> permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly … the intensity of the review … is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued (at 547 [27]).

Lord Steyn concluded however by approving a view 'that the intensity of review in a public law case will depend on the subject matter in hand', and adding '[t]hat is so even in cases involving Convention rights. In law context is everything' (at 547 [28]).

It may be predicted that the ACT Supreme Court will similarly make more intensive scrutiny of administrative action that engages an HRA right. Once it does so, it may well apply that level of scrutiny to all administrative action. This appears to have happened in Canadian administrative law.[29] In any event, the open texture of the HRA rights statements – and in particular of the notion of 'liberty' in s 18(1) and s 18(2) - could be a basis to claim that many an exercise of administrative power engages s 18.[30]

The impact of HRA s 21(1) on legislative choice in the design of schemes for the exercise of administrative power and of judicial review

> 21 Fair trial
> (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.

HRA s 21(1) derives from Art 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'. There emerges from the rulings of the Human Rights Committee of the United Nations concerning ICCPR Art 14 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'.[31] On this basis, the concept of decisions concerning 'rights and obligations recognised by law' embraces a vast range of administrative decisions. But must those decisions be final decisions, or are interim decisions included?[32] The language of Art 14 ICCPR ('determination') suggests a final disposition of the matter, but HRA s 21(1) omits this language.[33]

In respect of the decisions to which it does apply, s 21(1) provides that a person has the right both to have the decision made by a 'court or tribunal', and only 'after a fair and public hearing'.[34] It might be thought that this produces an absurd result. On its face, a law that reposed the power of making an administrative decision in a body other than a court or tribunal would be in conflict with s 21(1). Yet thousands of administrative powers are conferred on persons and bodies which are not courts or tribunals. 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. Even if the word 'tribunal' is read very broadly to encompass any administrative decision-maker,[35] most administrative decisions are not made after a 'public hearing'. Thus, on some basis, most administrative decision-makings schemes would derogate from s 21(1).

This absurd result may be resolved by reading s 21(1) with HRA s 28 (see above), and reasoning that s 28 permits application of the theory applied by the European Court of Human Rights, and adopted in the United Kingdom House of Lords, in their application of Art 6 of the *European Convention on Human Rights*.

OUTSOURCING LEGAL SERVICES – BOON OR BANE?

Rayne de Gruchy*

When organising this seminar, AIAL posed six questions to the panel of speakers:

- How successful have the new arrangements been for outsourcing legal services?
- What are the ongoing challenges for these arrangements?
- How well do agencies define the nature, scope and volume of legal service needs before they outsource?
- Are agencies fully costing legal service needs before outsourcing?
- How do agencies assess what are 'value-for-money' legal services?
- How well do agencies and legal service providers manage their relationship?

I will try to address each of those questions in order.

HOW SUCCESSFUL HAVE THE NEW ARRANGEMENTS BEEN FOR OUTSOURCING LEGAL SERVICES?

Reports

The needs of the Commonwealth for legal services and how these might best be met have been the subject of extensive review and consideration.

- *Report of the Review of the Attorney-General's Legal Practice*, March 1997 (Logan Report). This report was the genesis of the existing arrangements for sourcing legal services in the Australian Government legal services market.
- Sue Tongue, *Report of a Review of the Impact of the Judiciary Amendment Act 1999 on the Capacity of Government Departments and Agencies to obtain Legal Services and on the Office of Legal Services Coordination*, June 2003 (Tongue Report) (released by the Government in September 2003).
- The Australian National Audit Office (ANAO) audit report *Legal Services Arrangements in the Australian Public Service* (Audit Report No. 52 2004/05) released 20 June 2005.

The ANAO concluded that the quality of agency management of legal services since 1999 has been variable. ANAO did not recommend a particular model for provision of legal services but rather recommended a number of principles be followed to raise agency performance across government:

- Agencies should have a strong and well-functioning point of coordination (the legal services manager or 'informed purchaser') working between the agency's senior managers and those who deliver legal services.

