

**ASSESSING THE FIRST YEAR OF THE ACT HUMAN RIGHTS ACT
CONFERENCE**

Government in the ACT: a Human Rights Dialogue

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**LAW THEATRE, LAW FACULTY, FELLOWS ROAD
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I wish to acknowledge the traditional owners of the land we are meeting on, the Ngunnawal people. I respect their continuing culture and the unique contribution they make to the life of this region.

My topic is ‘Government in the ACT: a human rights dialogue’. A dialogue is defined as a ‘conversation’ – and there is definitely a conversation going on about human rights in government in the ACT at the moment. The form of that conversation is still taking shape and the content of it is growing in sophistication although it could still often be described as no more than rudimentary on occasion. The participants in the conversation are still taking their places.

The conversation occurs in a number of ways:

- within the Executive – perhaps most powerfully through the involvement of agencies with the *Human Rights Act 2004 (ACT)* (HRA) in the policy development process, advice to Cabinet from the Human Rights Unit of the Department of Justice and Community Safety and advice from the Human Rights Commissioner to the Attorney-General;
- within the Legislature – both through the statements of compatibility under section 37 of the HRA and by debate in the Legislative Assembly;

- between the Legislature and the Executive – by Government responses to issues raised in the Scrutiny of Bills reports of the Standing Committee of the Legislative Assembly on all legislation presented to the Assembly;
- between the Courts and Tribunals and the Executive – by consideration of issues raised by the courts in the course of proceedings and of judgements delivered concerning human rights issues.

Within the Executive

At this stage, the conversation within the executive is perhaps the most fruitful in terms of impact on policy development and government action.

As most will be aware, the Department of Justice has established a Human Rights Unit that is staffed by three lawyers with expertise in human rights. Advice from that Unit often plays a part in all four forms of conversation at the present time.

The Unit has issued a Plain English Guide to the HRA as well as detailed Guidelines which assist ACT public servants to develop legislation and policy consistently with the Act. Agencies are encouraged to approach the Unit as early as possible in the development of policy proposals that may engage human rights protected under the HRA. In any event, Cabinet procedures have now been implemented to ensure that no bill is presented by Government into the Assembly without being considered by the Unit who also advises the Attorney-General on whether the statement is consistent with human rights under section 37 of the HRA.

This can be a robust dialogue, particularly where agencies are committed to the implementation of a particular policy in a particular way. We have had to consider whether we can provide segregation for particular prisoners, voting booths for people with disabilities, whether we can exclude someone from public employment on the basis of a criminal record, whether we can set up roadblocks, prevent prisoners from voting or have a blanket policy of strip searches for all prisoners, whether children can be used for tobacco test purchases and whether car registration stickers can contain

promotional messages for the Red Cross Blood Donation Service. The Unit has had involvement in the development of legislation by ACT Health to permit the administration of involuntary electro-convulsive therapy in emergency situations in addition to an extensive public consultation process.

Our procedures were developed after an examination of the New Zealand and UK processes. There are probably three significant points of difference with those models.

Unlike New Zealand, the HRU does advise the Attorney-General in relation to bills emanating from the Department of Justice. The New Zealand Department of Justice considers that it is conflicted on these bills and advice is provided by the Crown Solicitors Office for all Department of Justice Bills. We decided that this would not work for us for a number of reasons: firstly we don't have enough resources to draw upon and secondly, our objective is to develop a coherent and consistent approach to human rights interpretation and to exclude 'Justice' bills from the Unit would remove the most significant area of engagement of human rights issues. We do some of our most intensive work with Justice bills and these form over half of the legislation program for government. This is obviously something we will keep under review and in the event that we feel that advising in these circumstances is not appropriate in future, we will amend the practice.

The second departure relates to the publication of advice. We do not, as a rule, publish legal or legal policy advice provided within government either in the development of a bill or in support of a compatibility statement. There are a number of reasons for that: we rarely advise by way of formal opinion in a publishable form and secondly, our objective is to develop a human rights culture within government by encouraging an open and honest dialogue with agencies on rights issues. Agencies would cease to come to the Unit with policy proposals if they knew potentially critical legal or legal policy advice may be publicly released. The alternative is to only release advice that is supportive of government proposals. We do not believe that this would be an intellectually honest position.

