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“Sibylline Observations: The Human Rights Act 2004 (ACT)”
By Professor Gerard McCoy QC

I have been allocated a speaking time of 20 minutes so I have had to adopt the style of an “*impact player*” called off the substitutes’ bench, with little time to warm up. In short, I can only engage in a limited amount of “*blitz advocacy*”. In view of the “mixed audience” of lawyers and non-lawyers I will seek to address you all on a happy-medium basis, in which lawyers may criticise that I have addressed complex issues in a very superficial way and in which non-lawyers may criticise that I have address superficial issues in a very complex way!

SHORT COMPARATIVE LAW INTRODUCTION

In 1990 the New Zealand Parliament enacted the New Zealand Bill of Rights Act. In 1997 the Hong Kong Basic Law (the Constitution of Hong Kong) came into direct effect. Both incorporated the International Covenant on Civil and Political Rights (“ICCPR”). The Human Rights Act 2004 (“HRA”) of the Australian Capital Territory (“ACT”) which came into effect on 1 July 2004, is also modelled on the ICCPR. Some comparative insights may be obtained from the experience of the ICCPR, in its domesticated forms in New Zealand and Hong Kong, in understanding how the HRA is likely to change pre-existing laws and practices in the ACT.

CHILDLIKE LANGUAGE

In 1953 in *Brown v Board of Education*, the United States Supreme Court made an irreversible, principled, demolition of legislation based on racist theory. The critical passages of that judgment of the Court were deliberately written in language so disarmingly simple, so pellucidly clear, that it was quoted verbatim on the front page of most major newspapers throughout America, the next day – because, ordinary people would be able to easily read it and easily understand it. This accomplishment is rarely attained today by courts, at or towards the apex of any legal system. Yet the ACT legislature has admirably attained it in the drafting of the HRA. It is written in very accessible language, which primary school children ought to be able to read and somewhat comprehend. This in itself is an important end.

The ACT model may well become the basis for successful propagation in other States and Territories throughout Australia and eventually lead to transplanting the arid Federal Constitution, with its implied-rights jurisprudence. All that could be gracefully supplanted by the explicit formulaic approach to human rights found in the ACT Act.

The right to irritate – guaranteed by freedom of expression – is a right I now seek to take advantage of.

I seek to predict the litigation issues that ought to be expected as early cases under the HRA. Upon my review of the limited local jurisprudence to date, I suggest that this Act may have been somewhat undervalued by the practitioner part of the profession – with just a touch of forensic somnolence or intellectual recumbancy in place. The alternative scenario is that there has

been an outbreak of lawfulness in the ACT so that there has been no opportunity to take obvious points in obvious litigation.

My task this morning is to overview, with alacrity, some of the litigation expectations and issues in both civil and criminal law, under the HRA.

I note specifically that the HRA does not contain a remedies provision. On one view this means that no remedies are excluded. But there remains a real issue as to what remedies will the ACT Courts be able to fashion from the fecundity of the HRA. The superior Courts are given a specific power by s32 to make a declaration of incompatibility, in which legislation is identified as being incurably violative of fundamental rights, guaranteed by the HRA. In my opinion the remedies available under the HRA will include: the right to order a conditional or permanent stay of civil and criminal proceedings, the right to exclude relevant evidence, the right to award costs (even without specific authority), the right to award damages against the ACT itself, its servants or agents for breach of the HRA guarantees. This very last issue, a cause of action against the Government, arose in New Zealand where the Court of Appeal was able to conclude, that in the absence of a specific remedies clause (and despite the fact that Hansard indicated that it was a deliberate decision to exclude such a power from the legislation), that the New Zealand Bill of Rights Act 1990 did contain this right or cause of action. See Simpson v Attorney-General (Baigent's Case) [1994] 3 NZLR 667 (CA).