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- Agencies require information on how well current legal arrangements are working both in their own organisation and elsewhere, to inform assessments of possible changes.
- Agencies should actively manage risks to their ability to purchase quality legal services as well as managing the legal risks to their own ability to deliver programs and services (their core risks).
- Agencies should undertake regular reviews of their legal services model to assess whether they still meet current needs. ANAO believes these assessments could be enhanced by the inclusion of a full-cost comparison of internal and external providers.
- The Better Practice Guide, *Legal Services Arrangements in Australian Government Agencies*, released by ANAO in August 2006, addressed the findings of the June 2005 audit report and aims to assist agencies to better manage their legal services arrangements.

How successful?

How successful the new arrangements are seen to be depends on what the measures are.

- Qualitative assessments are hard to devise.
- Surveys can just be snapshots – who is assessing success and on what criteria?
- There is a considerable focus on cost and whether Australian Government agencies are getting value for the perceived high cost of external legal services.

Market trends can give a good indication of various aspects of success.

- Is it possible to observe any significant trends over the last 7 years in legal services provision to the Australian Government and interpret those trends to see if they have a positive or negative impact on agencies' access to high quality legal services?

Market size

It is hard to tell what the market size is based on the investigations to date. Broad brush estimates suggest:

- 1999–2000: a market in the order of $300m spread 40/60 between internal agency services and outsourced services mainly provided by AGS, counsel at the private bar and private sector law firms providing mainly commercial services.
- 2003–04: growth of the market by some dimension and greater use by agencies of private sector law firms in addition to AGS. Based (loosely) on ANAO's figures, a market in the order of $450m spread evenly between internal and external services.
- 2006: the balance seems to have probably moved further to internal service provision while perhaps the market itself has continued to grow.
- Growth comes from a combination of the increasing complexity of legislation and law and the agitation of legal rights, as well as the increasing cost of labour and technology.

Positives

- The change to an open market has given agencies access to a broad range of legal expertise.
- A highly competitive market has meant that AGS and private sector law firms have invested heavily in improving the quality of their service provision to the particular needs

the law which authorises the making of the statutory instrument must be interpreted in the manner described in HRA s 30 – that is, so that it does not authorise an instrument the terms of which are in conflict with the rules and principles stated in Part 3 (ss 8-28) of the HRA. On the other hand, if the terms of the grant of power clearly authorise such an instrument, or if the achievement of the purposes of the empowering law so requires, the fact of the instrument being in conflict with the HRA does not affect its validity.[27]

Moreover, (although it is doubtful whether this adds anything), the interpretative principle in s 30 applies to the statutory instrument itself. This follows from the definition of 'Territory law' as meaning 'an Act or statutory instrument' (HRA Dictionary). The term statutory instrument is defined in the *Legislation Act 2001.*

The impact of the HRA on the content of the grounds for judicial review of administrative action

At least where an HRA right is engaged, and perhaps more generally, the reviewing court will come closer to a review of the substance or merits of the administrative decision under review than is involved in the application of the orthodox grounds of review.

Suppose that

- the empowering law permits the decision-maker to exercise a measure of discretion (choice) as to how the power may be exercised and does not clearly authorise a choice that would derogate from a particular HRA right, and
- the decision-maker decides to exercise the power in a way that does derogate from that HRA right.

As explained above, the effect of HRA s 30 is that the decision is not legally permissible *unless* the derogation of the freedom is justifiable under HRA s 28. Section 28 provides:

> 28 Human rights may be limited
> Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

On the basis of Canadian and New Zealand precedents, (and s 28 is not materially different to the derogation provisions found in the rights documents of those jurisdictions), it may be taken to require the court to assess whether the derogation:

- is appropriate – the sense of being rationally calculated – to achieve some legitimate end or purpose;
- is reasonably necessary to achieve that end; and
- is not such that its impact on affected individuals is lacking in proportion to the end or purpose.[28]

In *R (Daly) v Home Secretary* [2001] 2 AC 532 at 547 [27], Lord Steyn addressed the question of how a court should assess whether some administrative action could be justified under a derogation clause such as s 28. He said:

> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? … The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. … [A] few generalisations are perhaps

(i) where the empowering law provides clearly for the taking of the particular administrative action in question, and

(ii) (ii) where, in the light of the purpose of the empowering law, it must be read as authorising that action.