The third departure relates to the role of the HRU within government. It has taken some time to develop our views on these issues, but we are now strongly of the view

that we do not wish to centralise human rights interpretation within the HRU, as is the case within Canada, and to a lesser extent, New Zealand. The HRU does not own human rights within government and it is not the place to drop your human rights concerns at the door and collect the advice two weeks later. The approach of the Unit is to define the questions for agencies to ask themselves, send them away to identify sufficient and relevant reasons for justifying compatibility, and return to the Unit for final clearance, rather than receive the definitive answer to their problem. Each interaction is a tutorial on the particular human right engaged, rather than a conference with a client at which advice is provided. To some extent, this approach suits our resource limitations – but we rather think we would proceed this way even if we had unlimited resources. Again, this reflects our focus on building a human rights culture, rather than to produce a ‘technically pure’ model where we have excluded the possibility of any provision in ACT legislation being held to be inconsistent with the HRA by a Court.

I should point out that although committed to this approach, it remains the responsibility of the Unit to advise the Attorney-General on whether the bill is compatible. There will be, and have been occasions when the Unit has had to advise a line agency that, for example, the limitation proposed is not reasonable and if it is not amended, the Attorney General will be advised not to issue a statement of compatibility.

I believe that there remain some critical limitations on the human rights dialogue within the executive. The only public servants in the conversation at the moment are the policy development staff, some senior executives who have been directly affected by adverse advice, and Ministers. We are only starting to get to those involved in service delivery and administrative decision makers. These remain priorities for the future.

There is another important dimension to the conversation that warrants particular mention – that is the role of the Human Rights Commissioner. Under section 41 of the HRA, the Human Rights Commissioner’s functions include to advise the Attorney-General on anything relevant to the operation of this Act. The Human Rights Commissioner has been active in advising the Attorney-General and is

increasingly looked to as a definitive source of advice on human rights issues. This is a healthy development and reflects a genuine desire to get human rights ‘right’, and to not being afraid to ask the question. This week, the Commissioner will provide the Attorney-General with her audit of the Quamby Juvenile Detention Centre which provides a comprehensive review of human rights compliance in juvenile justice in the ACT.

Mention should also be made of other statutory office holders who have sought to apply the act to the issues they confront on a daily basis. The former Community Advocate, Ms Heather McGregor, on the occasion of her retirement, gave a compelling account of the dangers children face within their own family, and the need to protect children’s human rights in the same way that we have sought to protect the rights of victims of domestic violence by absolutely prohibiting any form of corporal punishment. Ms McGregor also made some extremely poignant comments about the meaning of a life of dignity and value, to use the words of the preamble of the HRA, in the context of end of life decisions and the use of artificial feeding and hydration to prolong the life of the dying, her point being that the prolongation of life and the movement of patients from intensive care beds to nursing homes is not necessarily humane. The significance of the Community Advocate’s comments, quite apart from their substance, is that a statutory official has applied human rights concepts to her work and been unable to reconcile the two without questioning current practice. In doing so, Ms McGregor made a valuable contribution to the conversation on these issues in human rights terms.

Within the Legislature

As I mentioned earlier, section 37 of the HRA requires the Attorney-General to prepare a written statement, referred to as a compatibility statement, about each bill presented to the Legislative Assembly. The compatibility statement must state, whether in the Attorney-General’s opinion, the bill is consistent with human rights and, if it is not, how it is not consistent with human rights.

As the government has not presented any bills that, in the Attorney-General’s opinion, have been inconsistent with human rights over the last 12 months, the compatibility

statement has been a one sentence document that, merely stating that ‘this bill is compatible with human rights’.

Upon presentation, in accordance with section 38 of the HRA, the bill is referred to the relevant standing committee of the Legislative Assembly, which must report to the Assembly about human rights issues raised by the bills. Prior to debate and passage of the bill, the Committee provides a written report outlining the human rights issues raised. This report is provided to Government and Government provides a written response to the report prior to the debate.

In addition, each bill is presented together with an Explanatory Statement that outlines the justification for the bill. If the bill involves the limitation of a right justified as ‘reasonable’ under section 28 of the HRA, that will be detailed in the Explanatory Statement.

A number of people, including members of the Assembly Committee, have suggested that the Committee does not have adequate information before it to determine a position on the human rights issues raised by particular bills and that this necessarily, limits the quality of the dialogue within the legislature. The practice in New Zealand of publishing the advice provided by the Department to the Attorney-General in relation to the requirement under section 7 of the NZ Bill of Rights Act is often cited. I respond to that with a number of points.

