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VALE PHILLIPA WEEKS
1953 – 2006

Phillipa Weeks spent much of her life being too young. She won her first major scholarship in 1963, a Canberra-Goulburn Archdiocese Bursary to enter first year of high school as a boarder at Our Lady of Mercy College Goulburn, but had to forfeit it because she was only 10. Six years later, having completed her schooling at Harden Catholic Primary School, Cootamundra Catholic High School (to year 10), and Cootamundra High School (to year 12), she won a prestigious National Undergraduate Scholarship (NUS) to attend the Australian National University at the age of only 16—too young even to have a drink, legally, at the University Union bar. And on 4 August 2006, she died of cancer at the age of only 53—far too young for a person whose outstanding achievements to that point, and whose remarkable impact on those around her, only underlined how much more she still had to give.

Phillipa graduated from the ANU in 1974 with a Bachelor of Arts, with first class honours in history, having made a considerable impression on Manning Clark, who later mentioned her in his autobiography. After a brief stint with the Department of Foreign Affairs in 1975, she turned to the law in 1976, embarking on a graduate-entry law degree at ANU. She graduated with first class honours in law in 1979 and a swag of prizes. Her talent and her potential for an outstanding academic career were quickly spotted and she was recruited, when she was but a student in Family Law in 1978, to teach that subject in 1979.

A tenurable position in the Faculty of Law became available in 1982 for a specialist in property law, one of the few subjects which Phillipa had not been called upon to teach in her four years of temporary teaching appointments. The selection committee wisely invested in her potential and she turned herself into a leading property lawyer, though the scholarship for which she is best known is her work in the area of labour law. She won ANU's prestigious Crawford Prize in 1987 for her LLM thesis on trade union law and subsequently earned a reputation as one of Australia's leading labour lawyers, one of the many communities mourning her loss.

Phillipa was appointed as a professor of the ANU in 2001. In her 2002 Inaugural Lecture, she spoke on 'Fairness at Work', a subject on which she was not only an incisive and insightful scholar, but also, in her capacity as Associate Dean and Head of School from 2000 to 2005, a masterful exponent.

Phillipa's scholarship made a significant contribution to our understanding of labour law, particularly in the areas of trade union security, freedom of association and public sector employment. Her book on the last topic, co-edited with Marilyn Pittard of Monash University, will be published posthumously; checking the proofs was the last work-related thing she did before she died. She also made a significant contribution as a teacher, and not just because of the clarity of her exposition or the sweep of her erudition. Generations of students attest to the personal interest she took in them, citing in particular her practice of writing personal notes of congratulation and encouragement; this in an era in which teachers of larger and larger classes are hard-pressed to know their students by name let alone have a meaningful relationship with them.

Edited version of an obituary that first appeared in The Canberra Times on 16 December 2006.

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

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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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

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:

- 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:

(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

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

> 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*.

Where the power to make a decision of a kind encompassed within s 21(1) is not vested in a court or tribunal, or, say, will not be made after a 'fair and public hearing' by a court or tribunal, the relevant ACT law will, on its face, derogate from s 21(1). But the scheme might be found under s 28 to be a justifiable derogation of s 21(1) if, to use the rubric of the UK case-law, 'the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires'.[36]

This theory was spelt out by the House of Lords in *Runa Begum v London Borough of Tower Hamlets* [2003] 2 AC 430. Having presented herself as homeless to the Tower Hamlets Council, Begum was provided with temporary accommodation under a non-secure tenancy, terminable upon a month's notice. She was then assessed as eligible for assistance and in priority need. In accord with a statutory duty, the Council offered Begum a secure tenancy, which she refused, citing various reasons. The council then determined that this refusal was unreasonable, and thus had discharged its duty. Begum was given notice to quit the temporary accommodation. Begum then sought an internal review, which in accord with statute was conducted by an officer of the Council who was not involved in the original decision and who was senior to the officer who made it. The Council notified Begum of the procedure to be followed (and in this case she was interviewed by a Council officer) and of her right to make representations in writing. The reviewing officer also decided that Begum's refusal was unreasonable. Begum then exercised her right to appeal to a county court on 'any point of law arising from the decision'. This enabled an applicant 'to complain not only that the council misinterpreted the law but also of any illegality, procedural impropriety or irrationality which could be relied upon in proceedings for judicial review' (at 443 [17] (Lord Hoffman).

Eventually, the House of Lords was called on to consider whether this scheme for decision-making and appeal failed to satisfy the provision in Art 6(1) of the European Convention that in the determination of a person's 'civil rights and obligations' he or she was guaranteed 'a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law'.

The Lords held that the review officer could not, by reason of her employment by the Council, be regarded as 'an independent and impartial tribunal established by law' (for example, at 438 [3] (Lord Bingham). But did the decision of the review officer amount to a determination of Begum's 'civil rights'? One possible answer was that Art 6 had no application to an exercise of administrative power. This was arguable on the basis that 'the *travaux préparatoires* and other background to the Convention' revealed that

> the term "civil rights and obligations" was originally intended to mean those rights and obligations which, in continental European systems of law, were adjudicated upon by the civil courts. These were, essentially, rights and obligations in private law. The term was not intended to cover administrative decisions which were conventionally subject to review (if at all) by administrative courts. It was not that the draftsmen of the Convention did not think it desirable that administrative decisions should be subject to the rule of law. But administrative decision-making raised special problems which meant that it could not be lumped in with the adjudication of private law rights and made subject to the same judicial requirements of independence, publicity and so forth. So the judicial control of administrative action was left for future consideration (at 445 [28] (Lord Hoffman)).

Nevertheless, the absence of 'addition to the Convention to deal with administrative decisions' led the European Court of Human Rights 'to develop the law' (at 445 [28] (Lord Hoffman)) concerning Art 6 in various ways to the general effect that it applies to much (but not all) administrative decision-making. Some judgments contain analysis of the relevant case-law, but each Law Lord declined to decide this issue, being content to assume that the decision of the review officer was a determination of Begum's 'civil rights'.

But this development posed a problem. In the practice of the European states administrative decision-making was commonly entrusted to an administrative official who was not 'an independent and impartial tribunal established by law', and whose decision was not subject to a right of appeal on the merits to a court ((at 446 [31] (Lord Hoffman)).[37] On one view, any such scheme did not comply with Art 6(1) because at no stage did a body which was 'independent and impartial' make the decision. To avoid this result, Lord Bingham LC said that this 'elastic' interpretation of the term 'civil rights' this must be accompanied by a 'flexible … approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided' (at 439 [5]).

Lord Hoffman noted that in *Kaplan v United Kingdom* the European Commission on Human Rights had

> offered what would seem to an English lawyer an elegant solution, which was not to classify the administrative decision as a determination of civil rights or obligations, requiring compliance with article 6, but to treat a dispute on arguable grounds over whether the administrator had acted lawfully as concerned with civil rights and obligations, in respect of which the citizen was entitled to access to a fully independent and impartial tribunal. By this means a state party could be prevented from excluding any judicial review of administrative action (as in the Swedish cases which I have mentioned) but the review could be confined to an examination of the legality rather than the merits of the decision (at 446 [32]).[38]

Of course, what an examination of the legality of a decision must involve in the particular context would remain for debate, as it does under the theory (see below) which has been adopted. For example, a short limitation period on the availability of review might render the scheme non-compliant.[39]

But the European Court has not adopted the *Kaplan* solution, and in *Runa* Begum the House of Lords confirmed that United Kingdom courts should follow suit. Lord Hoffman does not elaborate, but rejection of this theory might derive from the lack in many European states of a system of judicial review akin to the English system. It is however a solution open to a Territory court in its application of HRA section 21(1), and on the face of it has much in its favour. One matter in favour of the rejected *Kaplan* theory is that the European Court theory is convoluted and mystifying, and yet the result arrived at is close to that produced by the *Kaplan* theory ((at 446 [34], Lord Hoffman).

Lord Hoffman summarised the preferred European Court theory in four propositions:

> first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in the *Alconbury* case [2003] 2 AC 295, 330, para 87, "jurisdiction to deal with the case as the nature of the decision requires." (at 447 [33], and see for a shorter statement, at 463 [100]-[101] (Lord Millett)).

In relation to the third proposition, Lord Hoffman noted that 'the English conception of the rule of law [which] requires the legality of virtually all governmental decisions affecting the individual to be subject to the scrutiny of the ordinary courts' is 'accompanied by an approach to the grounds of review which requires that regard be had to democratic accountability, efficient administration and the sovereignty of Parliament' (at 447 [35]). Concerning the application of the third proposition to the case at hand, it was argued by the appellant that

> when a decision turns upon questions of policy or "expediency", it is not necessary for the appellate court to be able to substitute its own opinion for that of the decision maker. That would be contrary to the principle of democratic accountability. But, when, as in this case, the decision turns upon a question of contested fact, it is necessary either that the appellate court have full jurisdiction to review the facts or that the primary decision-making process be attended with sufficient safeguards as to make it virtually judicial (at 447-448 [37]).

Lord Hoffman rejected this distinction as a helpful guide to deciding whether an administrative decision-making scheme is Art 6 compliant.[40] But he did draw some other distinctions. Dealing with *Bryan v United Kingdom* (1995) 21 EHRR 342, Lord Hoffman said that a finding of fact by an administrator in the context of an enforcement proceeding 'was closely analogous to a criminal trial' (at 448 [41][41]), thus suggesting, it appears, that such a decision was affected by a general principle which he then stated:

> The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker: see *De Cubber v Belgium* (1984) 7 EHRR 236 (at 448-449 [42]).

On the other hand,

> utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. … in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament (at 448-449 [42]).

Consideration of these factors in a particular context might justify (in terms of what Art 6(1) requires) a finding that fact-finding may be entrusted to an administrator subject only to a limited degree of judicial review of fact-finding. In this context, review of fact on 'conventional principles of judicial review' (at 451 [50])[42] was appropriate.

Just what degree of judicial review is necessary will depend on the nature of the decision. In the *Runa Begum* context, Lord Hoffman noted that an earlier Lords decision had held that housing authority decisions should not be easily susceptible to judicial review.[43] Less clear is the statement that

> When one is dealing with a welfare scheme which, in the particular case, does not engage human rights (does not, for example, require consideration of article 8) then the intensity of review must depend upon what one considers to be most consistent with the statutory scheme (at 451 [49]).[44]

He described the review officer's decision as a 'classic exercise of an administrative discretion'. That is, 'the decision was arrived at was by the review process, at a senior level in the authority's administration and subject to rules designed to promote fair decision-making' (at 452 [52]). He held that 'the Strasbourg court has accepted, on the basis of general state practice and for the reasons of good administration which I have discussed, that in such cases a limited right of review on questions of fact is sufficient', (at 452 [53]), and that '[i]n the normal case of an administrative decision, however, fairness and rationality should be enough' (at 452 [54]). By the 'normal case', it appears that he referred to decisions in 'areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators', and included decisions which were based on 'preliminary findings of fact' (at 453 [56]).

Thus, Lord Hoffman rejected the notion that

> the test for whether it is necessary to have an independent fact finder depends upon the extent to which the administrative scheme is likely to involve the resolution of disputes of fact. I think that a spectrum of the relative degree of factual and discretionary content is too uncertain (at 453 [58]).

Rather,

> the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact (at 454 [59]).

Lord Hoffman offered some more general guidance as to how a court should assess whether a particular decision-making scheme coupled to some form of judicial review was Art 6(1) compliant. He cited 'the great principle' which *Bryan v United Kingdom* (1995) 21 EHRR 342 at 360 [45] decided, being that

> in assessing the sufficiency of the review ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal ([2003] 2 AC 430 at 451-452 [51]).

He concluded with a statement of a deference principle:

> I entirely endorse what Laws LJ said in [*R (Beeson's Personal Representatives) v Secretary of State for Health* [2002] EWCA Civ 1812, (unreported) 18 December 2002], at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles (at 454 [59]).[45]

At its most general level, the theory spelt out in *Runa Begum* is quite mystifying. The notion that 'the procedures, viewed as a whole, provide full jurisdiction to deal with the case as the nature of the decision requires' is devoid of significance. The somewhat more precise guidance provided by the 'great principle' of *Bryan*, even as elaborated by some United Kingdom caselaw,[46] still leaves to the judiciary much room for choice when ruling upon the adequacy of a particular administrative decision-making regime. This theory confers on the ACT Supreme Court an extensive power to re-fashion the principles of administrative law, and to decide just how far its jurisdiction to review the legality of administrative action can be modified. This result is, however, of a kind which flows from the enactment of a law like the HRA.

One important matter is clear. The assessment of whether the derogation from s 21(1) is justified under s 28 will turn critically on the ability of the person affected to seek legality review of the decision from a court. In relation to this last matter, in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 328 [81] Lord Hoffman said that the European Court saw Article 6(1) 'as a means of enforcing minimum standards of judicial review of administrative and domestic tribunals', adding:

> The cases establish that article 6(1) requires that there should be the possibility of some form of judicial review of the lawfulness of an administrative decision (at 329 [84]).

Clearly, HRA s 21(1) will provide another platform for challenge to the privative clause, although not perhaps as effective as other platforms.[47]

On any view, there is much grist in s 21(1) for the mills for academic administrative lawyers and practitioners. As yet, s 21(1) has not fallen for analysis by the ACT Supreme Court. Its effect has, however, been addressed by the Territory 'Scrutiny of Bills Committee', in particular where a Bill contains a privative clause. The role of the Committee in relation to the HRA deserves a brief note.