It will be for a court to determine whether the HRA is displaced in either of these ways, and while it cannot in every case be presumed that the purpose of the authorising law is to avoid conflict with an HRA right, one can expect judges to strain to so presume.

It might be added that if called upon to make a declaration of incompatibility under HRA s 32, the Supreme Court will address the issue of compatibility between the empowering law, as interpreted in the light of s 30, and some HRA right with which it is said to be incompatible. (But an administrative decision-maker must apply the law, and being bound by s 30(2), must adopt a meaning that accords with the purpose of the power conferred by the law, even if the decision-maker can see a prospect that the Supreme Court will find incompatibility.)

The HRA and non-statutory powers of administrative decision-making

It is axiomatic that government actors possess the same powers of action as the private person. As has been said 'that which is lawful to an individual can surely not be denied to the Crown'.[22] Government and those through whom it acts can do what may be done lawfully by a private actor. Powers under contract are but a particular example. The HRA will also operate to constrain the way these powers may be exercised, and, given that there is no statute authorising the exercise of these powers, in this respect the HRA operates as a higher law. This follows from s 121 of the *Legislation Act 2001* (ACT):

> 121 Binding effect of Acts
> (1) An Act binds everyone, including all governments.

There is nothing in the HRA which qualifies the operation of s 121.[23]

There is an analogous provision in s 32 of the *Canadian Charter of Rights and Freedoms*:

> (1) This Charter applies
> (a) to the Parliament and government of Canada … .

The Supreme Court of Canada has held that the Charter applies to the exercise by government of non-statutory powers, such as 'a cabinet decision taken under the prerogative power to allow the United States to test its cruise missile in Canada' and 'to the making by a Crown agent of a contract of employment with its employees'.[24] There is good reason to support this result. It would be odd were government action under statute to be limited by the HRA while action pursuant to some other source of legal power was not.

It might furthermore be noted that as the judiciary is 'the courts, as the custodians of the principles enshrined in the Charter, must themselves be subject to Charter scrutiny in the administrative of their duties'.[25] So far as concerns the ACT courts, the powers they exercise by virtue of statutory authority are affected by the effect of HRA s 30. In so far as their powers are non-statutory, s 121 of the *Legislation Act 2001* requires that the powers be exercised so as to be HRA compliant.[26]

The HRA and statutory instruments

The preceding analysis applies to administrative action which takes the form of a statutory instrument (the term used in the HRA to describe delegated legislation). The grant of power in

of clients. Our client surveys of recent years have indicated that AGS's performance across a range of client service areas has improved since we became a GBE.

- As the external market appears to be price competitive, there are some good pricing offers available to agencies.

Some issues that need watching

- Process costs are high due to procurement cost and the cost of managing the service provision for value.
- Increasing agency skill in managing outsourced services, following ANAO's Better Practice Guide and the Office of Legal Services Coordination's (OLSC) Guidance Notes, will help to contain these costs over time.
- It is a cost conscious market and while overall legal spend generally is increasing, individual agencies are often trying to find ways to control legal expenditure – this can lead to less than optimal outcomes for an agency needing high-quality legal advice on which to base a new policy or administrative regime.
- With the large number of legal services providers, both internal and external, there is greater fragmentation of the sources of advice. Agencies need to take great care to get good advice and retain it for the benefit of the agency/Commonwealth in the future. This corporate memory of legal advice comes at a cost to agencies.
- The Legal Services Directions 2005 help to manage this disadvantage.

Overall

- There are benefits that have accrued from the changes.
- Success from the open market arrangements can only come from each agency effectively accessing the market for its benefit (with the Commonwealth or whole-of-government in mind), ensuring the benefit represents value and ensuring the benefit is retained and shared for future access.
- ANAO, OLSC and the legal services providers themselves have a role to play in helping agencies realise that value.

WHAT ARE THE ONGOING CHALLENGES FOR THESE ARRANGEMENTS?

The market in its present form has been in place for 7 years and for the foreseeable future it is reasonable to assume that it will remain much as it is today.