For a full discussion of this important issue of remedies see the imposing text written by my colleague Professor Philip Joseph '*Constitutional and Administrative Law in New Zealand*' 2nd edition 2001 Brookers. I should also indulge in a little further trans-Tasman trade and commend to you the text by

Professor Paul Rishworth and others *'The New Zealand Bill of Rights'* 2003
Oxford University Press.

The area of criminal justice usually provides the first cases in which new constitutional instruments are tested. For some the HRA will be seen as a "*criminals' charter*" as inevitably there will be cases where the issue of human rights applies to most unprepossessing individuals, who will obtain a result from the criminal law that they may not deserve on a moral plane, but which they have owed to them on a rights-based jurisprudence. There will inevitably be a series of decisions dealing with: arrest, detention and the exclusion of unlawfully or unreasonably obtained evidence. These issues are plainly critical, affecting liberty of the subject, security and privacy. There is a wealth of comparative caselaw to select from. Courts should be eclectic and indeed in ACT they are specifically enjoined to be so by s31 HRA. If the experience elsewhere replicates itself, an early issue will be: is a motorist who is stopped while a roadside blood/alcohol test is administered, a person "*detained*" and therefore a person for whom the rights under s18 HRA abound?

On a more general level even the existing decisions of the High Court of Australia on the approach to evidence wrongfully, unreasonably or unlawfully obtained, must now be re-evaluated against the HRA imperatives. Decisions, which at common law are binding, now must be approached afresh from the mandated stand-point of the primary rights guaranteed under the Act. In some examples the result will be the same under the common law method and under the rights-oriented jurisprudence; but there will definitely be issues, which heretofore have been taken as settled under the doctrine of precedent, which will need to be, nay are required to be, reassessed. The HRA has a significant liberating potential from the orthodox binding effect of earlier

decisions of superior Courts. A new orthodoxy is commanded by the Human Rights Act.

Another issue that will undoubtedly arise is whether absolute liability and strict liability in criminal law are constitutionally compatible with the sanction of imprisonment. This issue has been closely examined by Canadian courts.

REBUTTABLE PRESUMPTIONS OF FACT AGAINST DEFENDANTS

Legislation containing rebuttable presumptions of fact against a defendant, in which a persuasive, as opposed to an evidential burden exists, will be read down to providing only an evidential burden.

Legislation dealing with: firearms and dangerous drugs are immediate candidates for attention, where evidential burdens are activated by possession of a container or thing or by possession of certain quantities of a thing.

In *R v Lambert* [2002] 2 AC 545, the House of Lords, under the Human Rights Act 1998 (UK) overturned long-standing dangerous drugs jurisprudence to find that the words “...*the defendant shall prove...*” meant only that the defendant had to adduce some reliable evidence.

The House of Lords stated that even the intractability of language would not defeat the need to keep fidelity with the overriding requirement of the Human Rights Act (UK), so the House of Lords were able to or were required to read down/rewrite the section, to comport with fundamental constitutional principles.

While the imposition of a persuasive burden is generally inconsistent with the presumption of innocence, it will not fail in all cases.

The paradox of the presumption of innocence was expressed by Sachs J in S v Coetzee [1997] 2 LRC 593, 677 (South Africa Constitutional Court). Prosecutors intuitively highlight the special danger of the particular crime in relation to which the evidential presumption has been created, as a justification for the existence of the evidential presumption. In short, there is made a claim that the seriousness of the offence itself, or the difficulty of proving the serious offence without the evidential aid of the presumption, is the intrinsic justification for the presumption. This line of thinking was put to the sword by Sachs J who said:

“Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder rape etc... and nothing would be left of the presumption of innocence, save perhaps for its relic status as a doughty defender of rights in the most trivial of cases”.

Last week in Hong Kong, in HKSAR v Hung Chan Wa CACC 411/2003, 23 June 2005 the Court of Appeal there found that the Basic Law of Hong Kong, incorporating the ICCPR, required it to reach the same result in Lambert. This decision has arguably put a huge number of earlier convictions in doubt, as they had been based on the very long-standing former interpretation of the

provision in the Dangerous Drugs Ordinance, which the Court of Appeal found was no longer sustainable because of the impact of the Basic Law. The effect of this decision was that the Court did not follow what it had repeatedly and clearly stated had been the law since 1969.