Firstly, the requirement to provide a statement to the Assembly in the ACT is broader than both the UK and New Zealand equivalent provisions. The ACT requirement relates to all Government bills and the responsibility is centralised with the Attorney-General. The New Zealand Act requires the Attorney-General to only bring to the attention of the House of Representatives any provision in a bill that appears to be inconsistent with any of the rights and freedoms in the Bill of Rights. The UK provision applies to all bills, but responsibility for attesting to compatibility is devolved to the Minister who introduces the bill. The ACT took on a more onerous statement provision because of the perceived inadequacy of the New Zealand and UK provision. That decision obviously has resource implications and our practice currently does not permit the preparation of detailed written opinions in a publishable

form for all bills. Our approach is that the case for compatibility will be made at first instance in the Explanatory Statements, cleared by the Human Rights Unit.

Secondly, we think there may be a more effective and targeted way of providing the Assembly Committee with more detailed information on the Attorney-General's view. As mentioned, the Assembly Committee, which also has access to its own expert legal advice (although I note there is only one of him), provides a report to government on the human rights issues it believes have been raised by a bill. The Human Rights Unit then works with the relevant agency to provide a detailed response on the Government position on each of the issues raised. This allows the Unit and government generally, to focus its resources on contentious areas and develop a comprehensive and coherent body of opinion about significant human rights issues that are raised in legislation.

There are risks with this approach. The HR Unit and the Assembly Committee may miss things. I acknowledge this risk but simply note that the resource limitations of government must also be acknowledged and that the Assembly Committee must take responsibility for raising human rights issues in accordance with its statutory charter.

Between the Legislature and the Executive

I have identified this dialogue separately, to refer to the process of responding to reports of the Assembly Committee on human rights issues raised by legislation presented for consideration by the Assembly. Although our views are evolving with practice and reflection, we do feel strongly that this is an important conversation and is significant in improving the quality of the conversation in the Legislature.

Between the Courts and Tribunals and the Executive

Many seek to judge the success or failure of the HRA on the basis of the number of declarations of incompatibility and by guideline judgements of the Supreme Court replete with purple passages about the meaning of the interpretive clause in section 30 of the HRA. If that is the measure, perhaps we get a bare pass.

To be frank, I think such judgements are harsh and unfair, and reflect the quite limited perspective of legal academics.

Firstly, the New Zealand experience is that significant litigation took 5 years or more to be generated. Things have happened more quickly in the UK, but there was certainly not the avalanche expected in the first 12 months of the UK HRA. One can speculate about the reasons behind this.

One reason must surely be the lack of familiarity within the profession of when human rights issues arise, and that takes time to grow.

Secondly, the ACT simply does not generate a sufficient volume of cases in which a significant human rights issue changes the outcome of the case. The ACT Supreme Court in 2004/5 finalised 2,400 matters and the ACT Magistrate's Court finalised 30,000 matters. Many of the Supreme Court cases are routine personal injury matters, and many of the Magistrate's Court cases a routine traffic matters. The magnitude of the difference was brought home to me when reading an article about Whitehall and the Human Rights Act in which the role of the Legal Issues Coordinating Groups – one criminal and one civil, was discussed. After the initial implementation, the role of the Criminal Issues Coordinating Group, a group of 30 to 35 senior lawyers drawn from the 20 different prosecuting bodies as well as policy departments across government, became largely operational, with a 'fast tracking' sub-group tasked with identifying and collating significant cases and making recommendations on the fast-tracking of appeals. Clearly such a mechanism is elaborate and unnecessary in the ACT where this group of players meet each morning in the Magistrate's Court coffee shop and a Magistrate or judge only have to mention the HRA in passing to cause ripples to wash through our very tight-knit legal community. We are a small jurisdiction, without involvement in matters such as immigration that generate significant casework elsewhere. This will always be a factor in the number and nature of HRA cases we generate.

Thirdly, this measure of success may be based on the assumption that there is a vast amount of ACT legislation that is inconsistent with the HRA. Our legislative review so far, albeit limited, does not indicate this to be the case.