- Legal services are an essential professional service to the Australian Government, supporting the development and rule of law in our democracy and the First Law Officer's role in ensuring the Executive Government has appropriate access to effective legal services in order to meet its accountability on a whole-of-government basis and over the long term.
- An important key to the Government accessing and utilising the legal services it needs to function well is for each agency to build its skills around effective organisational structures and effective management of legal risk.

Steps

- An agency's executive team should have a keen appreciation of its risks and how to manage them, taking into account governmental policy and accountability.

- In that context, it should think about what kind of legal support and assistance it needs – to what extent does the use of the structures of the law (legislation, regulation, the courts, tribunals) intersect with the day-to-day operations of the agency?
- That analysis will lead to a better review of the range of structures or models for provision of legal services that might best suit the agency's needs in managing its particular legal and business risks. This will entail a combination of internal personnel focused on legal services (whether or not they are providing legal services) and external lawyers relative to particular risks and needs.
- Choosing in-house or outsourced or a combination or the two is not all about comparing cost.
- Agencies should be strategic about their legal services. For this reason, the agency's senior executive should be involved in decisions about the structure of legal services procurement.
- The structure should be periodically reviewed as the agency's needs change.
- There is always a need to monitor value for money in the relation to the structure chosen for implementation.
- Agencies must ensure the efficient, effective and ethical use of Commonwealth resources (s 44 of the *Financial Management and Accountability Act 1997* and Financial Management and Accountability Regulations 1997, regs 8 and 9).

HOW WELL DO AGENCIES DEFINE THE NATURE, SCOPE AND VOLUME OF LEGAL SERVICE NEEDS BEFORE THEY OUTSOURCE?

- Purchasing legal services is vastly different to purchasing goods and is also different to purchasing other professional services.
- As mentioned above, the agency's executive should think about legal risks in the context of delivering its outputs and outcomes, and should analyse the agency's legal responsibilities and its needs for legal service support. Only then will it be able to determine the best way to access the legal support the agency needs.
    - Rarely would an agency regard the provision of legal services as part of its core business. Were it to, that would affect how it strategically meets its legal service need – one model is having an in-house legal branch focused, not on delivering legal services but, on managing the agency's strategic approach to legal services.
    - Where the provision of legal services is not core business, there is a real question about the best way to procure legal services. This is where the agency's executive should have a clear focus in implementing the model most likely to match needs and then review the model adopted periodically to ensure it continues to deliver value to the agency.
- Agencies should include in their risk considerations elements such as the sensitivity of various issues or legal matters, its importance to the agency's outcomes, the complexity of the legal solution required and the potential for conflicts of interest. Each of these will predicate different sourcing solutions, requiring agencies to be flexible in how they approach accessing the required legal service.
    - Basing a legal sourcing model on volume and without a strategic appreciation of risk may deliver less than optimum outcomes for the agency.
- These are not easy considerations and creating solutions that work over time is hard.

- what rights are recognised at common law;
- whether or not the scope of the administrative power is limited in the sense that it should not be exercised unless *regard is paid* to some right or freedom;
- whether the limitation is stricter in that the power *cannot be exercised* if to do so would infringe upon the right or freedom; and
- in either event, just what is the content of that right or freedom.

In contrast the HRA gives greater force to the rights it states.[17] Its effect is that in the exercise of any administrative, judicial, or subordinate legislative power, the decision-maker *must* – unless the law conferring the power clearly provides otherwise – proceed on the basis that the power does not authorise action inconsistent with a right stated in the Act.[18] This is a product of HRA s 30(1):

> 30(1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.[19]

Assessment of whether there is inconsistency between a particular exercise of a statutory power (the 'action') and the HRA is a two-step process. The first question is whether the action derogates from an HRA right, and the second is whether that derogation is justified under HRA s 28.[20] It is only where the first question is answered 'yes', and the second 'no', that it follows (subject to a qualification) that the decision-maker did not have power to take the relevant action. The qualification is that the action taken is lawful if the law authorising the power clearly authorises action inconsistent with the HRA. (In this case, the Supreme Court could, under HRA s 32, entertain an application for a declaration that the empowering law was in conflict with the HRA. If a declaration was made, the administrative action would, however, remain lawful.)