The Scrutiny of Bills Committee and privative clauses

HRA Part 5 is headed 'Scrutiny of proposed Territory laws', but the operative provisions apply only to bills (and not, thus, to proposed subordinate laws),[48] and, furthermore, only to bills

presented to the Legislative Assembly by a Minister. In respect such a bill, the Attorney 'must prepare a written statement (the compatibility statement) about the bill for presentation to the Legislative Assembly': s 37(2). That statement must state 'whether, in the Attorney-General's opinion, the bill is consistent with human rights' (s 37(3)(a)), and, 'if it is not consistent, how it is not consistent with human rights' (s 37(3)(b)).

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

> 38 Consideration of bills by standing committee of Assembly
> (1) The relevant standing committee must report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly.

As matters stand in January 2005, the relevant Committee is the Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee). In this role, the Committee is referred to as the 'Scrutiny Committee'.

The Committee has long been concerned about the privative clause, and in recent reports it has buttressed its long-standing concern that a private clause is an undue trespass[49] on rights by pointing to HRA s 21(1).[50] It has also pointed[51] to the possibility that the power of the Assembly to restrict judicial review is limited by s 48A(1) of the *Australian Capital Territory (Self-Government) Act 1988*, which might be read in a fashion similar to s 75(v) of the *Constitution*.[52] For some time the government resisted the view that the privative clause was problematic, but may now be conceding that it is undesirable.[53]

Conclusion

This brief and necessarily somewhat speculative review of the impact of the *Human Rights Act 2004* on administrative law in the ACT warrants at least a recognition that we may be on the brink of a substantial re-working of the principles of administrative law.

The review also raises a question whether, at least in respect of the way it impinges on the exercise of administrative power, the proponents of the HRA adopted an appropriate model. Section 21(1) is a quite unsatisfactory way to state principles to govern the exercise of administrative power.[54] Its language is obscure, and if (combined with s 28) it is applied according to the European theory outlined above, its effect will be very difficult to explain. This is likely to obstruct human rights dialogue.

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

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

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

Endnotes

1 For background, see ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, May 2003. The HRA does, however, depart in significant respects from the recommendations in this report.
2 *Entick v Carrington* (1765) 19 St Tr 1030 is widely regarded as the seminal case. Some judges now wish to substitute a narrower concept; see n 4 below.
3 Ibid at 407.
4 This substance is now sometimes subsumed under another use of the principle of legality; see JJ Spigelman, 'Principle of legality and the clear statement principle' (2005) 79 ALJ 769 at 774-776.
5 See *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290 at 321-322 [103]-[105] (Kirby J).
6 Spigelman, n 4, at 775 provides a useful list, and more generally see P Bayne, 'The protection of rights – an intersection of judicial, legislative and executive action' (1992) 66 ALJ 844.
7 See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 414 [28]-[31] (Kirby J) for the various ways this step is justified.
8 *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 492 [30], (Gleeson CJ). In *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 the High Court held that the Parliament of New South Wales had clearly authorised the Governor to make 'arrangements' for compensation for the acquisition of property which were not just or adequate in terms of the common law presumption that property not be taken except on this basis; see at 414 [28] and [31], and 417 [36] (Kirby J). Judges do however differ as to what rights are within the common law conception, and what is required by way of statutory provision to displace them. In *Malika Holdings Pty Ltd v Stretton supra*, compare the reasoning of McHugh J at 298-299 [26]-[31] to that of Kirby J at 328 [121], and 332 [130]-[131].
9 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed, MacMillan, 1920) pp 191-192.
10 The unreasonableness ground of review has long been a vehicle for protecting rights. In *Kruse v Johnson* [1898] 2 QB 91 at 99-100 Lord Russell of Killowen CJ said that local authority by-laws might be unreasonable if 'they were found to be partial and unequal in their operation between different classes...[or] if they involved ... oppressive and gratuitous interference with the rights of those subject to them...'.
11 *Ex parte Grinham; re Sneddon* [1961] SR (NSW) 862 illustrates how this technique may be employed to read a statutory power restrictively out of a desire to protect a common law right. A power to make regulations under a scheme governing the regulation of public vehicles, which was wide enough to permit the creation of new offences, was held to be insufficient to authorise a regulation which made it an offence to fail to provide information. The statutory power did not plainly authorise displacement of the common law right that a person should not be required to be her or his own accuser.
12 This proposition applies to decision-makers in all Australia jurisdictions, although in somewhat different ways, depending on the higher laws operating in the particular jurisdiction. The High Court is not sympathetic to the argument that 'rights' limitations can be spelt out of the grant of legislative power to a State or Territory parliament to make laws for the 'peace, order and good government' of the jurisdiction; see *Durham Holdings* n 8. Compare to developments in the United Kingdom, discussed in A Twomey, 'Implied limitations on Legislative Power in the United Kingdom' (2006) 85 ALJ 40.
13 For example, in *Lebanese Moslem Association v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 195 at 209-213 Pincus J held that Constitution s 116 (the guarantee of the free exercise of religion) required that the Minister take certain matters into account in the exercise of a power to grant (or not) a person permanent residence in Australia.
14 The right to political free speech has ramifications for the way administrative power may be exercised. The *Irving* cases illustrate the complexities of bringing this right to bear on an examination of administrative power; see *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 44 FCR 540, and *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 139 ALR 84; see generally, L Maher, 'Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving' (1994) 16 Syd LR 358, and P Bayne, 'David Irving, and the Federal Court and Free Speech', (a paper delivered to the seminar Silencing and Censorship in Australian Culture, Humanities Research Centre, ANU, 28 February 1997.)
15 In some contexts, it is very difficult to work out just what is the extent of s 23(1); see *Australian Capital Territory v Pinter* [2002] FCAFC 186. See too s 69(1) of this Act: 'Subject to subsection (2), trade, commerce and intercourse between the Territory and a State, and between the Territory and the Northern Territory, the Jervis Bay Territory, the Territory of Christmas Island or the Territory of Cocos (Keeling) Islands, shall be absolutely free'. Thus, administrative action which impinged on the freedom of 'trade, commerce and intercourse' would be invalid; compare *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
16 These numbers refer to the relevant section of the *Human Rights Act 2004*.
17 All of the HRA rights are within the common law conception of what rights deserve protection, but that conception is much broader than the HRA statement. For example, the principle that a law, or the exercise of a legal power, should not operate retrospectively is stated in the HRA s 25 in respect only of criminal laws. Despite HRA s 7, there is a risk that the HRA statement of rights will diminish the significance of those common law rights not recognised in the HRA.
18 This fundamental point was missed by the Territory Administrative Appeals tribunal in *Merritt and Commissioner for Housing* [2004] ACTAAT 37; see P Bayne, 'The Human Rights Act 2004 (ACT) – Developments in 2004' (2005) 8 Canberra LR 137 at 165-166. A similar result follows under the New Zealand and Canadian bills of rights; see P Rishworth, 'Interpreting Enactments: Sections 4, 5 and 6' in P

Rishworth, G Huscroft, S Optican, and R Mahoney, *The New Zealand Bill of Rights* (OUP, 2003) p 158. For Canada, see *Baker v Canada* [1999] 2 SCR 817 at 854, citing *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

19 A 'Territory law' is 'an Act or statutory instrument': HRA Dictionary.

20 Section 28 is discussed below.

21 This point is recognized in *Bragon Traders Pty Ltd and ACT Gambling & Racing Commission* [2006] ACTAAT 3 [39].

22 *Clough v Leahy* (1904) 2 CLR 139 at 157, applied in *Church of Scientology Inc v Woodward* (unreported, High Court, Aikin J, 1 November 1979), noted in (1980) 11 Fed LR 102.

23 See A Butler, 'The ACT Human Rights Act: A New Zealander's View', Ethos, no 94 (December 2004).

24 Hogg PW, *Constitutional Law of Canada* (2004 Student Edition) 767-768.

25 *R v Rahey* [1987] 1 SCR 588 at 633, per La Forest J; quoted in Hogg, above at 770.

26 The HRA may have a much wider effect. The reference in s 121 to 'everyone' raises of course the possibility that conduct by anyone is affected by the HRA.

27 The Supreme Court could under HRA s 32 entertain an application for a declaration of invalidity of the grant of power in the authorising law. If however a declaration is made, the instrument remains legally effective.

28 The Standing Committee on Legal Affairs of the Legislative Assembly of the ACT undertook a full analysis of the task of assessing justifiability under s 28 in *Scrutiny Report No 25 of the Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006.
http://www.parliament.act.gov.au/downloads/reports/6scrutiny25.pdf

29 Hogg PW, 'The Law Making Role of the Supreme Court of Canada' (2001) 80 Can Bar Rev 171 at 177.

30 This is quite speculative, and Canadian law does not suggest this outcome; see n 25 at 176.

31 See A Conte, S Davidson and R Burchill, *Defining Civil and Political* Rights (2004) at 118-119, and S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights* (OUP, 2nd ed, 2004) [14.07]. Commentary on s 27 of the New Zealand Bill of Rights sees this language as confirmatory of the scope of judicial review of administrative action; see G Guscroft, 'The Right to Justice', in Rishworth et al, n 18, at 760-765.

32 This problem is illustrated by *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113.

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

34 It does *not* say that s 21(1) applies only where a 'court or tribunal' makes a decision of the kind described.

35 It might be noted that the narrow use of the word 'tribunal' in ACT statutes should not control its use in HRA s 21(1). This will follow if ACT Supreme Court adopts the principle that the words of the HRA must be given an autonomous meaning, in the sense that their meaning cannot be controlled by another ACT law unless the other law is clearly designed to amend the HRA, (and excepting of course other laws - such as a Commonwealth statute - of higher status to the HRA). This principle will enhance the status of the HRA as a statute designed to set limits to what may be provided for by other statutes.

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

37 Citing the decision of European Commission of Human Rights in *Kaplan v United Kingdom* (1980) 4 EHRR 64 at 90 [161].

38 Lord Hoffman perhaps meant to refer to (1980) 4 EHRR 64 at [153]-[155], and [163]-[164]. Relevant extracts from the opinion of the Commission are in S Farran, *The UK Before the European Court of Human Rights* (Blackstone Press, 1996) pp 153-157.

39 This issue was issue examined in *A v Hoare* [2005] EWHC 2161.

40 Although conceding that he had made an 'incautious remark' in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 338 [117], which in turn was the basis for the appellant's submission concerning decisions turning on disputed questions of fact.

41 One might think that a decision on a criminal charge must be made by a court after a 'fair and public hearing' to be s 21(1) complaint. Why then s 21(1) contemplates decision of a criminal charge by a 'tribunal' is a puzzle. The answer may lie in unthinking adoption of the wording of the ICCPR by the HRA's drafters.

42 Of course, this raises the question of just what are the conventional principles, and how far they may be qualified. Whether an ACT court adopts the theory applied in *Runa Begum*, or the simpler theory of *Kaplan*, it may hold in some particular context, or even generally, that legislative restriction of its power to review findings of fact under say s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) is such as to render its power of review less than that required by HRA s 21(1).

43 Citing *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484 at 518.

44 The reference to Article 8 of the European Convention on Human Rights (right to respect for private and family life) may acknowledge that a court might, in cases in which Convention rights were engaged, quash a decision on the ground of lack of proportionality; see *R (Daly) v Home Secretary* [2001] 2 AC 532 at 547 [27] (Lord Steyn) quoted above.

45 English courts and commentators do not universally accept the notion the courts should defer to legislative judgment; see R Clayton and H Tomlinson, *The Law of Human Rights* (OUP, 2000 and Supplements) at [5.125]ff.

46 The cases are discussed in D Feldman (ed), *English Public Law* (OUP, 2004) at [12.29]-[12.36], and in P Craig, 'The Human Rights Act, Article 6 and Procedural Rights' [2003] Public Law 753.

47 See text at n 50 below.

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

49 The terms of reference of the Committee follow the usual form of requiring the Committee to report on whether a clause of a Bill unduly trespasses on personal rights and liberties.
50 *Report No 49 of the Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004.
51 See *Report No 11 of the Sixth Assembly*, concerning the Water Resources Amendment Bill 2005.
52 See *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. A broad view of the effect of s 48A(1) might be implicit in the judgment of Higgins CJ in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 61. See too *Commissioner for Housing v Ganas* [2003] ACTSC 34 [12]-[14] per Crispin J.
53 Compare the first response (found in *Report No 13 of the Sixth Assembly*) to *Report No 11 of the Sixth Assembly*, concerning the Water Resources Amendment Bill 2005, where HRA 28 was invoked to justify a privative clause, to the later response to be found in *Report No 14 of the Sixth Assembly*.
54 See too HWR Wade and C Forsyth, *Administrative Law* (OUP, 8th ed, 2000) p 441, noting criticism of Art 6(1) of the European Convention.

SOME REFLECTIONS ON VICTORIA'S CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Pamela Tate SC*

Introduction

The famous English administrative lawyer, Stanley de Smith said:

> [i]n all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public [officials] of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public.[2]

This recognition of the need for public powers and functions to be exercised in a principled way has increased in part because of the growth of government's powers and activity. No longer can it be said, as it was in the early twentieth century that 'a sensible law-abiding [citizen] could pass through life and hardly notice the existence of the state, beyond the post office and the policeman.'[3] This was unlikely to be true even then. As Sir William Wade observed:

> [B]y 1914 there were already abundant signs of the profound change in the conception of government which was to mark the twentieth century. The state schoolteacher, the national insurance officer, the labour exchange, the sanitary and factory inspectors, with their necessary companion the tax collector, were among the outward and visible signs of this change. The modern administrative state was already taking shape.[4]

There is no doubt that the State of Victoria in the early stages of the twenty-first century is a modern administrative state. There are few areas of activity by citizens which are not now regulated by legislation or affected by decisions or actions taken by departmental officers, agencies, boards, or specialist tribunals in the exercise of their statutory powers and functions.