Finally, whilst we will always strive to see justice delivered in the courts, the approach to implementation of the ACT HRA is that this is unlikely to deliver systemic change. The discrimination jurisdiction has demonstrated this. It is merely a measure of the particular matters that arose, the lawyers who acted in them, and the particular fact situation of the persons involved.

That being said, close examination of the jurisprudence so far is quite impressive. One of the risks frequently raised by stakeholders in the consultations surrounding the development of the HRA, was that the ACT judges are already progressive, even 'activist' with a positive slant towards the defence perspective.

I think that perspective owes more to the strength of urban myths, than any firm basis in reality of the court's decisions. My perspective is borne out by a closer examination of the cases so far in which the HRA has been referred to or considered.

In my judgement, none of the decisions have been jarring, in the sense that the interpretation of the law was at odds with community standards, even though a number have resulted in the termination of a prosecution for reasons unconnected with the strength of the Crown case. Human rights considerations, perhaps in a general way, have however, been referred to and are increasingly part of the fabric against which conduct is judged.

For example, in the Magistrate's Court decision of Mr Dingwall of *Carrington v Day*, 23 March 2005, ACT Magistrates Court, a defendant entered a plea of not guilty to five charges relating to the cultivation, possession and possession for supply of four cannabis plants in breach of the Drugs of Dependence Act. The case was based entirely on search warrant material and the warrant itself had a number of technical defects on its face. The defendant's counsel submitted that a warrant is a serious interference with civil liberties, an interference with a person's privacy and his right to personal integrity and safety and stressed that the technical requirements of the search warrant legislation should be interpreted strictly as a result. Mr Dingwall found that the warrant was defective, but referred to his discretion under section 138 of the *Evidence Act* which provides that the material is not to be admitted unless the

desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Mr Dingwall then went on to detail the degree of force used at the time the entry to the premises was first obtained and shortly thereafter. The transcript states (at page 8)

It's clear on the evidence that the door was forced open, it appears the defendant was standing in close proximity to the door and it is suggested in some of the evidence that he was in the process of opening the door. He was knocked back in the rush through the door, he was knocked to the ground by an officer and he was then handcuffed and he was kept handcuffed, on one view, for a period of about one minute.

Mr Dingwall goes on to say:

It has to be said that the issue of a search warrant does not result in the suspension of one's civil liberties or the general rights that an individual has under the law. On the evidence before me, I'm satisfied that the use of force on this day was not necessary to effect the execution of the search warrant and it was not reasonable. There was no suggestion that in the evidence there was any perceived danger to the officers entering those premises...There is no suggestion that the defendant in any way tried to impede the search or interfere with the officers at all, indeed, if one looks at the record of interview, he was cooperative with them throughout. Having said all that, one is left mystified as to why this degree of force was used on this particular instance.

Mr Dingwall referred to the submissions of counsel in relation to the International Covenant on Civil and Political Rights, a relevant consideration expressly provided for under the Evidence Act, as well as the HRA.

Finally Mr Dingwall found that if it were only for the defects in the search warrant, he would admit the evidence, but given the additional unlawfulness by the use of unnecessary and unreasonable force, he waived deterrence to exclude the evidence (at page 14)

So as to make it clear that such unlawful force in the execution of search warrant, is not to be used and as I say, this issue of a search warrant does not result in a suspension of a person's liberty or other civil rights.

I see this judgement as a well reasoned balancing of the interests of enforcing breaches of the law with the powerful message to law enforcement that a search warrant must involve an assessment in each individual case of what degree of force will be reasonable, and thus will be sanctioned by the warrant. The decision is important in the continual boundary negotiations that occur between law enforcement and the courts, informed by a legal system that has stated in positive terms that it values human rights.

Decisions such as this one give me great confidence that the judicial conversation about human rights is unfolding as it should and will continue to develop in a way that enriches our objective of respecting, protecting and promoting human rights.

Conclusion

There is a growing dialogue within and between all three arms of government in the ACT. It is, perhaps, not conforming to models elsewhere and I think there are good reasons as to why this has occurred. In my view, the early signs are healthy and provide a strong base from which to continue our journey.

The 'dialogue model ACT-style' is emerging as one in which there may be different views on human rights issues, between for example the Human Rights Commissioner, Courts and Tribunals, the Attorney-General and members of the legislature. No one player in our dialogue is the House of Lords or the Canadian Supreme Court at this stage. But who knows what is ahead of us.