While it may be presumed that the Assembly intends that statutes and statutory instruments be interpreted so as not to authorise action inconsistent with an HRA right, the position is complicated by HRA section 30(2). This states a limitation of uncertain scope to the operation of s 30(1):

> 30(2) Subsection (1) is subject to the Legislation Act, section 139.

The Note accompanying s 30(2) reads:

> Legislation Act, s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test).

Lying in s 30(2) is a significant qualification to s 30(1). On the face of it, the interpreter (a court, an administrative decision-maker, or whomsoever) must ascertain the purpose of some particular provision of a law, and then must take a view of the meaning of the provision that will best accord with its purpose. In this exercise, the interpreter must disregard any question about the consistency of that view with the statement of rights in HRA Part 3. This is the effect of the words 'subject to' in s 30(2). Thus, the decision-maker cannot, in 'working out the meaning' of the law under s 30(1), read it in a way that avoids inconsistency with an HRA right where to do so would not 'best achieve the purpose of a law'.[21]

It is likely that in respect of many statutory powers conferred by ACT law it will be possible to argue that they must be exercised in a way that does not derogate from an HRA right. But this will not be so in two kinds of case:

second case, the language of the law must be read in a way that does not authorise an infringement. These results follow whether the constitutional protection or guarantee is explicit,[13] or implicit.[14]

In respect of the ACT, some provisions of the *Australian Capital Territory (Self-Government) Act 1988* have a higher law status. Section 23(1) provides that the Legislative Assembly has no power to make laws with respect to '(a) the acquisition of property otherwise than on just terms', and of course this limitation on legislative power also precludes administrative action that would have this effect. Thus, although the HRA does not recognise a right to property, to the extent allowed by s 23(1), this right has a higher law status.[15]

The *Human Rights Act 2004 (ACT)*

This Act's statement of rights is found in Part 3 of the Act, and in very general terms comprises:

8 Recognition and equality before the law
9 Right to life
10 Protection from torture and cruel, inhuman or degrading treatment etc
11 Protection of the family and children
12 Privacy and reputation
13 Freedom of movement
14 Freedom of thought, conscience, religion and belief
15 Peaceful assembly and freedom of association
16 Freedom of expression
17 Taking part in public life
18 Right to liberty and security of person
19 Humane treatment when deprived of liberty
20 Children in the criminal process
21 Fair trial
22 Rights in criminal proceedings
23 Compensation for wrongful conviction
24 Right not to be tried or punished more than once
25 Retrospective criminal laws
26 Freedom from forced work
27 Rights of minorities
28 Human rights may be limited.[16]

In addition, s 7 provides:

> This Act is not exhaustive of the rights an individual may have under domestic or international law.

The note to section 7 provides non-exhaustive examples of other rights:

1 rights under the *Discrimination Act 1991* or another Territory law
2 rights under the ICCPR not listed in this Act
3 rights under other international conventions.

The paper will now address how the statement of a right in the Act affects an exercise of executive or administrative power.

The HRA and statutory powers of administrative decision-making

In the application of the common law approach, the reviewing court exercises choice when determining matters such as:

- There is always scope for improvement and assistance from ANAO, OLSC, AGS and other providers is ongoing and over time should lead to improvements at a government-wide level.

ARE AGENCIES FULLY COSTING LEGAL SERVICE NEEDS BEFORE OUTSOURCING?