It is perhaps more important than ever, in the context of public administration, that the exercise of powers and the performance of functions be governed by principles which promote consistent, fair and rational decision-making.

The Victorian *Charter of Human Rights and Responsibilities* passed through the Legislative Assembly on 15 June 2006 and the Legislative Council a month later (20 July 2006). It is the intention of the Charter that it should contribute to principled, rational and good public administration.

What I wish to explore in tonight's seminar are some of the central features of the Charter and to give you an indication (albeit a preliminary one) of how the Charter is designed to operate and what its effect might be.

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I refer to it as 'the Charter' and not 'the Charter Act' or some other inelegant title because the Charter itself allows me to do this. Unusually for Victorian legislation, there is a citation clause. For the record, s 1(1) provides that 'this Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The cross-references in the Act in fact favour the abbreviated term, 'the Charter'.

One of the common features of human rights legislation throughout the world is that on their terms they appear deceptively simple – indeed, they have, ostensibly, a charming simplicity about them. Statements like those that appear in New Zealand and the ACT that 'Everyone has the right to freedom of peaceful assembly'[5] or 'Everyone has the right to freedom of association'[6] are bald and grand. The legislation is typically short – they often cover no more than a few pages.

My first note of warning is: do not be deceived. They are conceptually complex instruments – they are powerful instruments in part because of their simplicity. They are designed not to cover a single subject-area of law, as does an income tax Act or even the WorkChoices Act[7] (which I think I am allowed to describe in public as at least constitutionally *stretched*). By contrast, the human rights instruments may potentially affect any subject-area of law and any area of public administration. In this sense they have a special and distinctive status. This is reflected by the title of the Charter which I've mentioned. It also means that much of the learning associated with human rights instruments lies outside their text – to a much greater degree than with the ordinary laws with which we are all familiar.

My second note of warning is this: any examination of the legislative protection of human rights will take you immediately on a journey into comparative and international law. Even if you have managed to lead a sheltered life until now – innocent of comparative or international law - there is now no option when considering the human rights protected by the Charter but to acquire an understanding of how those rights have been interpreted at international law and in comparative jurisdictions. This is apparent when opening any academic text on human rights legislation – and there are now plenty of texts of high quality available in Australia. Not only will those texts discuss their own legislation – whether it be, for example, the *New Zealand Bill of Rights Act* or the *Canadian Charter of Rights and Freedoms* – but they will immediately discuss and compare jurisprudence from other jurisdictions and commentary available from the United Nations or other international sources.

In my view, this is a journey to be welcomed. It reflects the fact that the Charter invites a connection – in many instances, a re-connection – with the legal learning and scholarship in other jurisdictions.

My third note of warning is this: while human rights legislation warrants and rewards intellectual immersion, it is advisable to digest that legislation in chunks. This applies as much to the Charter as to any of the other instruments.

With that particular caution in mind, I thought I might introduce you only to two particular 'chunks' or component parts of the Charter – the first concerned directly with public governance and the second concerned with a role to be played by the Charter in court proceedings.

The first relevant aspect of the Charter I wish to discuss is the requirement imposed on the Legislature to prepare and table compatibility statements; that is, statements which assess whether a Bill introduced into the Parliament is compatible with the human rights protected by the Charter.

The second aspect I wish to draw your attention to is the interpretive direction, that is, the direction that all Victorian laws must be interpreted in a way that is compatible with human rights, consistently with the purpose of those laws.

Before I consider the terms of the Charter itself, I would like to say something about its history and origins. It is important to an understanding of its operation for the background story to be told. When the English academic Francesca Klug visited the ACT in 2002, before that Territory had enacted its Human Rights Act in 2004, she warned against attempting to assimilate Australia's circumstances to the constitutional crises which had occurred in other countries. She said:

> If there is to be widespread support for …[human] rights legislation it is no use telling people in an advanced democracy like Australia or the U.K. that they are in the same place as the French or Americans in the late eighteenth century, or India in 1948, or South Africa in the aftermath of Apartheid. Instead, a related but different story must be devised.[8]

That story in Victoria grew out of the Attorney-General's *Justice Statement* in May 2004. One of the key initiatives of the *Justice Statement* was to establish a process of discussion and consultation within the Victorian community on how human rights and obligations could best be promoted in Victoria. The *Justice Statement* recognised that alternative models for human rights protection existed in different jurisdictions.

It also recognised, as Spigelman J, the Chief Justice of the New South Wales Supreme Court has said that:

> [w]ith the exception of [the ACT] Australia remains one of the last outposts of resistance to what has been described in contemporary jurisprudence as the "rights revolution".[9]

No doubt that resistance was due in part to what Sir Anthony Mason recognised in 1989 as the training to which Australian lawyers were subject. As he put it:

> Australian lawyers like myself, nurtured on Dicey's notion of parliamentary supremacy, find it hard to accommodate a [constitutionally entrenched] Bill of Rights. Dicey himself saw little virtue in such European trifles. Since his day parliamentary supremacy has become all-pervasive. It infuses the whole of our public law; it informs the attitudes of politicians and judges. In the case of politicians it produces an antagonism to judicial review; they see it as a brake on the exercise of political power. Along with the community at large they have come to assume, if not accept, that the will of the majority is a true reflection of democracy.[10]

He went on to say:

> The phenomenal emergence of human rights as a pre-eminent political force in our time challenges this orthodoxy. … Human rights are [now] seen as a countervailing force to the exercise of totalitarian, bureaucratic and institutional power – widely identified as the greatest threats to the liberty of the individual and democratic freedom in this century. [11]

The concern that the model of a constitutionally entrenched Bill of Rights might diminish parliamentary supremacy was reflected in the *Justice Statement.* If legislation which infringes rights could be declared invalid by the courts, as it can in the United States, or under Chapter 2 of the *Constitution of the Republic of South Africa 1996*, judges would be in a position to render inoperative or ineffective laws passed by the Parliament in opposition to the parliamentary will. The criticism was not significantly reduced by allowing the Parliament expressly to override rights in specific cases, as is reflected in the model adopted by the *Canadian Charter of Rights and Freedoms.* If the courts could declare a law invalid, the criticism remained. The *Justice Statement* also noted the rigidity of a constitutionally entrenched model.

The principal alternative model was that of a statutory charter of rights. A statutory charter, as it noted:

> is an ordinary piece of legislation of the Parliament. It is enacted in a manner that makes it no more difficult to change than other Acts of Parliament. It is subject to amendment or repeal in the same manner as all other legislation. A statutory Charter creates a presumption that other legislation must be interpreted to give effect to the rights listed in that Charter.[12]

The *Justice Statement* went on to say:

> The model does not invalidate any provision or allow a court to refuse to apply another Act's provisions because of inconsistency with one of the rights listed in the Charter of Rights instrument. This is the model of the *Human Rights Act* 1998 (UK) and the *New Zealand Bill of Rights Act* 1990.[13]

I might add that this is also the model adopted by the ACT in enacting its *Human Rights Act 2004.*

In April 2005 the Attorney-General announced the establishment of the Human Rights Consultation Committee. The Committee was chaired by Professor George Williams and its other members were Professor Haddon Storey QC, Ms Rhonda Galbally and Mr Andrew Gaze. As Solicitor-General I was appointed Special Counsel to that committee and I worked with them.

The Human Rights Consultation Committee released a discussion paper in which they invited responses from the Victorian community about whether change was needed in Victoria to better protect human rights. The Discussion Paper discussed some of the existing ways in which rights are protected in Victoria and identified the rights under the *International Covenant on Civil and Political Rights* (the ICCPR) as those which the Victorian Government had asked the Committee to look at, in considering whether to adopt further measures to protect human rights in Victoria.[14] These rights are primarily associated with individual human liberty.

The rights under the ICCPR include the right to vote; the right to freedom of thought, conscience and religion; the right to freedom of expression, peaceful assembly and association; the right to liberty and security of the person; the right to freedom of movement; the right to a fair trial; the right not to be held in slavery; the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment, nor subjected to medical or scientific experimentation or treatment without consent; the right to life; the right to privacy; the right to equality before the law and non-discrimination; and the right of individuals belonging to ethnic, religious or linguistic minorities to enjoy their own culture.

After community consultation, the Human Rights Consultation Committee delivered its report and made a series of recommendations to Government, including the recommendation that the Victorian Parliament enact a Charter of Human Rights and Responsibilities.[15] The Committee Report said:

> This Charter would not be modelled on the United States Bill of Rights. It would not give the final say to the courts, nor would it set down unchangeable rights in the Victorian Constitution. Instead, the Victorian Charter should be an ordinary Act of Parliament like the human rights law operating in the Australian Capital Territory, New Zealand and the United Kingdom. This would ensure the continuing sovereignty of the Victorian Parliament. [16]

Relevantly, the Report also said:

> The Charter would also play an important role in policy development within government, in the preparation of legislation, in the way in which courts and tribunals interpret laws and in the manner in which public officials treat people within Victoria.[17]

Well, how then, you may ask will the Charter affect public administration within Victoria?

Statements of compatibility

The principal impact of the Charter within Government will be the preparation of reasoned statements of compatibility to accompany Bills introduced into Parliament, most statutory rules, and policy proposals that are submitted to Cabinet. Not all of these obligations stem directly from the Charter itself. More specifically, the Charter requires that a Member of Parliament who proposes to introduce a Bill into a House of Parliament must prepare and table a statement of compatibility.[18] The Charter also amends the *Subordinate Legislation Act 1994* so as to require a comparable statement, described as a human rights certificate, for most statutory rules.[19] There may also be requirements throughout Government at an administrative level for human rights impact assessments to be made for policy proposals which are submitted to Cabinet, including at the stage of approval-in-principle and when policy has crystallised into a Bill at Cabinet.

What exactly will be the content of statements of compatibility? How will they operate? Perhaps the best way to explain this is by example. A useful example is the compatibility statement prepared in the ACT when legislation was introduced into Parliament to permit the involuntary administration of electro-convulsive therapy, or ECT. [20]

In 2005 the ACT Government introduced the Mental Health (Treatment and Care) Amendment Bill 2005 (ACT). The compatibility statement, which was tabled in Parliament, first identified what relevant rights this Bill might have an impact upon. What rights might it interfere with, or limit, or restrict? The principal relevant right was identified as the right to refuse medical treatment. More precisely, this is the right of a person under s 10(2) of the ACT Human Rights Act not to be subjected to medical or scientific experimentation or treatment without his or her free consent.

This right heralds from Art 7 of the ICCPR. We recognise the same right in the Charter[21] although it is there extended to include a right of a person not to be subjected to medical or scientific experimentation or treatment without his or her *full free and informed* consent. This extension was made to reflect the present requirements for consent under Victoria's *Medical Treatment Act 1998*. [22]

The other rights identified in the ACT as being relevant to the Mental Health Bill (and I'll spare you the section numbers) were the right not to be subjected to inhuman or degrading treatment;[23] the right to liberty and security of the person;[24] the right to humane treatment when deprived of liberty;[25] the right to privacy;[26] the right of a child to protection;[27] and the right to equality and non-discrimination.[28]

Having identified the relevant rights, the compatibility statement went on to consider whether the involuntary administration of electro-convulsive therapy (as provided for under the Bill) would be an unreasonable interference with any of those rights, in particular, the right not to be subjected to medical treatment without freely giving consent. It set out on this task by considering first the status of that right under international law. The compatibility statement noted that the right is not considered to be absolute under international law.[29] The value underlying the right is personal autonomy and there are circumstances where the right may need to be compromised to achieve some other lawful and proper purpose.

The compatibility statement went on to consider what was the purpose of the interference with the right and asked whether that purpose was an important one which addressed a pressing or substantial public or social concern. Indeed, the social concern to which the Bill was addressed was the clearly important one of ensuring that emergency ECT treatment was not unduly delayed where it was necessary to save a person's life.

Moreover, the nature and extent of the interference with the right was carefully confined under the Bill. Indeed, the Bill made provision for involuntary administration of electro-convulsive therapy only where, as I've said, it was necessary to save a person's life. It was also necessary that the person was incapable of giving consent and the therapy could only be administered pursuant to an order of the Mental Health Tribunal in response to an urgent application.

The safeguards surrounding the interference extended to the requirement that a doctor and the Chief Psychiatrist had to believe on reasonable grounds that the administration of the ECT was necessary to save the person's life. It was also necessary for the Mental Health Tribunal to be satisfied of this as well as being satisfied that the person was incapable of giving consent. Other safeguards included the need for the Mental Health Tribunal to be satisfied either that all other reasonable forms of treatment available had been tried without success or that ECT was the most appropriate treatment reasonably available. Furthermore, the emergency ECT order had to specify the number of occasions on which ECT could be given, to a maximum of 3, and the number of days the order remained in force, to a maximum of 7. The Bill also provided that the emergency ECT order would be superseded by any subsequent order of the Tribunal, for example, one made after a full hearing. Emergency ECT orders were prohibited for minors under 16.

Having considered the safeguards surrounding the interference with the right, the compatibility statement went on to assess whether there was a rational connection between the interference with the right countenanced by the Bill and the purpose the Bill sought to achieve (or the purpose the limits imposed on the right sought to achieve). It noted that emergency ECT treatment was prohibited for persons with the capacity to withhold consent and considered that there was a rational and proportionate relationship between permitting ECT to be administered without consent, where the person was incapable of giving consent and delay would place the person's life at risk.