At this point I need to make a disclosure. I was the unsuccessful counsel for the prosecution in that Court of Appeal decision in Hung Chan Wa. But I have raised before the Court a further issue of critical importance for the criminal justice system, which the Court has now agreed to decide. As the relevant legislation had been in force since 1961 you may be unsurprised to learn that there had been approximately 66,000 convictions, based on the evidential presumption as it had always stood and been understood. After all what is complex about a section that states that the “*defendant shall prove...*”. In common law terms the burden of proof is unarguably placed on the defendant to establish the relevant fact, on the balance of probabilities, which means that it was more likely than not that the fact existed. What happens to those other 66,000 cases? This is a real issue that prosecutors, in the ACT and elsewhere must confront.

The prosecution in Hung Chan Wa has now asked the Court of Appeal to declare that one consequence of the new rights-oriented approach under the Basic Law (and indistinguishably under the HRA) is that the concept of modified prospective overruling either exists or should be introduced into Hong Kong jurisprudence. How would that work? Let me explain.

That is, the prosecution will argue that the decision of the Court of Appeal should generally only operate prospectively, save that the instant appellant and those persons who are still within the statutory time limit to appeal or whose appeals are pending or reserved, shall also, but only those appellants,

shall have the benefit of the new construction of the statutory provision, imposed by the Basic Law. That would mean that some 30 applicants or appellants only would be the beneficiaries of the new approach, and it would mean that the earlier convictions of the 65,970 people, based on the approach which existed for 34 years are not reviewable.

In constitutional cases relating to criminal law, the United States Supreme Court, the Supreme Court of India, the Supreme Court of Israel, the South Africa Constitutional Court and the Supreme Court of Canada have all accepted that this type of approach is available. But it must be emphasised that in most of those jurisdictions, there is a specific remedies provision in the law to permit this outcome. However, the United States Supreme Court has reached that conclusion without any specific provision authorising it. So too has the Court of Appeal of Singapore and the Supreme Court of Malaysia.

This is plainly a matter of great moment and I would commend that the ACT legislature, which has provided in the Act itself that it will re-examine the working of the HRA, squarely address this issue.

I understand that the State of Victoria is considering the implementation of legislation comparable to that enacted in ACT. The width of a constitutional remedies clause is a matter for close consideration there too.

The importance of a remedies clause is identified by the dramatic example of the Manitoba Language Case decided by the Supreme Court of Canada in 1985. That Court, the highest in the country, concluded that it was an absolute constitutional requirement that the Province of Manitoba had to enact all its legislation in both English and French. Unfortunately, since 1898 it had not done so, with the consequence that on the face of it all its statutory laws for 87

years had been unlawful. It is hardly difficult to imagine the consequences of such a legislative power vacuum. The Supreme Court circumvented this massive problem by declaring that the existing position was unlawful, but by suspending the operation and effect of its own declaration for 2 years so that Manitoba could carry out the necessary urgent and corrective French legislation. This is a delightful example of how the law needs to be able to respond in deciding how to treat the consequences of its own decisions.

Today, before this audience, is not the day to begin a theoretical/conceptual '*war dance*' about the merits or demerits of prospective overruling. But it has been a traditional bastion of Judges to decline, say in insurance/commercial law, that they must reject highly promising challenges to long-standing Court decisions, because of the impact that the acceptance of the new arguments would have on settled expectations.

By s43(1) HRA the Attorney-General must present a report of the review of the operation of the Act to the Legislative Assembly – modified, prospective, overruling ought to be an issue in that report.