- Management decisions to use internal or external providers based on estimated costs should be informed by business cases that are in turn based on full cost information.1
- For external provider costs, the quoted price or agreed hourly rate generally reflects the full cost of services. The agency may have incurred additional costs in establishing and managing the relevant contract with the provider.
- Full costing of internal services requires collating data on employee salaries, salary-related overheads, accommodation, training and development, practice management systems, IT systems and other corporate overheads such as recruitment and HR management.[2]
- If a service required is routine, an external provider may have capital intensive systems which deliver low cost service. Also, the agency should consider longer term needs such as staff retention in relation to repetitive, commodity style work.
- Value can be looked at from a number of different perspectives. Adding up the salaries and on costs of an in-house team and dividing the total to derive an hourly rate, does not take into account:
  - the efficiencies generated by external lawyers operating in a competitive environment that imposes the disciplines of time costing and billing, and
  - the hidden costs such as the difficulty of training personnel in non-core agency skills, the problem of underperforming staff, loss of key staff and less than optimum workflow management, risk of lower levels of skills being available to the agency from independent external sources, risk to futurity of high quality, rapid and cost-effective advice.

HOW DO AGENCIES ASSESS WHAT ARE 'VALUE-FOR-MONEY' LEGAL SERVICES?

Some of the important aspects of service that an agency looks for in a legal services provider:

- An outcomes orientation – helping the agency do the job it has to do, well and in the right timeframe.
- Deep understanding of what the agency does, the context of the particular work and the effectiveness of the outcome the service provider is suggesting in that context and in the overall government context.
- Responsiveness to agency needs.
- Expertise that the agency is confident will mean that the suggested direction advised will suit the agency's needs.
- Confidence that the price the agency is paying is reasonable for the service being provided (VFM).

An assessment of value for money needs to take into account:

- the provider's experience and its knowledge of agency needs
- continuity in the provider's team

- qualifications and experience of the lawyers providing the legal services
- reliability
- timeliness in providing services.

As the ANAO Guide brings out well, value has to be understood from an assessment of the respective roles and value that the agency and the law firm can bring to the relationship.

Two aspects: *cost* and *quality*

Cost can be impacted by things such as:

- duplication of advice between internal and external providers
- inadequate attention to succession planning or professional development of in-house lawyers
- loss of internal lawyers' corporate memories with staff turnover
- provider over-charging
- inconsistent or unsatisfactory advice.

Quality needs to take into account:

- not just the 'correctness' of the advice, but its suitability for the agency's purpose
- the legal services provider's knowledge of the regulatory and policy imperatives of the agency, where a deficit in that knowledge puts the agency at risk of:
  - o breach of statutory powers or responsibilities and consequent risk of litigation;
  - o failure to advance a policy position due to inadequate legal advice;
  - o failure to take into account whole-of-government implications in adopting a policy position;
  - o failure to comply with prescribed procedures;
  - o ineffective management of administered legislation;
  - o failure to adhere to the Legal Services Directions;
  - o over reliance on a specific individual in a panel firm or the in-house team for specialist legal advice;
  - o any breaches of confidentiality or loss of legal professional privilege.

It cannot be assumed that the hours acquired from internal and external resources are both fully costed and can meaningfully be turned into hours of equivalent value.

***Value expected from outsourcing*[3]**

- external legal service providers have specialist expertise in the various areas of concern to the agency;
- can draw on resources to undertake large, complex or urgent tasks;
- meets litigation requirements in the Legal Services Directions;
- mitigates agency risk through independent advice:

susceptible to more than one meaning, and the court has thereby some room for choosing between one or more possible reading of those words.[5] Thus, the decision-maker and the court must resort to some other source for guidance. For this purpose, the courts have long taken the view that common law rights and freedoms of individuals are such a source. That is, the courts have reasoned that

- there is a common law statement of 'rights' (albeit one that changes over time)[6];
- it is assumed[7] that the legislature intends that these rights will be respected by a decision-maker exercising any administrative power;
- thus, any empowering law will not authorise action which derogates from a common law right;
- unless the empowering law manifests 'a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment'.[8]

To put it shortly, a court may choose to protect a judicially recognised right by holding that the statutory conferment of administrative power did not clearly enough authorise the infringement of a common law right. This reasoning has been manifested - and through its manifestation gained strength - in the outcomes of countless judicial decisions which have drawn the limits to an administrative power in some particular context. Dicey's third sense of the rule of law encapsulates the process. He said that 'the English constitution' (and in this respect he had in minds rights such as 'the right to personal liberty, or the right of public meeting') '[has] not been created at one stroke, and, far from being the result of legislation, in the ordinary sense of that term, [is] the fruit of contests carried on in the Courts on behalf of the rights of individuals'.[9]