It was clear that in the circumstances of this measure, the interference with, or limitation upon, the right not to be subjected to medical treatment without freely given consent, was designed to achieve a relevant purpose. Further, it was likely to be effective in achieving its purpose and it was not arbitrary, unfair or based on irrational considerations. As an aside, might I note that these were amongst the central considerations which informed the discussion of proportionality in a leading judgment of the Canadian Supreme Court, that of *R v Oakes*.[30]

The ACT compatibility statement further considered whether any less restrictive means would have been reasonably available to achieve the purpose of the Bill. However, it should be noted that it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end[31] - it is sufficient for compatibility with human rights for the interference to be within the range of reasonable solutions to the problem faced.

The statement ultimately concluded that the Mental Health (Treatment and Care) Amendment Bill 2005 was compatible with the human rights it had identified and the Attorney-General for the ACT expressed his opinion that the Bill was indeed consistent with the Human Rights Act.

On the basis of that example, we can draw some conclusions. The central conclusion is that a reasoned statement of compatibility not only raises the question of *how* a law will have an impact upon human rights, but it does so in a way which introduces a structured and principled method of decision-making into the process by which legislation is enacted. It requires that the minds of the legislators and the Executive, and those who act on their behalf, grapple with those difficult questions about the extent to which the laws they pass interfere with rights, and whether the interference is proportionate to the objective the law

seeks to achieve. And it requires them to think through those difficult issues in a structured and principled way, and to articulate those issues in a manner which should lead to better governance and better public administration.

Before leaving the issue of compatibility statements, might I make these observations about them in Victoria. First, we differ from the ACT in requiring reasoned compatibility statements to be tabled with all Bills.

Under the ACT Human Rights Act there is only a requirement that the compatibility statement state *whether*, in the opinion of the Attorney-General, the Bill is consistent with human rights – not *how* it is consistent. This requirement was complied with in the first year of operation of the ACT's Human Rights Act largely by one-line statements indicating that the Attorney held the relevant opinion. Indeed, the compatibility statement on the Mental Health Bill is, to my knowledge, one of only two reasoned statements yet made – the other accompanied, unsurprisingly perhaps, the Terrorism (Extraordinary Temporary Powers) Bill 2006.

Victoria has learned from this experience in the ACT and the Human Rights Consultation Committee recommended, and included in its draft Bill, a requirement to the effect that the compatibility statement provide reasons. As a result, under s 28 of the Charter a statement of compatibility must state not only *whether*, in the opinion of the Member of Parliament who introduced the Bill, the Bill is compatible with human rights but also, if it is compatible, *how* it is compatible.[32] (I might add that in the UK the compatibility statements are only required to be made 'in writing and to be published in such manner as the Minister making it considers appropriate'.[33] These are sometimes one-liners, but there are also reasoned and articulate statements as those expressed in relation to the Offender Management Bill which confers new powers of search and amends existing powers of detention,[34] introduced into the House of Commons on 22 November 2006).[35]

The second way in which we differ from the ACT is that the Charter itself sets out the type of factors which can be taken into account in arriving at an opinion on compatibility. The ACT Act does not provide this. The compatibility statement on the Mental Health Bill in the ACT asked the appropriate questions about the nature of the rights that would be interfered with, the importance of the objective to be achieved by reason of that interference and the rationality of the connection between the involuntary treatment and the objective to be achieved. It did this, however, under the general provision in the ACT Human Rights Act that allows for human rights to be limited or restricted if those limits are 'reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society'. [36]

While this notion may sound rather nebulous, there is, of course, authority to assist in its interpretation. In the leading Canadian case of *Oakes* I mentioned before, the Chief Justice of the Supreme Court of Canada noted that the values underlying a free and democratic society include:

(1) Respect for the inherent dignity of the human person;
(2) Commitment to social justice and equality;
(3) Accommodation of a wide variety of beliefs;
(4) Respect for cultural and group identity; and
(5) Faith in social and political institutions which enhance the participation of individuals and groups in society.[37]

While such authority assists in the task of arriving at a position on compatibility, in Victoria the Committee recommended that express guidance be given in the Charter as to the factors to be considered in determining whether a limitation or restriction on a right is a reasonable one. Accordingly, under the important s 7(2) of the Charter and under the general umbrella

of acknowledging that laws may impose limits on rights where the limits are reasonable and can be demonstrably justified in a free and democratic society, there are five specific factors set out which ought to assist in assessing compatibility.

Those five factors to be considered reflect much the same questions as were in fact used in the compatibility statement we considered from the ACT. They are:

(1) identifying the nature of the right;
(2) the importance and purpose of the limitation [on the right];
(3) the nature and extent of the limitation;
(4) the relationship between the limitation and its purpose; and
(5) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The Charter does not prescribe that a compatibility statement for a Bill set out each of those factors (whereas a human rights certificate for a proposed statutory rule must set out those factors if the rule limits or interferes with a human right[38]). However, it is clear that a consideration of each of the five factors set out in s 7(2) would assist in arriving at an opinion on the compatibility of a Bill.

Those five factors were not formulated as a result of the Consultation Committee's own creativity. Rather, they are drawn from Chapter 2 of the *Constitution of South Africa*[39] and intelligence provided from across the Tasman indicated that New Zealand policy and legislative officers informally adopted this rubric as a useful and principled means of assessing compatibility.

The interpretive direction

Let me turn then to the other component of the Charter which I wish to discuss. This is the interpretive direction. There has been some not inconsiderable argument about which human rights instrument has the strongest interpretive direction - the UK or New Zealand's.[40] There has also been discussion about the complexity of the interpretive direction under the ACT Human Rights Act.

An interpretive direction is in essence a direction to interpret legislation compatibly with human rights. Let me give you a couple of examples of what effect an interpretive direction can have in a court proceeding. The first example comes from New Zealand and the second from the ACT.

The New Zealand Bill of Rights Act directs that:

> Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.[41]

This had a significant effect in a political protest case. In March 2003, a crowd of people marched through the streets of downtown Wellington in New Zealand and assembled in the grounds of Parliament House. At the time of the protest the New Zealand Government was hosting the Australian Prime Minister. Rightly or wrongly, the protest was aimed at New Zealand's involvement in pre-war sanctions against Iraq and the New Zealand Government's welcoming of the Australian Prime Minister when he supported the United States' invasion of Iraq.

One of the protestors held a New Zealand flag attached upside down to a pole as a sign of distress. It was later wryly remarked that, while this is a legitimate distress signal in nautical circles to indicate a ship is in trouble, the protestor had hung the flag in this way to

demonstrate that it was the flag itself which was in distress because of the actions of the New Zealand Government.

The protestor proceeded to douse the flag in kerosene and light it. The flag was consumed in a fireball. The singed end of the pole was extinguished on the grass. No member of the public was harmed.

It will come as no surprise that the protestor was arrested. He was charged with an offence under the New Zealand *Flags, Emblems and Names Protection Act 1981* (the Flag Act). The Flag Act is cast in these terms - every person commits an offence who:

> in, or within view of any public place, uses, displays, destroys, or damages the New Zealand flag in any manner with the intention of *dishonouring* it.[42]

The protestor was convicted by the District Court and fined $600. He decided to appeal. One of his grounds of appeal was that the Judge in the District Court had not been alert to the variety of meanings that the word 'dishonour' carries. The Judge had interpreted it as meaning 'disrespecting' when he ought to have interpreted 'dishonouring', it was submitted, as equivalent to 'defiling', imputing an active and lively sense of shaming or a deliberate act of callousness. The protestor argued on appeal that, if the statutory offence was interpreted in this way, the type of conduct caught by the offence would be, for example, intentionally urinating on the ashes of the flag or knowingly blowing one's nose on it and he had done no such thing. By contrast, he argued that according to flag etiquette, burning a flag is the only honourable way to destroy it.[43]

How did the New Zealand Bill of Rights Act affect all of this? It affected it in this way. Under the New Zealand Bill of Rights Act the protester had a right which belonged to him as an individual person to enjoy freedom of expression which includes 'the freedom to seek, receive, and impart information and opinions of any kind in any form.'[44] He also had the right of peaceful assembly.[45]

This meant three things. Firstly, on appeal, the Court considered whether, in adopting a natural or broad meaning of the word 'dishonour' as the judge at first instance had done, the offence of dishonouring the flag would restrict or limit the protestor's right of freedom of expression. It found that there was no doubt that, adopting a broad meaning of the word 'dishonour', prima facie the statutory offence of infringing the prohibition on dishonouring the flag would involve a breach of a person's right to freedom of expression.[46]

Secondly, the Court acknowledged that the right to freedom of expression is not absolute, and considered whether the restriction, or interference, or limitation imposed on the right to freedom of expression by the Flag Act was a reasonable or justified limit.

The objective of the Flag Act was recognized as the important one of protecting and preserving the flag as an emblem of national significance.[47] The Court then engaged in a balancing exercise. This consisted of considering whether the manner in which the Flag Act sought to achieve the objective of preserving the flag as an emblem of national significance, that is, by imposing a criminal sanction which might extend even to protests, was in *reasonable proportion* to the importance of the objective.

The Court concluded that in New Zealand there was an acceptance of the ability to express staunch criticism of the Government, even if many in society disagreed with the criticism. It held that *if* the criminal offence extended even to acts of political protest, it was *not* a justified limit on freedom of expression.[48]

As a third step the Court was obliged under the Act 'to identify the meaning which constitutes the least possible limitation on the right or freedom in question'[49] as New Zealand's interpretive direction has been understood. The Court accepted the protestor's submissions that the proper meaning of 'dishonour' read consistently with the right to freedom of expression, meant to 'vilify' or 'defile' the flag and this the protestor had not done.[50] It was that narrow reading, consistent with the protestor's rights, which the Court was therefore obliged to adopt.[51]

Such was the effect of the interpretive direction that the protestor's conviction was quashed.

It is worth noting that if there had been no way of interpreting the statutory offence to render it consistent with the protestor's rights, the broader meaning would have had to have prevailed and the conviction would have stood.

A less colourful but nevertheless illustrative case is that of *R v Upton*[52] heard by Connolly J of the ACT Supreme Court.

Mr Upton was charged in 2002 with common assault and damaging a motor vehicle. There was a committal hearing in the Magistrates Court and it was listed before the Supreme Court for trial in October 2003. A jury was empanelled and the trial commenced. The accused entered a plea of not guilty. There was a real contest of fact. The Crown case was that this was an unprovoked assault while the defence claimed that the incidents occurred when Mr Upton sought to remove from his fireworks business premises an employee whom he had caught engaged in illegal activities.

On the second day of the trial the jury was dismissed when it appeared that a witness had been improperly approached. The matter was set down again to proceed in June 2005. The day before the trial was to commence the DPP sought to vacate the trial date because certain key witnesses, the victims, could not be located.[53] This was opposed. If the trial date was vacated Mr Upton would have incurred another round of legal costs, having already incurred costs when the first trial was aborted for reasons beyond his control. A resumed trial would have not been able to be set until February 2006, four years after the events in question.

In those circumstances, Connolly J had to consider whether to grant a permanent stay of the criminal proceeding and to consider the sources of his power to grant a stay. He acknowledged that, of course, he had a power at common law to grant a stay of criminal proceedings that would result in an unfair trial.[54]

However, he also had a statutory power to grant a stay. There was no specific statutory provision which conferred that power but under s 20 of the ACT *Supreme Court Act 1933* the Court had a broad discretionary power to exercise all original and appellate jurisdiction necessary to administer justice in the Territory. This would clearly be broad enough to include the power to grant a permanent stay.

The ambit of the statutory discretionary power and the manner in which it could be exercised was something that could clearly be affected by the interpretive direction under the ACT Human Rights Act. That directive is formulated in these terms:

> Section 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.

And it continues:

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

If you go to the other Act mentioned, the Legislation Act, you will discover that it requires that the interpretation that would best achieve the purpose of a law is to be preferred to any other interpretation (the purposive test).

Might I say parenthetically that the complexity I mentioned earlier in relation to the ACT interpretive direction is partly due to some uncertainty as to what relationship the ACT Act intends to establish between the directive for a human rights-consistent interpretation and the directive to follow the standard purposive test.[55] Questions have been asked along the following lines. In the ACT on the one hand, is a judge (or for that matter, anyone trying to interpret legislation, be it lawyer, public servant, client or otherwise), first to establish the meaning of a law by reference to the purpose or mischief it is seeking to remedy and then to attempt to qualify that, if necessary, by a human rights-consistent interpretation, ensuring that the law does not fail to achieve its purpose? Or on the other hand, is a human-rights consistent interpretation to be arrived at first and then a check made to ensure that that preferred interpretation also achieves the purpose the law is designed to achieve and achieves it in the best possible way?

This question of the relationship between a human rights-consistent interpretation and an interpretation which best achieves the purpose for which a law was passed is, and has been, a significant live issue in all jurisdictions in which an interpretive direction has been included in the relevant human rights legislation. This includes not only the ACT but also New Zealand and the United Kingdom.

It could not be denied that in some instances the interpretive results have been in error and contrary to the clear Parliamentary intention manifest in the statute. Perhaps no case is more regrettable than that of the House of Lords in *R v A (No 2)*[56] in which legislation designed to protect rape victims from cross-examination about previous sexual history (known as rape shield legislation) was interpreted in such a human rights-consistent manner so as to considerably reduce the protection afforded to the victim and to allow otherwise inadmissible evidence to be used to the accused's advantage in the criminal trial. However, the House of Lords had since adopted a more purposive approach, accepting that the interpretation arrived at in accordance with the directive must be such that any 'words implied must 'go with the grain of the legislation'.'[57]

We cannot expect that in Victoria we will completely escape the debate between interpretations which best achieve the legislative purpose and human rights-consistent interpretations. However, the Committee recommended a form of words for the Victorian interpretive direction that, as it said in its report, is intended to give 'clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question'.[58] This objective has been sought to be achieved by formulating the interpretive direction as a single direction unlike the sequenced approach in the ACT. Section 32 of the Charter provides that, with respect to Victorian laws:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. [59]

I might add that the formulation of the right which was the subject of the rape shield case, the right of an accused to examine witnesses against him or her, also appears in the Charter but in a qualified form, so that an accused has a right to examine witnesses 'unless otherwise provided for by law'.