In *Osmond v Public Service Board of New South Wales* (1986) 159 CLR 656, the High Court of Australia held that there was no obligation at common law for administrative decision-makers to give reasons for their decisions. That hard-edged decision is indubitably inconsistent with the creeping momentum of caselaw in the common law world. But accepting it as correct for the common law, does not mean that the HRA does not now have the effect of requiring decision-makers, who decide matters that impact on any human rights, to now have to give satisfactory and specific reasons for their decisions. This is a simple example of how the HRA will affect the daily working of persons who exercise public power in ACT, from the grandest powers to the most modest.

In short, lawyers would say, that Osmond has now been distinguished, out of existence, in relation to human rights. This outcome is wholly consonant with the dignity and autonomy of the individual and the spirit of the HRA. No smug self-satisfied rebuff with a summary rejection or template-formula response rejection will now do. The reasons given should also be proportionate to the importance of the issue and the nature of the human right engaged. The HRA has created a new larger superior jurisprudence requiring the re-evaluation of black-letter common-law decision-making.

A necessary consequence of the HRA is that Courts must, of their own motion, raise possible issues that impinge on matters under the HRA. The passive model of judicial activity in civil law is quite inconsistent with breaches or threatened breaches of the HRA. If the parties omit to raise a relevant issue, the court, has a duty itself to ensure that the litigants are demonstrably aware of the overlooked dimension in the litigation. It would be spectacularly wrong (*per incuriam*) to let a material rights-impact point go by default, or possibly even by consent.

In Briginshaw v Briginshaw (1938) 60 CLR 336 the High Court of Australia recognised that the ordinary standard of proof in civil proceedings would be difficult to satisfy in the case of fraud or bad faith allegations. But the real question now, caused by the HRA, is whether that standard of proof is applicable at all anymore. Should an academic or a lawyer or any member of society be in peril of losing their position or profession on any version of the balance of probabilities?

Two months ago, in Campbell v Hamlett, Privy Council Appeal 73/2001, 25 April 2005 it was decided that now the only valid standard for disciplinary proceedings was proof beyond reasonable doubt, as in a criminal case. The

influence of constitutional rights and their normative force, permeates at all levels of decision-making. There is now a respectable argument to be made that *Briginshaw* needs to be re-examined as a guide or defining approach to the standard of proof in disciplinary proceedings, at least where a human right has been engaged.

In *Coleman v Powers* [2004] HCA 39, 1 September 2004, the High Court of Australia had to deal with a provision in the Vagrancy, Gaming and Other Offences Act 1931 [Qld], which proscribed offensive language. The defendant repeatedly but unsuccessfully proclaimed that certain police officers were involved in corrupt conduct and called for their investigation.

The High Court had to consider a conviction under that section. McHugh J would have found the offence to be unconstitutional. In ACT a magistrate or Justice would need to assess the law against the freedom of speech. In doing so the Delphic dicta of Sedley LJ in *Redmond-Bate v DPP* (1999) 163 JP 789 would be in point:

“Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative, provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.”

In the law of defamation, the HRA will have an impact as well. I was not surprised to note the judgment of Higgins CJ in the ACT Supreme Court in *Szuty v Smyth* where some reference was made to the Act. The limits of free speech and the law of defamation are closely connected.

As I am in the ACT, the coincidence of a decision in the law of defamation of the ACT Supreme Court being expressly disapproved by a decision of the Court of Final Appeal in Hong Kong is irresistible. In Cheung Albert v Tse Wai Chun [2000] 4 HKC 1, Lord Nicholls of Birkenhead, delivered the judgment of the Court. The issue was “*fair comment*” and its intersection with “*malice*”. Does malice, as a motivation, destroy fair comment? This point was highlighted by Blackburn J, sitting in the Supreme Court of the Australian Capital Territory, in Renouf v Federal Capital Press of Australia Pty Ltd (1977) 17 ACTR 35. The plaintiff was a distinguished civil servant. He sued a newspaper in respect of a defamatory article. Blackburn J noted that, malice in the context of fair comment, cannot simply be characterized as the abuse of a special legal relationship. Everything must turn on the state of mind of the person making the comment. Proof that the comment was motivated by a desire to embarrass or prejudice the plaintiff was not sufficient to constitute malice. That motivation must be shown to have distorted the judgment of the defendant before it could avail the plaintiff. The question then followed:

What, then, of the case where intention to embarrass or injure does warp the defendant’s judgment but, nevertheless, the defendant sincerely believes the opinion he expresses?