In an administrative law matter, this reasoning may be employed as the foundation of an argument that some ground of review is made out, such as that:

- in making the decision, the decision-maker had regard to some consideration which was not relevant to the making the decision; or
- that some particular consideration was required to be taken into account and was not; or
- that in the end, the decision was 'unreasonable';[10] or
- that there was some limitation on the scope of the power which, while not stated expressly, was to be implied.[11]

Constitutional limitations on administrative power

A decision-maker acting under an ACT law may be compelled by the operation of a law of higher status to the empowering law to exercise their power in a way which avoids a conflict with a particular right protected by the higher law.[12]

The Constitution of the Commonwealth states expressly or by implication a range of rights, and thus (i) an empowering law will be invalid (and thus cannot authorise the administrative action) to the extent that it purports explicitly to authorise action which derogates from one of these rights, and (ii) where the law does not explicitly purport to authorise such action, but might be construed so to do, it must be construed as not authorising such action - on the theory that a stream – the Act - cannot rise higher than its source – the Constitution. In the

THE HUMAN RIGHTS ACT 2004 (ACT) AND ADMINISTRATIVE LAW: A PRELIMINARY VIEW

Peter Bayne*

The *Human Rights Act 2004* (ACT) (henceforth *HRA*) came into operation on 1 July 2004.[1] This paper is a brief and necessarily somewhat speculative review of the impact of the Act on administrative law in the ACT. First, the impact of the HRA needs to be set in the context of how common law and constitutionally entrenched rights set limits to the scope of administrative power.

Common law rights and the limitation of administrative power

In a major respect, administrative law describes the body of principles according to which the courts review the legality of administrative action. Overarching these principles is the principle of legality[2] - that to act lawfully, the administrative decision-maker must act within the scope (or 'the four corners') of their legal source of power. In *Walton v Gardiner* (1993) 177 CLR 378 at 408 Brennan J said:

> Where a statute confers a jurisdiction or power, the Supreme Court must construe the statute in order to exercise its supervisory jurisdiction. If the statute, either expressly or by implication, limits the power or prescribes rules governing its exercise, the Court enforces the limitation or the observance of the rules in obedience to the intention of the legislature. That legislative supremacy is the justification for judicial supervision is clear enough when the limitation or the rules are expressed; it is no less the justification for judicial supervision when a limitation or governing rule is implied (at 40).

The court does not ask whether it would have come to the same decision as the decision maker. Nor should the court seek to draw the boundaries of the administrative power in accord with its own view what is in that respect desirable. Brennan J also said:

> When judicial notions of justice or fairness are offended, there is a tendency, perhaps unconscious, for a court to see its jurisdiction as wide enough to authorize the granting of a remedy. ... But justice is not judicially administered by the making of orders which, while satisfying abstract notions of justice or fairness, are inconsistent with statutory law.[3]

On its face, the principle of legality says nothing about the kinds of powers which may be vested in a governmental body. An authoritarian or even a totalitarian system might be conducted according to this principle. But in the Anglo-Australian legal system the courts have been able to give some substance to the principle of legality.[4]

Typically, an administrative law matter requires the court to determine whether some particular administrative action taken by an officer or instrumentality of the government is justified in terms of the law said to be the source of justification. (Of course, at a prior point in time, the administrative decision-maker, or a tribunal on an appeal, must also address this issue.) Stated in purely formal terms, the limits on power are gathered from the text and the purposes of the relevant statute, and while this exercise is critical, and may yield a clear enough answer in a particular case, it often fails to do so. In many cases, the words are

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  - this is critical – it means making a call that the agency will be better positioned or protected through developing the policy or transaction through external, independent advice;
  - that call should be made early;
- helps the agency manage uneven workloads;
- creates a largely 'variable' cost basis for legal services;

There can be difficulties with in-house lawyers being able to maintain legal professional privilege, particularly where lawyers do not have practising certificates and do not confine themselves to answering legal questions, and therefore are not perceived to be independent from their employer.