But back to Mr Upton.

Justice Connolly acknowledged that Mr Upton had a right under the ACT Human Rights Act to be tried without unreasonable delay and that, in construing the ambit of his power under the *Supreme Court Act* to grant a stay, he ought to adopt an interpretation which was consistent with that right. He considered that so construed, his statutory power to grant a stay could be greater than the common law position.

At common law an accused has a right to a fair trial and, as I indicated, delay can lead to the granting of a stay, but this is only where that delay will cause prejudice to a fair trial. As Connelly J observed, noting Gaudron J's judgment in *Jago v District Court (NSW)*,[60] while delay may be a factor, 'actual prejudice to a fair trial is necessary in order to enliven the discretion to stay proceedings'.[61]

Under the Human Rights Act, Connolly J accepted that a different approach might be required. *Not* an approach that allows mere delay alone to provide a ground for a stay. But an approach that requires an assessment of a range of factors to determine whether the delay in the circumstances is unreasonable. Justice Connolly noted that in the United Kingdom the House of Lords has considered that it would not be appropriate to grant a stay unless there could no longer be a fair hearing *or* it would *otherwise* be unfair to try the accused. [62]

He also noted that the New Zealand Court of Appeal had approved of the approach adopted by the Canadian Supreme Court in *R v Morin*[63] in relation to the right to be tried without unreasonable delay, where it was said:

> The general approach to a determination of whether the right has been denied is not by the application of a mathematical or administrative formula, but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay … it is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable? … it is now accepted that the factors to be considered in analysing how long is too long may be listed as follows:
> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including:
>   a. inherent time requirements of the case,
>   b. actions of the accused,
>   c. actions of the Crown,
>   d. limits on institutional resources, and
>   e. other reasons for the delay, and
> 4. prejudice to the accused. [64]

Justice Connolly took these matters into account and granted an interim stay. He ordered that the stay would not become absolute unless the DPP paid the costs of Mr Upton, on an indemnity basis for the preparation of the two trials that were aborted. Ultimately the stay became absolute.

There might be disagreement as to whether, in *Upton*, the same result would have been arrived at even if there had been no Human Rights Act and no interpretive direction. Indeed, in those judgments in the ACT which make reference to the Human Rights Act, the reliance is largely as a means of ancillary support for a result which is independently arrived at. However, what is clear is that the approach has changed, regardless of the result, and there is a genuine attempt to grapple with competing public interest considerations, including the human rights of the accused.

I should reiterate that the interpretive direction is not to be followed only by judges. It will need to be applied, in particular, by all those who exercise discretionary statutory powers and in this way it will affect all aspects of public administration.

I advised at the outset that human rights jurisprudence is best dealt with in chunks. There are many more major aspects of the Charter, including the power conferred on the Supreme Court to make declarations of inconsistent interpretation and the Parliamentary responses which they might trigger, as part of what is known as a 'dialogue'. The express obligation on public authorities to comply with the Act is another major aspect of the Charter, as is the understanding of what constitutes a 'public authority',[65] for which United Kingdom law will be useful.

Might I venture to say that we, in Victoria, are at the initial stage of what is likely to prove to be a fascinating development within our legal system, and in the relationship between the citizen and the State.

Endnotes

1 Or his followers: De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell) (5th edition) (1995) 3.
2 Ibid.
3 AJP Taylor, *English History, 1914-1945*, 1 as quoted by Sir William Wade, *Administrative Law* (OUP) (9th edition) (2004) 3.
4 Sir William Wade, ibid.
5 *New Zealand Bill of Rights Act 1990* s 16.
6 *Human Rights Act 2004* (ACT) s 15(2).
7 The *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) which amended the *Workplace Relations Act 1996* (Cth).
8 Francesca Klug, 'The United Kingdom Experience' in Christine Debono and Tania Colwell (eds), *Comparative Perspectives on Bills of Rights* (National Institute of Social Sciences and Law) (2004) 9.
9 Chief Justice James Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 *Australian Bar Review* 1.
10 Sir Anthony Mason, 'A Bill of Rights for Australia' (1989) 5 *Australian Bar Review* 79, 79. See also Sir Anthony Mason, 'Democracy and the Law: The State of the Australian Political System' (2005) 43 (10) *Law Society Journal* 68.
11 Sir Anthony Mason, 'A Bill of Rights for Australia', op. cit., 79.
12 Attorney-General (Victoria), *New Directions for the Victorian Justice System 2004-2014*: *Attorney-General's Justice Statement*, May 2004, 54.
13 Ibid.
14 Australia is a party to the ICCPR (and the International Covenant on Economic, Social and Cultural Rights (the ICESCR)). Both were adopted by the United Nations in 1966, and signed by Australia in 1972. The ICESCR was ratified by Australia in 1975, and the ICCPR in 1980. However, international covenants are not binding in Australia unless they have been specifically incorporated into Australia law by legislation. There has also been a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see *Coleman v Power* (2004) 220 CLR 1, [17]–[19] (Gleeson CJ). See Spigelman CJ, above n 10, 7.
15 Human Rights Consultation Committee (Victoria) *Rights, Responsibilities and Respect* (November 2005) vi.
16 Ibid ii.
17 Ibid.
18 The Charter s 28. The compatibility statement may be tabled by another member of Parliament acting on his or her behalf: s 28(2).
19 The Charter s 47 and item 7 of the Schedule.
20 Compatibility Statement, Mental Health (Treatment and Care) Amendment Bill 2005 (accessible at www.legislation.act.gov.au).
21 The Charter s 10(c).
22 Section 5(1).
23 Section 10(1).
24 Section 18.
25 Section 19.
26 Section 12.
27 Section 11.
28 Section 8.
29 It should be noted that, in Victoria, none of the rights protected by the Charter are absolute. In other words, all of the rights may be subject to reasonable limitations: the Charter s 7(2). However, as most of the rights are modeled on those recognized under the ICCPR, and some of these are treated as absolute under international law (for example, the prohibition on torture; on 'cruel, inhuman or degrading' treatment or

punishment; and on medical or scientific experimentation without consent) the status of a right at international law will be a relevant consideration in determining whether the limitation upon the right (the extent to which a Bill interferes with or intrudes upon a right) is reasonable.

30 [1986] 1 SCR 103, 139.
31 *R v Sharpe* [2001] 1 SCR 45, 101-102.
32 Section 28(3)(b) of the Charter also allows for the member of Parliament to express the opinion that the Bill is incompatible with human rights. This is also allowed for in the A.C.T. (under s 37(3)(b) of the *Human Rights Act*, whereupon the statement must state *how* the Bill is not consistent with human rights) and in the U.K. (under s 19(1)(b) of the *Human Rights Act*). In all these jurisdictions the statements are nevertheless described as statements of compatibility.
33 *Human Rights Act* s 19(2).
34 Explanatory Notes, Offender Management Bill 2006 (UK) [159]-[160].
35 Explanatory Notes, Offender Management Bill 2006 (UK) [1].
36 *Human Rights Act* s 28.
37 *R v Oakes* [1986] 1 SCR 103 [136].
38 See the Charter, s 47 and item 7 of the Schedule which amends the *Subordinate Legislation Act 1994* (Vic) by the insertion of s 12A which requires (under s 12A(2)(b)) that each of the five factors are to be addressed.
39 Section 36.
40 See for example Lord Steyn in *R v A (No 2)* [2002] 1 AC 45, 67.
41 Section 6.
42 Section 11(1)(b) (emphasis added).
43 The protestor relied on the United States *Flag Code* 4 USC s 8(k) (1998). See *Hopkinson v Police* [2004] 3 NZLR 704, 709 [31].
44 *New Zealand Bill of Rights Act 1990* s 14.
45 Ibid s 16.
46 *Hopkinson* above n 44, 711 [41].
47 Ibid 713 [49].
48 Ibid 717 [77].
49 See *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 [17].
50 *Hopkinson* above n 44, 717 [79], [81].
51 Note that the test adopted by France J (on appeal from the District Court) differs somewhat from the five-stage test outlined by the New Zealand Court of Appeal in *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16-17 [16] – [19]. France J noted that the New Zealand Court of Appeal did not intend the five-stage test to be prescriptive and that other approaches were open.
52 [2005] ACTSC 52.
53 *R v Upton* [2005] ACTSC 52 [6].
54 *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).
55 Petra Butler, 'Australian Bills of Rights: The ACT and Beyond: Lessons from New Zealand' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Canberra, 21 June 2006) 8.
56 [2002] 1 AC 45. See Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, (OUP) (2003) 20-21.
57 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 [33].
58 Human Rights Consultation Committee (Victoria), *Rights, Responsibilities and Respect* (2005) 82-83.
59 The Charter s 32(1).
60 (1989) 168 CLR 23, 78.
61 *R v Upton* [2005] ACTSC 52 [13].
62 Ibid [21] noting *Attorney-Generals Reference (No 2)* [2004] 1 All ER 1049, 1061 (Lord Bingham).
63 [1992] 1 SCR 771.
64 [1992] 1 SCR 771, 787-788.
65 See the Charter s 4.

FROM WHENCE WE HAVE COME AND WHITHER ARE WE GOING?

The Constitutional and statutory breadth of judicial review under Australian Federal and State Law

Robert Lindsay*

Two World Wars gave a significant impetus to the development of administrative law. Both in the United Kingdom and Australia these wars led to increased governmental intervention in the affairs of the community with the exercise of emergency powers. Yet the increased use of regulatory powers from 1914 onwards continued the increase in greater legislative control, which had commenced in the second half of the 19th century with the Factories Act legislation in the United Kingdom and other regulatory activity.

Judicial review has been described as 'a procedure, by which the courts scrutinise decisions for the purpose of determining if the decision is of a kind that the decision maker has the power to make; to determine whether the decision is lawful, and to determine whether the decision is made fairly. Administrative action may be seen as review of that body of general principles which governs the exercise of powers and duties of public authorities including the Crown and Ministers'[1].

Today judicial review may be seen as the product of a change of approach by the judiciary that occurred during the 1960s. The decision in *Ridge v Baldwin*[2] was a turning point. Since that decision was given by the House of Lords, Australian Courts have abandoned significant limitations that had existed on the range of decisions subject to judicial review, and have applied the duty to act fairly to decisions that affect rights, interests or legitimate expectations, and have more firmly insisted that fairness be accorded unless clearly excluded by Parliament[3].

The Australian Constitution

In Australia judicial review has not been so wide ranging in recent times, as in some other jurisdictions such as England. In part, that present situation may be attributable to the constitutional foundation for judicial review in Australia.

As Gummow J has said:

> the subject of administrative law cannot be understood or taught without attention to its constitutional foundation [4]

Under Chapter III the Commonwealth Constitution addresses in which courts the judicial power of the Commonwealth shall be vested (s 71); and the appointment and tenure of the justices of those courts (s 72); the appellate jurisdiction of the High Court as it relates to lower courts and rights of appeal.

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Section 75(iii) gives the High Court original jurisdiction in all matters in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party. Likewise, in s 75(v) the High Court has original jurisdiction in all matters in which a writ of mandamus, prohibition, or an injunction is sought against an officer of the Commonwealth. It has been said s 75(v) was added because of the possibility s 75(iii) would be read down by reference to decisions on Article III of the United States Constitution so as to make relief unavailable where the Commonwealth itself is not the real party. The Convention debates suggest that the framers of the Constitution were aware of this possibility, and that their purpose, in including s 75(v), was to overcome the defect revealed in *Marbury v Madison*[5] that the Supreme Court of the United States lacked jurisdiction to grant mandamus[6].

Sir Anthony Mason has said that it may be a mistake to regard s 75(v) as the only or even the primary source, of the High Court's jurisdiction by way of judicial review. In a jurisdiction with a written Constitution incorporating a separation of powers, it is natural to assign the ultimate authority for the exercise of all curial jurisdiction to that Constitution. If it is accepted, as Sir Owen Dixon contended, that in Australia the common law is the ultimate constitutional foundation, it means the Constitution owes its recognition in part at least to the common law, and that the provisions of the Constitution are framed in the language of the common law and is to be interpreted by reference to the common law.

It is accepted that the duty and the jurisdiction of the courts, as Marshall CJ said in *Marbury v Madison* is 'to say what the law is'. That means, in administrative law, declaring and enforcing the law which determines the limits, and governs the exercise of, the repository's power. The vesting of the federal judicial power in Chapter III courts, and its separation from the other organs of government, is enough to arm the High Court as a Federal Supreme Court with a jurisdiction to declare and enforce administrative law and by way of judicial review. The existence and exercise of this jurisdiction is a manifestation of the rule of law. The Australian Constitution is an instrument framed on the assumption of this rule of law[7].

Under s 76(ii) of the Constitution the Federal Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under laws made by the parliament. This enabled parliament to enact the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) providing for a regime of judicial review extending beyond the constitutional writs referred to in s 75(v). Section 76(ii) enabled parliament to provide for an appeal from federal administrative decisions to both the Federal Court, and to a more recently constituted Federal Magistrate's Court, and also to any other court exercising federal jurisdiction. However, such a court, vested with an appellate jurisdiction, would necessarily be restricted to exercising functions which involved the exercise of judicial power. Because of the decision in the *Boilermakers*' case[8], a Federal Court is precluded from exercising non-judicial power. By analogous reasoning, under s 77(iii), which allows parliament to make laws investing a court of a State with federal jurisdiction, the vesting of such federal jurisdiction is limited to matters within the federal judicial power.