Blackburn J answered this question at p54:

“If the plaintiff can show that the opinion represented by the comment was affected by personal hostility, or some such irrelevant motive in such a way that it does not represent a disinterested judgment upon the matter which is the subject of the comment, then the reply of malice succeeds notwithstanding that it is not proved that the comment was insincere – ie did not

represent the defendant's real opinion. It seems to me that unless this is so, the law ignores the common human experience that personal animosity may perfectly consort with sincerity to produce a comment which is harmful and unfair."

But Lord Nicholls of Birkenhead expressly disagreed with this approach.

"Although I have some sympathy with Blackburn J's, difficulty, I am unable to agree with his conclusion. The root cause of the difficulty here is that the defence of fair comment is bedevilled by its name and by the continuing use of the anachronistic and confusing term 'malice'. In layman's terms, a view which is warped by a dominant intent to injure does not rank as a fair comment. Blackburn J's solution is to curtail the scope of the subjective test of genuineness, or 'sincerity', of belief. Sincerity of belief will be efficacious only so long as it is disinterested.

I can see no sufficient warrant for thus cutting down the scope of the defence of fair comment. Disinterestedness cannot always be expected in political life. Its presence should not be a prerequisite of the freedom to make comments on matters of public interest."

This conclusion shows the vitality of the freedom of expression, as a human right, being found in the private law of defamation.

JUDICIAL REVIEW - ENERGISED

Judicial review represents the central plateau of public law. It is the meeting point at which public rights are adjudicated and public decision-making examined for its lawfulness.

In the United Kingdom, the Human Rights Act 1998 came into force in October 2000. The Act there has had a significant effect in a very short time. It has led to a re-definition of the boundaries of judicial review because the Courts there were immediately confronted with the need to acknowledge the approach of proportionality, which had been a feature of European law for a long time, such that it can be traced back to decisions of the Prussian Courts of the late 19th century. The new focus is not on an application of administrative law, but on the engagement of administrative law in a constitutional rights setting. The long-time reliance on common law methodology has been necessarily supplanted by a new paradigm, in which decisions must be admeasured against constitutional values and rights. My colleague, Professor Philip Joseph has in his text written widely on this threshold subject. Rights-based jurisprudence is the antithesis of tabulated legalism.

s32 HUMAN RIGHTS ACT (ACT):

DECLARATIONS OF INCOMPATIBILITY

The institutional interdependence of the branches of government must be distinguished from their operational independence. Each branch is functionally separate from the other; the political branch asserts the democratic mandate and the legislature's historic privileges; the judicial branch asserts its autonomy to uphold the Rule of Law under the principle of judicial independence.

Declarations of incompatibility under s32 HRA allow the courts to communicate directly with the political branch, while leaving to the democratic element the decision whether to respond through corrective or ameliorative legislation.

Any suggestion of constitutional fragility stemming from this political-judicial pact is misplaced. That pact is robust and flourishes by mutual self-restraint and comity. It is an *entente cordiale*. Declarations of incompatibility promote direct “*dialogue*” between legislature and courts.

Canadian constitutional writers PW Hogg and AA Bushell, “*The Charter Dialogue between Courts and Legislature (Or Perhaps the Charter Isn’t Such a Bad Thing After All)*”, (1997) 35 Osgoode Hall LJ 75 conclude that the legitimacy of judicial power is enhanced when legislatures and courts jointly determine the rights-implications of legislative policy.

