HUMAN RIGHTS ACT 2004: A NEW DAWN FOR RIGHTS PROTECTION?

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I would like to thank the Institute for inviting me to speak to you in this lunch-time seminar on the ACT Human Rights Act 2004. The topic of human rights protection is always of great importance but as the first legislation of its type in Australia our subject today is particularly significant.

After a lengthy and somewhat tortuous debate the ACT Legislative Assembly passed the Human Rights Act 2004 in the early hours of Wednesday 3 March 2004. The Assembly vote brought to a close, at least for a while, the discussion about the value of Bills of Rights and whether and what model should be adopted in the ACT. It has been a controversial and sometimes heated debate that has been going on for over two years in and around Canberra.

When the ACT Human Rights Act commences on the 1 July 2004 it will bring into Australian law for the very first time a coherent statement of human rights as a measure against which executive action can be tested. Although it will take some time for it to filter through to all parts of the system, the Human Rights Act holds the potential for profound change in the ACT. The intersection of human rights and administrative law is rich with possibility: a focused, consistent, transparent human rights framework has the ability to inform and reshape traditional administrative law methodology.

The Act is based on what is generally referred to as the interpretive model. It is an ordinary statute that incorporates into ACT law fundamental civil and political rights enshrined in the International Covenant on Civil and Political Rights (ICCPR). At the heart of the Human Rights Act is a direction to public decision-makers and the judiciary to interpret ACT primary and subordinate law in a manner that is consistent with human rights.

This statutory direction is subject to the proviso that a human rights consistent meaning must prevail but only to the extent that it is possible to do so without overriding the clear intention of the legislature. Unlike a constitutionally entrenched Bill of Rights, human rights will not 'trump' other laws where there is an inconsistency and the Assembly retains all its existing law making power.

This new rule of construction has been described as a codification of the common law presumption that parliament does not intend to legislate inconsistently with human rights. In fact it takes us several steps further than this – namely, to actively look for a human rights consistent interpretation wherever it is possible to do so. It is not limited to situations where an ambiguity has been identified. Instead, section 30 of the Act enables the judiciary to go beyond the traditional search for the Assembly's intended meaning and legitimises the reading in of rights into existing and future laws.

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A human rights approach requires judicial consideration of the right as its starting point and an assessment of the proportionality of any limitations.

As Sir Stephen Sedley points out in relation to the UK Human Rights Act, the effect of human rights legislation is 'to focus the sometimes fuzzy concept of reasonableness through a lens of proportionality, and so make judicial reasoning about it more structured and more intelligible....Courts and public administrators are still getting used to this reorientation, and it does not make headlines; but it affects hundreds of thousands of people every year, and to them it matters a great deal'.[1]

The Human Rights Act also expresses the clear intention that human rights principles in the local context are to be informed by international human rights law. It does not compel, but actively invites, recourse to the judgments of other national courts such as the House of Lords and the New Zealand Court of Appeal and the judgments, decisions and views of international human rights bodies such as the UN Human Rights Committee and the European Court of Human Rights.

This is a logical requirement if ACT law is to develop alongside and consistently with internationally accepted human rights norms. Although it is common-place for Australian judges to look to comparable jurisdictions for guidance we must acknowledge that it is rare for the judgments of international human rights bodies to play an explicit role in judicial reasoning. Australia's lack of a national bill of rights has kept the Australian judiciary isolated, although not entirely divorced, from the general trend towards greater integration of domestic law with international human rights jurisprudence.

I would suggest that this is quite out of step with public expectations that Australian law protects basic rights and that human rights treaties to which Australia is a party have domestic application. There are many factors at play here but there is no doubt that Australia's accession to individual complaints mechanism under three international treaties – the ICCPR, the Convention Against Torture and the Race Discrimination Convention - has slowly raised expectations and the arguments against incorporation overstated.

Attempts by the courts to give effect to fundamental rights in administrative law have been met with a swift response. The High Court decision in *Teoh*[2], for example, was criticised as a backdoor incorporation of fundamental rights. The introduction of the Human Rights Act in the ACT will mean that, in this jurisdiction at least, that judicial method is internationalised and administrative and human rights law will become more entwined.

The Human Rights Act provides the content to the standards by which executive action is to be exercised and measured. Decision-makers in all areas of ACT government will have to incorporate consideration of human rights into their decision-making processes. And statutory discretions must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right.

The Human Rights Act does not create a direct right of action in the Supreme Court but it will give rise to actions based on human rights grounds that did not previously exist. For example, a challenge could be brought under the Administrative Decisions (Judicial Review) Act 1989 (ACT) to an administrative decision subject to review under that Act. The question will be was the action or decision lawful and was it consistent with human rights. The failure to interpret the law by reference to human rights may result in an error of law, be otherwise contrary to law, or a failure to take account of a relevant consideration. In addition to its power to grant remedies under s17 of the Administrative Decisions (Judicial Review) Act 1989, the Supreme Court could also grant a declaration of incompatibility.

I want now to discuss declarations of incompatibility in some detail.

If a question of interpretation is raised during proceedings in the Supreme Court, the Court will have the power to issue a declaration of incompatibility. The discretion will only arise if the Court is unable to conclude that the law in question is consistent with the Human Rights Act.