Neither s 75(iii) nor s 75(v) is a source of substantive rights, except insofar as the grant of jurisdiction necessarily recognises the principles of general law, according to which the jurisdiction to grant the remedies is exercised[9].

The statutory jurisdiction of the Federal Courts

The Federal Courts' jurisdiction is derived from the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (ADJR Act) and from s 39B(l) of the *Judiciary Act* 1903 (Cth).

Under the 1977 Act the Federal Court has jurisdiction to review the decisions of an administrative character made under a Commonwealth enactment or by a Commonwealth Authority under a State or Territory enactment[10]. Decisions made under executive or

prerogative powers, which do not have a statutory source, are excluded. So, too, are decisions by the Governor-General, or those expressly excluded under Sch 1 of the ADJR Act.

The word 'enactment' is defined in s 3 as referring to an Act, Ordinance, or Instrument which includes rules, regulations and byelaws under a Commonwealth Act. This requires not only that the enactment expressly or impliedly requires or authorises the decision but also the decision itself confers, alters or otherwise affects legal rights or obligations that will arise[11].

A person aggrieved by a decision to which the ADJR Act applies may seek from the Federal Court or the Federal Magistrates Court an order of review: in respect of a decision relating to a breach of the rules of natural justice; procedures not being observed in connection with making the decision; an absence of jurisdiction to make the decision; that the decision was not authorised by the enactment; that the decision involved an error of law; that it was induced or affected by fraud; that there was no evidence or other material to justify the making of the decision; or that it was an improper exercise of the power conferred by the enactment. An improper exercise of power includes taking into consideration irrelevant material or failing to take into account a relevant consideration. It also includes an exercise of a power for a purpose other than the purpose for which the power was conferred; an exercise in power in bad faith; and an exercise of power that is so unreasonable that no reasonable person could have so exercised the power[12].

The other source of Federal Court jurisdiction is to be found in the *Judiciary Act* 1903. Under s 39B(1) the court has jurisdiction with respect to any matter in which the writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. However, this does not include a decision to prosecute a person for an offence against the law of the Commonwealth and where the prosecution is proposed to be begun in the court of a State or Territory (s 39B)(1B). There are a limited number of other exceptions also to be found in (s 39.B(2)(a) and s 39B(2)(b)).

There is a quite separate source of jurisdiction in the Federal Court to undertake judicial review to be found in s 39B(1A). This confers jurisdiction arising under any laws made by the Parliament, other than a matter where a criminal prosecution is instituted. In the case of s 39B(1) the prerogative writs or an injunction may be sought at common law against a Commonwealth officer. On the other hand the jurisdiction under s 39(B)(1A) is not limited to Commonwealth officers. Nor is it limited to the remedies specified in s 39B(1).

In the migration area the operation of the ADJR Act is limited. In the main, migration decisions are governed by the *Migration Act 1958* (Cth) and the *Judiciary Act 1903.*

The Federal Magistrates Court

Where the court does have jurisdiction it has power to make orders of such kind and to issue such writs as the court thinks appropriate.[13]

Under the ADJR Act the Federal Magistrates Court has the same jurisdiction as the Federal Court.[14] So too, the Federal Magistrates Court has the same original jurisdiction under the Migration Act in relation to migration decisions, as the High Court has under s 75(v) of the Constitution, and this is set out in s 39B of the Judiciary Act.

Administrative Appeals Tribunal

The *Administrative Appeals Tribunal Act 1975* and the ADJR Act passed three years later signalled a broadening of federal judicial review. Under the Administrative Appeals Tribunal Act (AAT Act) it was provided that where an enactment states that applications may be

made to the Tribunal for review of decisions made in the exercise of powers conferred by a particular enactment, or the review of decisions made in exercise of powers conferred by another enactment having effect under that enactment, then review may lie to the Administrative Appeals Tribunal.[15]

Where a decision has been made under an enactment, any person entitled to apply to the Tribunal for a review of the decision, may request that a statement be made in writing, setting out the findings on material questions of fact; and the Act sets out the prescribed procedure for review and the applicable time limits[16]. Under s 44(1) there may be an appeal from the AAT Act to the Federal Court 'on a question of law' from any decision of the Tribunal. Where an appeal is pending, the Federal Court may transfer the appeal to the Federal Magistrates Court, except where the Tribunal includes a presidential member.[17]

Commonwealth activities subject to judicial review

It can be seen therefore that decisions made, and conduct engaged in, under Commonwealth enactments are subject to judicial review by the Federal Court or the Federal Magistrates Court, with the exception of decisions as to conduct described in Sch 1 to the ADJR Act and decisions as to the conduct of the Governor-General. Where decisions are exempted from the ADJR Act they may be reviewed under s 39B and s 39B(1A) of the Judiciary Act if the criteria there set out are met.

Available remedies

In summary therefore, there are the remedies by way of a writ of mandamus, prohibition and injunction vested in the High Court under s 75(v) of the Constitution where sought against an officer of the Commonwealth. Similar powers are given to both the Federal Court and the Federal Magistrates Court in regard to those remedies. However, all these Courts also have power to give the remedies of certiorari, declarations, and habeas corpus where these are associated with one of the nominated remedies. The High Court has power under s 31 and s 33 of the Judiciary Act to give broad remedies when its jurisdiction is invoked under s 75(iii) of the Constitution. The Federal Court has power to make orders and issue writs as well under s 23 of the *Federal Court of Australia Act 1976* where it has jurisdiction in a specific matter even where mandamus, prohibition and injunctions are not sought.

The nature of these remedies

Mandamus is a command compelling the party to perform a public duty and is given where the public duty is not being performed, or a party has constructively failed to perform it, because the performance was infected with jurisdictional error. Prohibition restrains a person from doing something unlawful that is proposed to be done, or from continuing to do an unlawful act that has commenced. An order of certiorari removes the official record into the court making the order, and where the action is found to have been unlawful quashes the impugned decision. In the case of certiorari, it applies also to an error of law even though there is not a jurisdictional error, but the error must appear on the 'face of the record'.

An injunction has the flexibility of allowing a respondent an opportunity to rectify problems before it is imposed. It lies for both jurisdictional and non jurisdictional illegality. A declaration is just that; a mere declaratory order, but effective because a public authority will give effect to the court's determination. Habeas corpus is for the purpose of securing the release of a person unlawfully detained. So far as these remedies are discretionary, various factors may determine whether the discretion is exercised in favour of the issuing of a writ. It may not be granted if a more convenient and satisfactory remedy exists; no useful result can ensue, or if there has been unwarrantable delay by the parties seeking it; or if there has been bad faith on the part of the applicant[18].

Workplace relations legislation

In some Acts, such as the Workplace Relations Legislation, the Act expressly provides for seeking declarations: for example, under ss 178 and 413A of the *Workplace Relations Act 1996* the Federal Court may be invited to find contraventions of certified agreements and make declarations in relation to clauses of such agreements. In such cases the remedy is expressly stated by the Commonwealth statute itself.

The State jurisdiction in Western Australia

The *Supreme Court Act 1935* vests in the Supreme Court of Western Australia general and appellate jurisdiction and this of course includes judicial review of prerogative writs[19].

The West Australian Attorney-General claimed that the introduction of the State Administrative Tribunal (SAT) constituted the most significant reform of a state level system of administrative justice anywhere in Australia. He said that the legislation involved incorporating 1,582 clauses and numbered 742 pages. It was the largest piece of legislation ever passed by the Western Australian Parliament. The centrepiece of this legislation is the *State Administrative Tribunal Act 2004* which created the Tribunal and operates along with the *State Administrative Tribunal (Conferral of Jurisdiction*) *Amendment and Repeal Act 2004*. It amends 137 enabling Acts. In early 2005 regulations were introduced under both Acts and s 172 of the SAT Act provides for rules made by a Rules committee.

SAT can make original or primary decisions regarding various civil, commercial and personal matters including guardianship and administration, equal opportunity, commercial and strata title matters. The vocational boards, ranging from architects and medical practitioners to plumbers and real estate, can bring disciplinary proceedings in SAT against their members.

It also has a review jurisdiction whereby it reviews administrative decisions, made by public officials or local governments, about personal and commercial activities, and in connection with regulatory bodies operating in an industry or profession.

Where an enabling Act vests jurisdiction in the Tribunal and it does not involve review of a decision, then this forms part of SAT's original jurisdiction[20]. SAT must act in accordance with the requirements of the enabling Act[21]. Where an enabling Act enables a matter to be brought to SAT the Tribunal may make a decision in relation to that matter.

Where there is a right to have a decision reviewed by SAT there is a choice whether to make application to SAT for review or commence judicial review proceedings in the Supreme Court. There is a need to opt for one or the other. Where a review is by the Tribunal, it is not limited to reviewing matters that were originally before the decision maker, and it has been said that the purposes of the review is to reach the 'correct and preferable decision'[22].

A very valuable guide to the jurisdiction, legislation, application procedure, and decisions database is set out at www.sat.justice.wa.gov.au and this website even includes 'a SAT wizard' which sets out the provisions of the enabling Act[23].

Judicial review under the Mining Act 1978 (WA)

Sections 146 to 149 of the *Mining Act 1978* provides for a right of review to the Supreme Court. Under s 146 the Warden's Court may reserve at any stage any question of law for decision by the Supreme Court. Under s 147 any party aggrieved by decisions of the Warden's Court may appeal to the Supreme Court. Section 148 provides where the grounds include any matter of fact the Supreme Court may order that the appeal shall be by way of rehearing before a judge. Section 149 sets out the powers of the Supreme Court. Section

147 allows a party aggrieved by a decision in the Warden's Court a right to appeal except in those matters referred to in s.151. Under that provision where the parties agree in writing that the decision of the Warden's Court would be final, or the Mining Act provides that the determination of a Warden is final and conclusive, then there is no right of appeal. Most significantly, there is no right of appeal in respect of any decisions of the Warden, the Mining Registrar, or the Minister, upon any application for a mining tenement, its forfeiture, or exemption from expenditure or other conditions. This last exception imposes a very wide limit on the right of appeal.

Apart from those appeal procedures it is open to the Supreme Court to use declaratory orders which may be coupled with an injunction to review a Warden's decision.[24]

A Warden's administrative and judicial decisions, if affected by an error of law or by acting outside jurisdiction, may result in a declaratory order being obtained from the Supreme Court. In addition mandamus, prohibition or certiorari may lie.

In *Harlock: Ex parte Stanford & Atkinson Pty Ltd*[25] mandamus was sought to require a mining warden to hear and determine plaints for forfeiture of mineral claims for failure to comply with specific conditions. The warden found that the plaints disclosed no valid cause of action and dismissed them. The Supreme Court granted mandamus requiring the warden to hear the plaints. The plaintiff was held entitled to a judicial hearing of the plaints and mandamus compelled the warden to hear the plaints. So too in *Molopo Australian Ltd v Eastern Gold NL,*[26] the warden had failed to address the correct issue and mandamus issued where a tribunal had misconceived its duty by disregarding relevant considerations and addressing the wrong question. Prohibition also lies to prevent an unauthorised exercise of jurisdictional power by a Warden's Court.

It has been held that certiorari will not lie unless the decision under attack prejudicially affects the rights of the applicant. Where a warden's decision was only a report to the Minister which the Minister had a discretion to accept or reject, the warden made no decision as to rights.[27] On the other hand in *Re Egypt Holdings Pty Ltd: Ex parte Esso Exploration & Production Australia Inc*,[28] it was held certiorari will not go to quash a recommendation by the warden. However, Burt CJ said where it is the warden's report which conditions the Minister's power and not the contents, the report may be quashed and not the recommendation which it contains[29]. These decisions may now be open to review in the light of *Ainsworth v Queensland Criminal Law Commission* where the High Court said the ultimate decision-maker may not be the only one who can be impugned, where the decision-maker acts on recommendations of a body, which itself is the subject of a prerogative writ.

In *Ainsworth* the High Court said:

> the report made and delivered by the Commission has, of itself, no legal effect and carries no legal consequences whether direct or indirect. It is different when a report or recommendation operates as a precondition or as a bar to a course of action, or as a step in a process capable of altering rights, interests or liabilities.[30]

These matters were explored in *Hot Holdings Pty Ltd v Creasy & Ors*[31] where a majority of the High Court held that certiorari would lie to challenge a decision by a warden under the *Mining Act 1978* to conduct a ballot to determine which of several applicants for a mining tenement was to receive the priority right. The land became available for mining exploration on the 15 October 1992, and a number of people gathered outside the doors of the Leonora Registry. Eight applications for an exploration licence were lodged in what was described as 'a rather unseemly rush' within 51 seconds. Each of the applications was heard by the warden who concluded that the five applicants complied with the initial requirements at the same time for lodgement, and accordingly that it was appropriate to conduct a ballot to

determine priority. The Act states that there shall be no right of appeal in respect of any 'decision' of the warden or of the Minister upon any application for a mining tenement. Accordingly the parties unhappy with the warden's 'decision' held a ballot to determine priority and sought prerogative relief in the Supreme Court.