Successful challenges to legislation by declarations of incompatibility frequently prompt legislative sequels that seek to reconcile the relevant human rights guarantees. While the objective of the legislation itself may be laudable and sound, it is usually the legislative detail and design that fails the irreducible minimum standards of human rights and their values.

As Professor Philip Joseph said in his text at p6:

“A declaration ... throws responsibility on to Parliament to make a deliberate, transparent and informed decision – whether or not to remedy a legislative intrusion on ‘a guaranteed right.’”

TELEVISION AND RADIO IN COURTS.

Broadcasting is an applied form of freedom of expression – the public imparting of information. Because the media represent “*the eyes and ears of the public*”, there can be made a convincing argument that television and radio ought to be able to regularly record proceedings in court, subject to certain obvious safeguards. There should be no filming of any jury and of any non-adult. See ss 20, 21(2) HRA. It is not difficult to devise a protocol that will maximise freedom of expression without impinging on any issues of security. The right of privacy must be subordinated to the right of freedom of expression where the fact in issue is the provision of statements by a witness or lawyer, intended to enter the public domain. That is the very essence of open justice in action. What good reason can there be why the public should not be able to see extracts of in-court proceedings on the evening news? In New Zealand for some years it has now been recognised that the media are furthering the freedom of expression by being able to film proceedings in Court.

In *Jackson v Canwest TV Works Ltd* [2005] NZAR 499, the New Zealand Court of Appeal confirmed its earlier approach to this issue and accepted that all proceedings, except family law matter and subject to individualised circumstances, may be televised or recorded, upon application to the presiding judicial officer. This gives literal meaning to what Street CJ of the New South Wales Court of Appeal once described the cathartic glare of publicity, as being the soul of open justice: *R v Page* [1977] 2 NSWLR 173,. See also: *Television NZ Ltd v R* (2000) 18 CRNZ 635.

RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE

This is provided for in s24 HRA, which reads:

“No-one may be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law.”

But this right is also not an absolute. Take this real scenario. X is charged with murder. The principal witness against X is intimidated and put under genuine duress by associates of X, at the behest of X. At trial, the witness out of fear, refuses to give evidence or deliberately and repeatedly contradicts herself so that her evidence is so unreliable that there is no case to answer. X is acquitted. Does s24 HRA protect X's human rights, so that he can never be tried again for the same murder?

If the underlying constitutional value is that X was entitled to a fair trial by s21 HRA, this scenario shows that the trial was overwhelmingly unfair, from the wider perspective of justice. X had a fair trial, nothing was done by the prosecution, his own lawyer or the Court, that adversely impacted on the fairness of his trial. But X was the very person who caused the failure of justice to happen. Is it not offensive that X could rely on his human rights under s24 as being an absolute protection from a further trial, in which X has manipulated the outcome including the human rights of the material witness?

Where an acquittal has been obtained by fear or fraud, should it not be impugnable? After all a conviction based on fear of fraud would be quickly set aside. Does not equality of treatment require symmetry in result?

Should not s24 mean that the right against being tried again is predicated on a result of the actual intrinsic merits of the case, as opposed to extraneous and destructive intrusions of the legal system by fear or fraud?

Could not an ACT court rule, that s24 was confined to cases where there was an acquittal, in which the prosecution could prove that the acquittal itself had been based on fear or fraud of the material witness?.

The right - *autrefois acquit* - should be grounded in pervasive fairness of the trial process - both to the prosecution as well as the defence. Otherwise X has literally - "*got away with murder!*". This issue is currently being considered by the New Zealand Law Commission. I would commend that this matter be addressed in the forthcoming review under s43(1) HRA.