Value expected from insourcing[4]

- an in-house team can have a better understanding of the agency's business and specialist expertise in the agency's legal needs;
- no conflict of interest;
- team is readily available;
- part of building and retaining corporate knowledge;
- the volume of legal services required by a small agency may be insufficient for a law firm to offer attractive rates or to establish corporate knowledge of the agency;
- commits the agency to a largely 'fixed' cost base.

HOW WELL DO AGENCIES AND LEGAL SERVICE PROVIDERS MANAGE THEIR RELATIONSHIP?

Legal services are not simply commodities; they involve the building of relationships and an understanding and appreciation of change in their environment. At a strategic level the aims and objectives of an agency are achieved through the building of strong relationships between an agency and its external provider/s.

This requires constant communication and feedback at all levels to enable the legal service provider to develop a deep appreciation of the agency's business and needs.
In addition to this, it is necessary to manage the process surrounding the delivery of services, but it would be counter-productive to achieving value for money to allow process management to drive the relationship.

Care needs to be taken to ensure both the agency and the provider are investing in the relationship to achieve the agency's strategic aims:

- There can be a tendency for an agency to keep its external provider at arm's length, bring the law firm in late in the piece in order to keep costs down. This approach can lead to greater cost and lost time when the external advice means the policy or transaction needs to be redesigned.
- Law firms who are brought into a strong relationship with an agency can help the agency through early advice and discussions. It can use its business systems to support an agency's internal legal or project team working on an important project.

It is also strategically important for the legal executives within an agency to consider how best they can help the agency's executive, managers and personnel manage legal risk. AGS and other providers are more than happy to work with legal executives to assist in this.

Acknowledgement

I thank Bronwyn Neroni, Senior Lawyer assisting the CEO, AGS, for her contribution in conducting the research for, and in drafting these notes.

Endnotes

1 ANAO Better Practice Guide, *Legal Services Arrangements in Australian Government Agencies*, August 2006, p. 23.
2 Ibid.
3 Ibid., p. 18.
4 Ibid.

If her contributions to scholarship and teaching were significant, her contributions to the university and the wider community were astonishing: Director of the Credit Union of Canberra, Member of the Social Security Appeals Tribunal, Chair of the ACT Sex Industry Consultative Group, and a plethora of like offices and activities. Although quite ill, she was fittingly honoured for her service to the university community at an ANU graduation ceremony in December 2005, when a packed Llewellyn Hall rose to its feet as one and movingly paid tribute—a magical moment that will live in the memory of those present.

It is not these contributions, however—significant as they are—for which Phillipa Weeks will be primarily remembered. Every now and again, a person comes along with personal qualities that (if we assume, as we must, that they are capable of acquisition rather than simply part of our genetic inheritance) are truly inspirational. A mere catalogue cannot do Phillipa justice, but these are some of the values and qualities with which she was typically identified: grace, empathy, generosity, integrity, compassion, courtesy, kindness, modesty, collegiality, humanity, commitment, honesty, respect, wisdom, warmth, positiveness, unaffectedness, courage, gentleness—and yet, amidst these saintly characteristics, an indelible professionalism, even a certain toughness when the situation required it. She was, most of all, a refreshing and powerful antidote to cynicism, an awesome role model, and incontrovertible, though regrettable, evidence of the truth of the aphorism that it is indeed the good who die young.

A measure of the affection and esteem in which Phillipa was held is that at the ANU College of Law Annual Alumni Dinner on 25 August 2006, a group of alumni spontaneously initiated some fund-raising for a scholarship in Phillipa's memory. Most likely, the scholarship will assist intending law students with a country or regional background not dissimilar from Phillipa's own formative experience in Harden and Cootamundra. Interested contributors to the fund should contact Michellé Mabille at the ANU College of Law on (02) 6125 4070 or michelle.mabille@anu.edu.au .

Phillipa Weeks was a wonderful colleague and a very special person, and is sorely missed. Her presence defined the spirit of collegiality that pervades the ANU College of Law. Her memory will continue to do so.

Professor Michael Coper
Robert Garran Professor and Dean
ANU College of Law