The question was whether a decision taken, prior to the final exercise of the discretion of the Minister, can be said sufficiently 'to affect legal rights' so that certiorari may lie. The result of the ballot would under the Act be included in the report recommending grant or refusal, which is transmitted to the Minister. The question was whether the decision of the warden to conduct a ballot had a sufficient legal effect upon the final decision of the Minister to grant or refuse applications. It was found that the decision which led to the ordering of the ballot to be held, had 'an apparent or discernable legal effect' upon the Minister's decision. The Minister was required to consider the information transmitted by the warden and could not exercise the discretion to grant or refuse until the warden's recommendation and report had been received and taken into account. This being so, merely because the Minister was not bound by the recommendation of the warden and that the report was not decisive, did not mean that certiorari would not lie. The High Court said that certiorari would go.

Federal and State judicial review compared

The Supreme Courts of each State receive the supervisory jurisdiction of the English Courts and therefore face no constitutional constraints. Conversely, as can be seen from the earlier reference to the Federal legislation, the High Court derives its jurisdiction from the constitutional writs under s 75(iii) and (v) of the Constitution and the Federal Court derives its jurisdiction from the *Judiciary Act 1903*, the ADJR Act and other Federal legislation. Because both the High Court and the Federal Court's supervisory jurisdiction are constrained by the Constitution the State Courts enjoy a broader scope for judicial review[32].

Range of judicial review: the divide between 'public' and 'private' bodies

In Australia the Federal Constitutional restrictions taken with the High Court decision in the *Boilermakers case* has meant that there has been a marked reluctance to embark upon merits review at least where it can not be concluded:

- That a particular administrative decision was so unreasonable that no reasonable decision-maker could have arrived at it[33].
- That the decision was 'illogical, irrational or lacking a basis in findings or inferences of facts supported on logical grounds'[34].
- That there was procedural unfairness amounting to a significant departure from observance of the rules of natural justice.

These areas and perhaps others, are ones which in a more liberal judicial climate, may be expanded as has already occurred in the United Kingdom not only with the existing legislation to which it is now subject as a member of the European Union but also with the development of the proportionality principle and flirtation with substantive as well as procedural unfairness.

It has been observed that a broader application of judicial scrutiny has been impeded in Australia by the restriction contained in the ADJR Act confining decisions subject to review being those decisions 'under an enactment'[35].

With the privatisation of many activities previously performed in the public sector the Courts now face the need to develop principles to determine which bodies are amenable to judicial review.

An array of factors fall for consideration. If the source of the entity's power is statutory (eg Telstra) then judicial review is likely. Likewise if the function is one of public concern, such as a private company running a prison, then judicial review will be available. So too, it is relevant to consider the rights and interests of the individual affected in determining whether the accountability that judicial review demands is relevant to the particular body under examination[36].

In formulating uniform rules for the availability of judicial review under an integrated judicial system, with the High Court standing at its apex and in seeking to shape appropriate principles to determine the availability of judicial review in the case of privatised bodies, the Australian Courts face a formidable task. Yet judicial review must be a 'go go' area of judicial development if an ever expanding executive power is to be held properly accountable to the Australian community.

Endnotes

1 Wade and Phillips: *Administrative Law*
2 *Ridge v Baldwin2* [(1964) AC 40]
3 *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J; *Haoucher v MIMEA* (1990) 169 CLR 648 at 653 per Deane J. See also 'Administrative Law and the Rule of Law': 1998 AIAL; 'Accountability: Parliament, the Executive and the Judiciary' by the Hon John Doyle.
4 Justice Gummow 'The Permanent Legacy' (2000) 28 *Federal Law Review* 177 at 180.
5 (1803) 5 US 187
6 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 179 per Mason CJ; *Re Refugee Tribunal; Ex parte AALA* (2000) 204 CLR 82 at 92 per Gaudron and Gummow JJ; at 138-139 per Hayne J; see also at 137-138 per Kirby J.
7 Sir Anthony Mason 'The foundations and limitations of judicial review' (2001) AIAL Forum. 31 at 3.
8 *R v Kirby; Exparte Boiler Makers Society of Australia* (1956) 94 CLR 254.
9 *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 184 CLR 168 at 178 per Mason CJ; *Re Refugee Tribunal; Exparte AALA* (2000) 204 CLR 82 at 139. See again Sir Anthony Mason's comments supra at pp 3 & 4 of AIAL Forum No 31.
10 See ADJR Act 1973 s 3
11 *Griffith University v Tang* 2005 HCA 7 at [89]
12 See ADJR Act 1973 s 5
13 s 23, *Federal Court of Australia Act 1976* (Cwlth)
14 Section 5(1) of the ADJR Act.
15 Section 25 of the AAT Act.
16 Section 28 and 29 of the AAT Act
17 Section 44AA of the AAT Act.
18 *Re Refugee Review Act; Ex parte Aala* (2000) 204 CLR 82 Gaudron and Gummow JJ; at 108 [56]. See the *Scope of Judicial Review*, Report number 47, April 2006, pp 8 to 12.
19 Section 16(1)(a) vests the Supreme Court with the like jurisdiction and powers of the Courts of Queen's Bench, common pleas, and exchequer as at the Supreme Court of 1886. See also ss 20 and 24.
20 Section 15 of the SAT Act.
21 Sections 9 and 16.
22 See s 27.
23 'Detailed Overview of the State Administrative Tribunal', SAT by Judy Eckert, Brief Volume 32, February 2005 pp 6 to 15.
24 Michael Hunt: *Mining Law in Western Australia* (3rd Ed) Federal Press 2001 pp 245-247
25 1974 WAR 101
26 1989 WAR 270
27 *Centamin Exploration (WA) Pty Ltd v Gething* (unrep) WASC FC 28 May 1982 SCL 4527
28 1988 WAR 122
29 See Hunt: *Mining Law in Australian*, Federal Press 2001 pp 249 to 251
30 1992 175 CLR 564 at 580
31 1995 HCA 60
32 'Crossing the Intersection: How the Courts are Navigating the 'Public' and 'Private' in Judicial Review' Hon Raymond Finkelstein April 2006 48 AIAL Forum 1
33 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1948 1KB 223
34 *Re: MIMA ex parte Applicant s.20/2002*; 2003 77 ALJR 1165; 2003 198 ALR 59 McHugh and Gummow JJ at [52]
35 See note 32. 48 AIAL Forum; Hon Raymond Finklestein at p 6
36 See note 32 and the High Court cases of *Neat Domestic Trading Pty Ltd v AWB Limited* (2003) 198 ALR and *Griffith v Tang* (2005) HCA 7

OUTSOURCING LEGAL SERVICES – THE ROLE OF THE INFORMED PURCHASER

Denis O'Brien*

Background

When I began to practise law in Canberra, legal services to Commonwealth agencies were provided through the Attorney-General's Department and the Office of the Crown Solicitor within that Department. To the extent that work of a legal nature was done in-house by government agencies, that work was not done by 'legal officers'. Only within the Attorney-General's portfolio were 'legal officers' recognised as doing legal work.

The first significant change to these arrangements occurred when agencies such as the Department of Social Security and the Department of Immigration and Multicultural Affairs were permitted to establish their own in-house legal units specialising in the legal issues relevant to those agencies.

Government business enterprises, on the other hand, had had access to private sector legal providers since the 1970s.

On 1 July 1995 a significant change occurred concerning the provision of legal services to Commonwealth agencies. From that date, for the first time, Commonwealth Departments and FMA Act agencies were able to use private sector lawyers for:

- general legal advice;
- general legal agreements; and
- work in tribunals.

Court litigation remained the province of the Legal Practice within the Attorney-General's portfolio.

The changes which occurred in 1995 were the first stage of outsourcing arrangements.

The second stage of outsourcing arrangements came with the acceptance by the Australian Government of the March 1997 *Report of the Review of the Attorney-General's Legal Practice* (Logan Review). As a result of the Logan Review, the government's legal policy functions remained in the Attorney-General's Department but the Legal Practice was re-established as a government business enterprise and was consolidated under the Australian Government Solicitor (AGS). The Office of Legal Services Coordination (OLSC) was established within the Attorney-General's Department to develop and administer the government's legal services policy. This second stage of outsourcing arrangements began to operate on 1 September 1999.

The result is that private firms now compete with the AGS for most of the legal work available from government agencies, although there are some categories of tied work (constitutional, Cabinet, national security and public international law) which are not open to private sector firms.

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As was said in Auditor-General, Audit Report No 52, 2004-05, 'Legal services arrangements in the Australian Public Service' (at paragraph 1.8):

> Opening the Government's legal services market to competition from the private sector was aimed at introducing the following benefits:
> - giving agencies greater freedom of choice when purchasing their legal services;
> - stimulating competition amongst private and public providers to contain or reduce their costs and increase their quality of services;
> - enhancing the ability of agencies to ensure that they receive value for money in the purchase of their legal services; and
> - giving private firms the opportunity to contribute their expertise to the delivery of government legal services.

Today's seminar

The topic of today's seminar is 'Outsourcing legal services – boon or bane?' That provocative title is essentially asking whether the objectives of outsourcing I have described have been or are being achieved. It seems to me that that is something which can only be judged, and should only be judged, by government clients. It is perhaps a pity that the panel today does not include someone who can give the client perspective.

Obviously from the point of view of private firms, outsourcing has been a benefit in that it has expanded the market for the delivery of legal services. Whether firms choose to seek to enter the government sector of that market, or particular areas of it, is a matter for them but at least outsourcing has opened the doors of what was previously a closed shop.

That having been said, it is worth noting that smaller firms are probably not as well placed as the larger national firms to derive benefit from outsourcing opportunities. But, as I said, the appropriate perspective from which to judge whether outsourcing has been successful is the perspective of government clients.

Some observations: in what follows, I make a few brief observations about the current arrangements.

The informed purchaser

The recent ANAO better practice guide, 'Legal services arrangements in Australian government agencies' said that it is better practice in legal service arrangements for an agency to have an informed purchaser, ie an identified person or unit to act as a coordination point in the agency for obtaining legal services. I am very much in agreement with the ANAO about the need for agencies to have an informed purchaser. My impression is that some agencies have been much better than others in managing the acquisition of legal services and the delivery of those services to the agency. Agencies in which the arrangements have worked well are invariably those in which a single person or unit has been the informed purchaser in managing the obtaining of legal services for the agency.

Even the Department of Defence is now moving to an informed purchaser model. I am confident that that will lead to greater efficiencies for Defence in the obtaining of legal services.

An informed purchaser is also required even in small agencies that do not, because of their size, have an internal legal unit. If there is a person within such an agency who develops a thorough knowledge of the legal services market and is designated as the coordination point for the obtaining of legal services, a more efficient outcome is likely to result for the agency.

I agree with the ANAO that the informed purchaser role should not be delegated out. The informed purchaser should be an employee of the Department. Delegating the role to someone who is contracted from a legal practice may give rise to perceptions of partiality in the purchasing decisions the agency makes.

The informed purchaser needs to devote time to getting to know the major players in the firms and gaining an understanding of the strengths and weaknesses of the firms, in terms of subject matter expertise, delivery of services and management of the legal services relationship. The informed purchaser should read firm publications and newsletters, attend firm seminars and engage with colleagues and providers through participation in industry forums such as the Australian Institute of Administrative Law and the Australian Corporate Lawyers Association. The informed purchaser should also take an interest in the outcomes of market surveys of the delivery of legal services to get a feel for where things are being done well and where things are not being done so well. It is also not a bad idea to keep up with legal news and gossip through the Friday legal affairs pages of *The Australian Financial Review* and *The Australian*.

Managing the outsourcing process

In what I am next about to say, I do not wish to be overly critical. I fully appreciate the difficulty of framing a tender for the supply of professional services to an agency. A tender for the supply of widgets of one sort or another is considerably easier to frame than a tender for the supply of legal services. However, one does wonder from time to time whether those who frame some requests for tender in the legal services area really have a clear understanding of the tender process they have embarked upon.

Let me give you some examples:

- One from time to time sees tenders for legal services which require the bidders to warrant that they are not in breach of certain pieces of Commonwealth legislation. Perhaps one can understand the Age Discrimination Act and the Crimes Act being included in the list of legislation in relation to which such a warranty is required to be given. However, it is very difficult to understand what is meant when the tendering agency lists the Freedom of Information Act as one of the Acts in relation to which a no breach warranty is sought. (In one case bidders were asked to warrant that they had never breached any Commonwealth law. At least I suppose we could safely give that warranty for the 74 years of our existence as a firm that pre-dated federation.)
- Other tenders require us to give details of our ownership structure. We do that by listing our 200 plus partners. What comfort that gives the agency is not that clear to me. But then the request for tender may go on to indicate that the agency requires us to notify them of any change that occurs in the ownership structure. I have to tell you that, in a large firm like ours, if this requirement were to be taken seriously, we would be giving a notification almost once a month of a partner being admitted to, or leaving, the firm. Again, what is the utility of this requirement?
- Another bane of some RFTs is the requirement to include a statutory declaration in which the partner responsible for the tender response is required to make a solemn declaration as to particular facts or beliefs. While I have no objection to making a declaration that no collusive conduct was involved in the preparation of the tender, I do object to the required statutory declaration being framed in such a way as to include warranties as to particular matters, eg a warranty that no conflict of interest is likely to arise which would affect the performance of our obligations to the agency. Those who require statutory declarations to be prepared in this form demonstrate that they really have little understanding of the legal nature of a statutory declaration.

- A further feature of some tenders is that they do not limit themselves to requiring referees to be nominated but ask for written references to be supplied in which the referee is asked to address the capacity of the firm concerned to meet the selection criteria. What a waste of the time of busy senior officers of agencies it is to have them prepare such written references! What little value such written references are really likely to provide!