UNFAIR CRITICISM OF WITNESSES

If in the course of a case before a court or tribunal, the decision-maker unfairly criticizes a witness, not a party, could there not be redress under the HRA? If a Judge has publicly stated something that is demonstrably or unarguably wrong or contrary to admitted facts and has by that statement criticised a person who had given evidence, why should that person not have the right to challenge that criticism? Only parties to a proceeding can appeal - and then only the unsuccessful party. It sometimes happens that the winning party is seriously aggrieved by something said by the Judge in his ruling or decision. The successful party cannot appeal because he has won and Courts on appeal examine the correctness of the decision made rather than the reasons for it. In short, it sometimes happens that a party wins for reasons it does not like, just as much as sometimes a party loses for reasons it does not like. It only takes a moment's reflections though to realise that if everyone alleging themselves to

be aggrieved by what a Judge had said at some stage of the proceedings could appeal, the prospect of the higher courts being swamped by what may prove in many cases to be challenges without merit, is itself likely to undermine the integrity of the legal system. But it must be possible that under the HRA, in an appropriate case, that someone significantly aggrieved by judicial comment, ought to be able to have a remedy. Normally a mere witness does not have the right to take judicial review or to seek some declaratory or appellate proceeding, simply to reverse or resurrect her or his reputation. If the general power of judicial review is considered, alongside the HRA, can they not be read together so that a mere witness, becomes a person properly aggrieved, in law, for the purposes of redemption?

COMPENSATION FOR WRONGFUL CONVICTION

Two nights ago I watched “*Four Corners*” on ABC, which included an interview with the former Chief Magistrate of Queensland, Di Fingleton. Her conviction had just been quashed by the High Court of Australia: *Fingleton v The Queen* [2005] HCA 34 (23 June 2005). She had gone from being Chief Magistrate, to someone who themselves had served 6 months imprisonment for an offence she did not commit. Would she have a right to compensation under the HRA, if this bewilderment had happened in ACT and not Queensland?

It is now well known as the judgment of the High Court records that everyone at her trial and first appeal overlooked a provision in the Magistrates Act in Queensland which provided her with a complete defence. I very much doubt whether an overlooked provision in an Act qualifies, when it is finally recognised for what it is, as a “*newly discovered fact:*” within s23(1)(c) HRA. That section provides that if a conviction is reversed “...on the ground that a new

or newly discovered fact shows conclusively that there has been a miscarriage of justice” then compensation for the wrongful conviction is payable. But that provision is also qualified by s23(3) HRA which provides where “...*the nondisclosure of the unknown fact in time is completely or partly the person’s own doing*” no compensation is payable. It would be difficult, one might think, for the Chief Magistrate, to take refuge in ignorance of the law, as a matter of fact, being very poignantly a section in the very Act which she administered. Better off, one might think considering to sue her former legal advisers. The expression “*partly*” in s23(3) must surely mean “*appreciably*” though, otherwise a trivial (or *de minimis*) act or omission would wholly disqualify. That conclusion would not seem to accord with the spirit of the section.

PERMISSIBLE DEROGATIONS FROM RIGHTS

Section 28 HRA provides for permissible derogations from rights. Fundamental rights exist and must be given full plenitude:

“...subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society”

This engages the concept of proportionality. The intriguing reality is that now proportionality should engulf unreasonableness or Wednesbury irrationality as an administrative law ground of review. The sequenced methodology of proportionality has attendant advantages over recourse to the generalized claim of unreasonableness. Unreasonableness will be jettisoned so that unstructured reference to it will disappear from the lexicon of administrative law in the ACT. But in Australian Pork Ltd v Director of Animal and Plant Quarantine (2005) 216 ALR 549 at 615-617 Wednesbury managed to survive.

Conclusion

I have attempted to rapidly overview a number of specific issues that experience elsewhere demonstrates are likely to be amongst the earliest issues that come before the Courts. The advantage of a mixed colloquium of academics and interested persons from a panorama of disciplines and backgrounds, as assembled today, is that together we can examine from a wide angle the first full year of experience under the Human Rights Act. This examination has the very real purpose of providing insights that are likely to be of signal importance when the Act comes back before the Legislative Council for its statutory review in 2007.