A declaration of incompatibility does not invalidate either primary or secondary legislation. Nor will it make the operation or enforcement of the law invalid or in any way affect the rights or obligations of anyone.

It was suggested by the Legislative Assembly Scrutiny of Bills Committee that the power conferred on the Supreme Court is both non-judicial in nature and incompatible with the exercise of Territory and Commonwealth judicial power. The Government has rejected that view. The interpretation of the law is quintessentially an exercise of judicial power and the requirement to determine a question of compatibility is integral to that process.

The power to make a declaration of incompatibility is not unique to the ACT. In New Zealand declarations of inconsistency have been developed by the Court of Appeal, which said in *Moonen's* case[3] that the question of consistency is a legal one that is incidental to the judicial function of statutory interpretation. The UK followed New Zealand's lead and included an explicit power to issue a declaration of incompatibility in the UK *Human Rights Act 1998.* And in 2001 the New Zealand Government formalised the availability of declarations of inconsistency for discrimination matters.

From our point of view the provision for a declaration of incompatibility is an integral part of the interpretive approach and the dialogue model established by the Act. Its purpose is to alert the Government and the Assembly to an issue of incompatibility while preserving parliamentary sovereignty. Although the declaration of incompatibility is unique in Australia, judicial review can be regarded as a kind of dialogue between the judiciary and the executive. Judicial supervision of executive decisions is part and parcel of our system based on the rule of law and ideally the decisions of the courts and tribunals should operate as a feedback mechanism to government.

It is premature to say that the Government can simply ignore a declaration. There are statutory obligations to present the declaration within 6 sitting days of the Attorney-General receiving it and to make a written response within 6 months. There may be situations where the Government decides for policy reasons to leave an inconsistent law unamended. However, there will also be cases where the inconsistency may be one that was unintended or went unidentified. In these cases the Government may decide not to contest a matter or initiate a review before the question is finally decided. In any event, declarations should not be a common occurrence if decision-makers are actively interpreting and applying the law consistently with human rights. It should only be in those cases where it is impossible to do so that a declaration is likely.

These features of the legislation have generated some excited debate but we should not lose sight of the fact the the Human Rights Act is not primarily aimed at generating human rights litigation but a human rights culture. The Government is focused on creating change within the public service and to make sure the frontline managers are making decisions within the human rights framework. The Act is also designed to integrate human rights into policy development.

The requirement that the Attorney-General form an opinion on the consistency of each Government Bill is crucial to achieving that goal. The statement of compatibility must be in writing and be presented to the Assembly. Where legislation is inconsistent with the Human Rights Act, the Attorney-General is required to say how the Bill is inconsistent.

The statement of compatibility will institutionalise human rights considerations at the beginning of the policy process. And although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt. It centralises the function in the Attorney-General's portfolio and requires a statement for every government bill – not just those that limit human rights. In this respect the ACT provisions are stronger than equivalent provisions in the New Zealand Bill of Rights Act 1990 and the UK Human Rights Act 1998.

To give effect to this new obligation we are developing pre-enactment scrutiny policy and introducing new procedures across the whole of the ACT public sector. This is a significant undertaking for a small government with relatively few resources. But it is important because it means that policy officials must start to integrate human rights into policy development and that individual Ministers and the Cabinet as a whole will be made aware of the human rights implications of legislative proposals.

To complement the government's new procedures, the Scrutiny of Bills Committee has a statutory responsibility to report to the Assembly on issues arising under the Human Rights Act. The Committee will no longer look for undefined intrusions into personal liberties, it will have to adopt a human rights framework when looking at all Bills – government and private members. And it will have to draw upon human rights law expertise to assist it in this process. This should have the effect of increasing the understanding of human rights amongst parliamentarians and improving debate.

If, for practical reasons, either the Government or the Scrutiny of Bills Committee fails to report before legislation is considered, this will not affect the validity of laws passed by the Assembly. This provision has met with some criticism but it would be quite inappropriate for the internal workings of the Assembly to be bound by the legislation. There is nothing to be gained by disrupting or subjecting parliamentary procedures to unnecessary delays.

The Act also establishes the office of 'Human Rights Commissioner'. Dr Helen Watchirs has been appointed as the first Human Rights Commissioner for the ACT. She will have several functions, namely, to review Territory law, conduct education programs and report to the Attorney-General on any matter relating to the Human Rights Act.

The Act does not allow individual complaints to the Commissioner. The Government agreed with the Consultative Committee that involving the Commissioner in complaints handling would conflict with the primary responsibility of the courts and tribunals to interpret ACT laws. Nevertheless, the Commissioner has a right, subject to the leave of the court, to intervene in proceedings that concern the interpretation and application of the Act.

In conclusion, the Human Rights Act will have a significant impact on how we work. It will provide a coherent and principled framework for decision-makers and open the judiciary to the rejuvenating influences of international human rights jurisprudence. Parliamentary procedure should be strengthened and a heightened interest and understanding of human rights will develop over time.

Endnotes

1 Sir Stephen Sedley, 'Colonels in Horsehair', *London Review of Books*, 19 September 2002, at 17.
2 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.
3 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 129; [2002] 2 NZLR 754.