Yet another problem that can sometimes be seen with the tendering process is that evaluations are conducted solely on the basis of the paperwork, without due weight being given to relationship issues. A contract for the supply of legal services is, I would suggest, a more complex matter than a contract for the supply of widgets in that a productive relationship between lawyer and client requires the gaining by the lawyer of a thorough understanding of the client's business and the development of trusting relationships at the personal level. For the client to derive benefit from the relationship, the lawyer must become and must be allowed to become, the client's trusted adviser. Paper evaluations which fail to give weight to relationship issues are unlikely to result in the best outcomes.

The final area of difficulty that I wish to mention is a tendency of some tendering agencies to establish panels that are larger than the volume of outsourced work warrants. Unless panel firms get a reasonable volume of work, they will lose interest. As a result the agency is unlikely to gain the benefit of value-adds (e.g., seminars, secondments) that firms are generally happy to provide in a steady work-flow environment.

Office of Legal Services Coordination

In my experience, OLSC has performed well in monitoring and coordinating the provision of legal services to the Commonwealth. It has also performed a useful role in addressing whole of government and public interest issues in relation to the provision of those services. It could, however, develop more of a leading role in the area of tendering for legal services. I know that it is trying to develop a model RFT approach for agencies that wish to go out to the market for legal services. The development of greater consistency in approach would be welcome. At present, tendering for the Commonwealth's legal services is unnecessarily expensive because of the considerable diversity in approach of agencies.

Conclusion

The outsourcing of legal services in the Commonwealth is still a relatively recent phenomenon. There is undoubtedly scope for the process to become more efficient and effective. The guidance provided in the recent better practice guide of the ANAO is a useful step in the right direction. The process will become more effective and efficient for everyone if OLSC strengthens its guidance role in the tendering process.

CHALLENGES WHEN OUTSOURCING LEGAL SERVICES

Ian Govey*

I was fortunate last month to hear the UK Lord Chancellor deliver a wide-ranging talk in Sydney. One of his major themes was the rule of law, in particular, the critical role the Courts play in exercising jurisdiction over the Executive and thus defining and restraining the conduct of the Executive.

It is interesting that the critical role played by legal advisers to government in ensuring the Executive adheres to the rule of law is seldom referred to. In one sense this is understandable – because the role is largely hidden from notice. But, in a day to day sense, the government's legal advisers play a more critical role in achieving adherence to the rule of law than the judiciary.

Of course, government legal advisors do more than advise on what the Executive can and cannot lawfully do. Handling various forms of dispute resolution and assisting in commercial transactions are other key roles.

There have, of course, been fundamental changes over the last 10-15 years in the way legal services are provided to government.

We have gone from a highly centralised system when virtually all legal work for most agencies was directed to or through AGS, to one of almost complete freedom of choice. Except for the very small areas of 'tied work', agencies have freedom to choose between AGS, private law firms, barristers or, with the further exception of litigation, in-house lawyers.

The requirement that 'tied' work be performed by government lawyers, primarily AGS, probably applies to only around 2-3% of the current external legal services market.

The few limitations on agency autonomy, including the requirements for handling tied work, are set out in binding rules issued by the Attorney-General under the *Judiciary Act 1903* – the Legal Services Directions 2005.

The previous framework was set by the provider of the legal services and contained in the Crown Solicitor's and then AGS's legal practice manual which was largely an internal set of procedures. By comparison, the Legal Services Directions enable greater accountability. Unlike the previous system, where the controls rested essentially with AGS and before that the Crown Solicitor's Office, the Legal Services Directions impose the primary compliance obligation on the client agency within the Australian Government.

The policy and regulatory role in relation to the rules for government legal services is now the responsibility of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department.

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* *Deputy Secretary, Attorney-General's Department: AIAL Seminar, Canberra, 24 October 2006*

The dismantling of the previous monopoly service provided by AGS and the Crown Solicitor's Office should not be allowed to detract from the many good aspects of their work. However, in major respects, they were not in a position to provide the level of service, both as to quality and timeliness, that agencies needed. Resourcing problems meant that salaries, office support and management systems fell behind the private sector. A 'free service' meant that other means of rationing the service were used. I remember hearing of advices delivered over a year after the request. Responsiveness to client needs was not as high a priority as it might have been.

In essence, legal services were often delivered in a form and at a time determined by the needs of the lawyer. This is best illustrated by the common complaint at the time that legal advice tended to be couched in terms of 'your question as I have rephrased it' – so that agencies were given the answer the Department wanted to give them to the question the Department thought they should be asking, rather than the question they may actually have been seeking assistance with.

Over recent years probably no area of government expenditure has been the subject of more scrutiny than legal services. We have had:

- the Logan review which led to the current structure being implemented in 1999
- the 2003 Tongue report which evaluated these reforms and provided valuable recommendations for improvement, and
- the 2005 ANAO report on Commonwealth legal services to which I will refer shortly.

In addition to these formal reviews, numerous questions on notice and extensive media commentary have focussed on the Commonwealth's management of its legal services. The current system has stood up very well to this scrutiny.

It has probably three key advantages:

1. the separation of the role of the legal services provider from the role of the regulator;
2. the ability of agencies to choose their provider and the corresponding agency accountability, and
3. the flexibility and freedom for AGS to conduct its business largely as it sees fit in meeting client needs.

The result is that the provision of government legal services is largely determined by ordinary market forces – based on price and quality.

What are the ongoing challenges?

I see four essential requirements for the successful delivery of legal services to government:

1. sufficient high-quality providers of government legal services to assure a competitive market;
2. a high quality government provider;
3. well informed and responsive clients, and

4. an effective facilitator and regulator of the market.

My aim now is to provide an assessment of where I see the greatest challenges to the delivery to government of quality legal services, taking into account these four criteria.

1. High quality providers in competitive market

Clearly, the operation of an effective market would be at risk if too few good firms were available to supply legal services to government. A couple of major firms have closed their Canberra offices in recent years. Whether they were major providers for government is perhaps open to debate. More importantly, however, all the available information suggests that strong competition exists in providing legal services to Commonwealth agencies.
Issues do arise from time to time about agencies obtaining the best value for money and ensuring they are not over-serviced – but these appear to relate more to individual matters, rather than to the market as a whole.

For private law firms there are no doubt risks relating to their ability to develop and maintain expertise in government law. These risks will be greater if the rewards do not provide sufficient incentive to focus on this area or if staff turnover makes it difficult to maintain the expertise. While isolated instances may arise of such risks being realised, there is nothing to give rise to systemic concerns.

2. Good quality government lawyer (AGS)

For AGS the greatest challenge probably revolves around the need to maintain its unique expertise in meeting the legal needs of the Commonwealth Government and its agencies.

It is worth recalling one fundamental point about AGS which was emphasised in the former Attorney-General's speech introducing the Bill to set up AGS as a separate statutory authority:

> The AGS is not, and cannot be, the same as privately owned law firms. Its unique value to government is based on its government ownership and its expertise in delivering legal services to government clients... The public interest served by having the AGS undertake this role is not inconsistent with having the AGS operate at the highest level of efficiency and making a profit as a government business enterprise.

There are some who query whether a new generation of AGS lawyers will match the expertise of their predecessors in servicing government, especially in the highly critical and sensitive areas. Some who express concerns of this kind believe that AGS's ability to handle constitutional, cabinet and other sensitive issues has been diminished by their separation from the Attorney-General's Department.

The Attorney-General and the Department would be very exposed if AGS's expertise in these areas were diminished.

The impact of the split of AGS and the Department on the handling of these areas of work, especially constitutional law work, is difficult to assess. However, in my view AGS would have struggled to be viable if it did not provide services on constitutional law and other 'core' areas – they are what make AGS unique and indispensable. The advantages of separating AGS from the Department and the need for an ongoing, strong legal services provider able to deliver all legal services required by government, in my view, justified the decision to have AGS handle these core areas. Nothing that has happened since the separation alters this view.

Most importantly, however, our very clear view is that AGS has handled constitutional law and other core government law matters in a very high quality manner since their creation as a separate entity. And there is no reason to doubt its ability to continue to do so.

3. Well informed and responsive clients

Agencies undoubtedly face significant challenges under the current arrangements.

They need to know their needs and the market. They need to make appropriate decisions about how to obtain the best value, which includes applying rigorous scrutiny and management to in-house legal services, as well as the management of external legal services. They need to be vigilant in their handling of particular matters – both in ensuring compliance with the Legal Services Directions and in making judgements about their handling of those matters.

Of course, these risks 'come with the territory'. They represent the 'flipside' of agencies' benefiting from freedom of choice and the removal of a monopolistic, paternalistic supplier of services.

The ANAO report emphasises the responsibility of client agencies to ensure the efficient and effective purchase of their legal services. The report also found that most agencies do have proper systems in place to manage this process.

Major agencies are increasingly operating under panel arrangements. The competition to be on these panels and then to get work after being selected for a panel is, according to most reports, very strong. There are continuing and we think sensible trends for panels to be somewhat smaller than earlier. This is likely to increase the initial competition to be selected, and make the ongoing management of the panel and relationships easier.

Agencies face obvious challenges in ensuring they get proper and consistent service. Some of these challenges result from agencies spreading work across several firms.

Judicial officers and Tribunal members are in a good position to notice if an agency is adopting a different approach in handling matters solely because a different firm is representing the agency. Informal feedback from a few sources suggests that in some matters some Commonwealth agencies could do better in ensuring consistent practice, especially in handling high volume disputes.

Recent informal indications also suggest that some Commonwealth agencies are seen as taking an unnecessarily hard line in handling disputes, giving rise to concerns about compliance with the model litigant rules.

While I don't want to overstate the concerns arising from this feedback, it does highlight the ongoing need for agencies to be active in monitoring and controlling the way in which their matters are handled. Agencies' lawyers can be expected to play a significant role in ensuring high quality services, but the real responsibility rests with each agency. The trend of having fewer firms on panels should make this more manageable.

One point is worth making in light of the occasional publicity about the amount of money Commonwealth agencies spend on legal services. Commonwealth legal expenditure has undoubtedly increased over recent years, although almost certainly not to the extent sometimes suggested. Such an increase does not of itself, in my view, justify criticism that agencies have lost control of their legal expenditure. This growth is equally consistent with the view that legal services providers can add value to new areas of work or existing areas

where greater service is needed. Contracting, procurement and policy development all seem to be areas where this has occurred.

The flexibility and ability of the market to meet new demands are, in my view a clear indication of the success of the current arrangements. Interestingly, the legal expenditure detailed in the ANAO report shows that the increases were not disproportionate.

Nevertheless, securing value for money does seem likely to be an ongoing challenge, especially in the current fairly tight labour market. More detailed information about agency legal expenditure is now required under recent amendments to the Legal Services Directions.

The risks relating to value for money are probably greater in relation to solicitors than barristers. Because of the Commonwealth's ability to exercise its purchasing power in engaging barristers the Commonwealth gets very good value overall for its expenditure.

4. Attorney-General's Department role as regulator and facilitator

A major risk will arise if we in the Attorney-General's Department don't properly perform our role in facilitating the operation of the market, if we don't properly help in educating providers and client agencies about their opportunities and obligations under the Legal Services Directions and if we don't actively work to ensure compliance with the Directions.

Agencies and law firms have incentives to ensure they have a high level of compliance.

Suspected breaches of the Legal Services Directions are all investigated. Where confirmed they are reported to the Attorney-General and publicised through our annual report and at Senate Estimates. The level of breaches is not high and, while undoubtedly some breaches go undetected, our sense is that the problems are not major. In fact, since 2000 OLSC has reported an average of only about eight breaches a year.

OLSC has enhanced its role in facilitating information sharing between Commonwealth agencies, including through lunchtime forums for legal unit heads, and by acting as a clearing house for sharing information and solutions between legal units of different agencies. .

The ANAO consulted OLSC very closely in publishing in August this year a *Better Practice Guide for Legal Services Arrangements in Australian Government Agencies.* It is a concise, but comprehensive and very useful guide, covering the full range of matters agencies need to focus on - from assessing their needs, purchasing legal services, compliance with the Legal Services Directions, managing relationships and evaluating and reporting on performance.

A major area of increasing focus for us will be the requirement for agencies to avoid litigation wherever possible, especially in some of the more difficult and protracted disputes. This requirement has been strengthened in the recent changes to the Legal Services Directions. OLSC is becoming more active in this area and we are very hopeful that this will continue to lead to positive outcomes.

Another area of activity will be to prepare more detailed guidance on purchasing and tendering. OLSC has contacted the agencies and law firms on its contact list to seek input to this project. OLSC will also be conferring with the Department of Finance and Administration. If you are interested in being involved and have not been contacted please contact OLSC (6250 6424, olsc@ag.gov.au).

Conclusion

My involvement with the reforms and the ongoing delivery of the Commonwealth legal services makes it hard for me to provide an entirely objective assessment. However, the independent reviews, including one by the ANAO and the feedback we receive from agencies and lawyers suggests that overall the current system is working well. It will always be capable of improvement. I've highlighted some of the issues we will be focussing on, and we look forward to doing this in close consultation with agencies and providers.

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.

* *Rayne de Gruchy is the Chief Executive Officer, Australian Government Solicitor, speaking at an AIAL seminar, Canberra on 24 October 2006.*

- 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

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.

- 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:
    - breach of statutory powers or responsibilities and consequent risk of litigation;
    - failure to advance a policy position due to inadequate legal advice;
    - failure to take into account whole-of-government implications in adopting a policy position;
    - failure to comply with prescribed procedures;
    - ineffective management of administered legislation;
    - failure to adhere to the Legal Services Directions;
    - over reliance on a specific individual in a panel firm or the in-house team for specialist legal advice;
    - 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:

  - 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.

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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.