(1), is found in s 27 of the *New Zealand Bill of Rights*:

27. Right to justice. – (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's right, obligations, or interests protected or recognised by law.
- (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

³⁵ The kind of problem that may arise is illustrated by *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113.

³⁶ The Explanatory Statement to the Human Rights Bill contains no commentary on s 21.

³⁷ It does not say that s 21(1) applies only where a “court or tribunal” makes a decision of the kind described. That perhaps is what was meant, but clearly it is not what it says.

³⁸ This problem could be ameliorated, but hardly solved, by reading the word “tribunal” broadly so as to encompass persons and bodies not styled as such.

³⁹ *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113 at 129, per Clarke LJ.

Section 27 deals with the problem of administrative power directly and in words that are easily grasped by the common lawyer, and indeed by administrative decision-makers and the public. It commends itself as a preferable statement to that found in HRA s 21(1).

The lesson to be drawn from the importation of a modified version of Article 144 of the ICCPR into the *Human Rights Act 2004* may also apply in other respects. At the least, it cautions against adoption of statements of rights framed in earlier periods and by committees comprised of persons approaching the matter from very different standpoints. If a bill of rights is to promote a culture of human rights in a particular society, its wording should comport to the understandings about law held in that society.