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Mr Stephen Goggs
Deputy Chief Executive (Community Safety)
Department of Justice and Community Safety
Level 9, 12 Moore Street
Canberra City, ACT, 2601

Dear Mr Goggs

Matter of Economic, Social and Cultural Rights – Constitutional Issues

I am instructed to advise as to the constitutional issues associated with the incorporation of economic, social and cultural rights (ESCR) in the *Human Rights Act 2004 (HRA)*. The request for advice arises in relation to a Human Rights Amendment Bill 2010 (**Model Bill**) prepared by the Australian National University (ANU) for consideration by the Territory.

In this advice I do not propose to engage with the specific proposal, having regard to your request for "conceptual" advice. Doubtless, once a specific proposal is put to the Attorney-General my further advice can be sought.

A. Background

1. The Model Bill proposes the inclusion of a range of ESCR in the HRA including:
 - (1) A right to adequate housing (s 27A);
 - (2) A right to health, food, water and social security (s 27B);
 - (3) A right to education (s 27C);
 - (4) A right to work (s 27D); and
 - (5) A right to take part in cultural life (s 27E).
2. These rights comprise, on the one hand, immediately enforceable rights and obligations and, on the other, general duties on the Territory relating to progressive realisation of those rights (s 28A). Breach of this duty may be subject to a declaration of incompatibility by omission (s 33A).
3. You ask whether it would be a valid exercise of judicial power for a court:

- (1) To interpret Territory law consistently with ESCR;
 - (2) To make a declaration of incompatibility under s 32 HRA in relation to ESCR; and
 - (3) To determine that a public authority had acted unlawfully with respect to ESCR?
4. In relation to the issue of a declaration of incompatibility by omission, you ask:
- (1) Would the making of a ‘declaration of incompatibility by omission’ be either a valid exercise of judicial power or ancillary to the exercise of judicial power;
 - (2) Whether the existence of proceedings seeking some other relief or remedy is a requirement for seeking a ‘declaration of incompatibility by omission’; and
 - (3) Would any further provisions be necessary or desirable in relation to the making of a ‘declaration of incompatibility by omission’ in order to support validity?
5. Further you request advice as to whether there are any other constitutional issues that arise under the Model Bill which, in my opinion, should properly be addressed.

B. Overview

1. The questions you have asked raise a number of issues which have been the subject of considerable attention in the context of a debate over a national bill of rights.
2. Within that debate, whether from the perspective of a draft national bill of rights or existing bills of rights, attention has focused on the declaration of incompatibility; specifically, its consistency with generally accepted notions of judicial power and its compatibility with the basic independence and impartiality of judicial office. You provided with your instructions a sample of the contributions to that debate.¹
3. It must be acknowledged that much of this debate has centred on civil and political rights (CPR) and requirements that may be peculiar to the Australian Constitution. While the contributions are informative and traverse issues relevant to this advice, the conclusions drawn may have limited application to ESCR and to the Territory.
4. Conversely, it must be acknowledged that many of the issues raised in the debate may have implications for the way in which both categories of rights are dealt with.

¹ Stephen Gageler & Henry Burmeister, "In the Matter of Constitutional Issues Concerning a Charter of Rights – Opinion", *SG 40 of 2009*, 15 June 2009; "In the Matter of Constitutional Issues Concerning a Charter of Rights – Supplementary Opinion", *SG 68 of 2009*, 7 September 2009 (**Gageler & Burmeister**); Dominique Dalla-Pozza & George Williams, "The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights", (2007) *Deakin Law Review* 12(1), 1-39 (**Dalla-Pozza & Williams**), The Hon. Michael McHugh AC, QC, "A Human Rights Act, the Courts and the Constitution", *Presentation given at the Australian Human Rights Commission*, 5 March 2009 (**Justice McHugh**), James Stellios, "State/ Territory Human Rights Legislation in a Federal Judicial System", *Paper presented at the 2007 Protection of Human Rights Conference, Melbourne Law School*, 25 September 2007 (**Stellios**). See also Stefanie Wilkins, "Constitutional Limits on Bills of Rights Introduced by a State or Territory", (2007) *Federal Law Review* 35, 431-465 (**Wilkins**).

Some of the contributions, if accepted in their entirety, may cast doubt upon the validity of the existing declaration of incompatibility mechanism within the HRA.

C. Judicial Power

1. One of the key questions canvassed in the debate in this area is whether, or to what extent, the making of a declaration of incompatibility can be characterised as an exercise of judicial power or ancillary or incidental to the exercise of such a power.
2. This may be a question the relevance of which is more in relation to the Constitution and less in relation to the *Australian Capital Territory (Self-Government) Act 1988 (Self Government Act)*, but it will be canvassed as the characterisation of such a declaration as an exercise of judicial power provides the greatest guarantee that a declaration of incompatibility will be valid.
3. Traditionally, judicial power is described as the power to decide controversies over existing rights, duties and liabilities by effect of a binding and authoritative decision.² However, it has been accepted that the task of "framing a definition of judicial power that is at once exclusive and exhaustive" is difficult if not impossible.³ The task of characterisation may be one of weighing the factors that are peculiar to courts, the factors that are peculiar to tribunals and those that are common to both.⁴
4. Moreover, it may be permissible to look at context and, applying the "chameleon principle", or the principle (which is not universally accepted) that the characterisation of a power may vary according to context, consider the nature of the body on which the powers are conferred,⁵ the purpose for which they are performed and the way in which they are exercised.⁶
5. Equally, it has been accepted that a power may properly be conferred upon a court even if it is not truly judicial provided it is ancillary or incidental to judicial power.⁷ Conversely, a power may not be conferred upon a court if it would lose its identity or if its exercise would impermissibly interfere with the independence of the court.⁸
6. At the Commonwealth level there is, of course, a further rule, or implication, that (original) federal judicial power may only be exercised in relation to a "matter". A court exercising federal judicial power cannot give advisory opinions. It cannot be authorised to "determine abstract questions of law without the right or duty of any body or person being involved" or "make a declaration of the law

² *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 per Griffiths CJ at 357.

³ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, per Curiam at 188.

⁴ *Attorney General (Cwth) v Breckler* (1999) 197 CLR 83, per Kirby J at 124-125 [78].

⁵ *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, per Aickin J at 15; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, per Deane, Dawson, Gaudron and McHugh JJ at 267; *Attorney General (Cwth) v Alinta Ltd* (2008) 233 CLR 542, per Hayne J at 577.

⁶ *Attorney General (Cwth) v Breckler* (1999) 197 CLR 83, per Kirby J at [83]; *Nicholas v The Queen* (1998) 193 CLR 173, per Gaudron J at 208 [72]-[73]; *Attorney General (Cwth) v Alinta Ltd* (2008) 233 CLR 542, per Hayne J at 577.

⁷ *R v Kirby, Ex parte Boilermakers* (1955) 94 CLR 254, per Dixon CJ at 257.

⁸ *Kable v Director of Public Prosecutions* (1995) 189 CLR 51, 117-118.

divorced from any attempt to administer [it]".⁹ There must be some immediate right, duty or liability to be established by the determination of the court.

D. Present Context

1. Having regard to the contributions listed at footnote 1 above, the crucial questions appear to be:
 - (1) whether the power to be exercised involves the application of objective legal standards as opposed to moral judgments or policy considerations;
 - (2) whether the power involves a form of adjudication as to existing rights and obligations or arbitration resulting in the creation of rights and obligations; and
 - (3) whether a declaration must give rise to binding and enforceable obligations, *and* whether it must affect the rights, duties and liabilities, of the parties.
2. Having reviewed the contributions that have been made to the national debate, and having considered a substantial body of relevant authorities which are there cited, I am of the opinion that the concerns implicit in questions (1) and (2) above do not present an insuperable obstacle to the inclusion of ESCR within the HRA. The concerns implicit in question (3) are less capable of being answered readily but the answers are likely to emerge from the answers to questions (1) and (2). It must be said that any real concern in this last respect is unlikely to be limited to the nature or subject matter of the ESCR proposed to be included and is likely to arise also with respect to the rights already contained in the HRA.
3. The foundation for these conclusions is to be found, in my view, in the authorities discussing the need for a controversy as to existing rights, duties and liabilities and, ironically, the authorities discussing the role of a court in giving advisory opinions.
4. They characterise as an exercise of judicial power a process with these elements:
 - (1) It is commenced by a person who has a sufficient interest and standing;
 - (2) It relates to a controversy based on existing rights, duties and liabilities;
 - (3) It applies standards that are discoverable, objective and predictable; and
 - (4) It provides a remedy to quell the wrong that underlies the controversy.
5. A person who has a sufficient interest in an existing or prospective executive act, and whose human rights are engaged, whether "positive" or "negative" in nature, will have sufficient standing to plead the existence of some right, duty or liability. If a controversy can be identified, in relation to the proper construction of a statute or, indeed, the proper and lawful execution of a policy or program under a statute, then the controversy, in my view, can be the proper subject of judicial deliberation.
6. Moreover, if the focus of that deliberation is upon a matter that may *conceivably* alter the rights, duties and liabilities of the individual or relevant decision maker,

⁹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ at 266.

for example by altering the way in which a statute, policy or program is applied, then a declaration of incompatibility, or incompatibility by omission, will be an exercise of judicial power, or ancillary or incidental to such an exercise of power, notwithstanding that it does not *directly* alter a right, duty or liability of the parties.

7. The more that is done by way of guidance in relation to the content of the rights and the operation of the relevant proportionality test, and perhaps interpretive rule, the greater the case will be to view the process as an exercise of judicial power.
8. Accordingly, the more clearly the standards implicit in ESCR rights can be sufficiently identified, the greater the certainty that it is a judicial power being exercised. That understanding may be informed by international and comparative jurisprudence or from the language, scope and object of the relevant amendments to the HRA, and that their application does not otherwise involve indefinite considerations of policy. It is not a sufficient objection, in my view, that the rights and their standards cannot be defined with mathematical precision or that their content needs to be elaborated. It must be kept steadily in mind that the power to do so is vested in a judicial body, that the legislation would contain guiding principles for any policy considerations and that the standards would be identifiable not only in the content of the rights but through the application of a proportionality test consistent with existing authority.¹⁰
9. The key issue appears to be the ability of a court to interpret legislation or to define the duty of a public authority to consider and to act compatibly with human rights, as this provides a potential remedy that is relevantly connected to existing rights. Provided a remedy is not divorced from an attempt to administer the relevant law, and is integral to the process of determining relevant rights, duties and liabilities, it will not matter that it does not produce a binding outcome between the parties.¹¹
10. The validity of the existing declaration of incompatibility in section 32 of the HRA is found in the antecedent process of applying the interpretive rule in section 30. The validity of a declaration of incompatibility by *omission* is to be found in the process of interpreting a statute consistently with ESCR, or, with the duty on public authorities, the process of applying a policy or program consistently with ESCR.
11. The House of Lords has recognised that a human rights consistent interpretation of a law is the primary remedial measure and a declaration is an exceptional course.¹² Accordingly, there is a strong presumption in favour of an interpretive approach.¹³ A court is required to seek an interpretation that is consistent with human rights and a declaration of incompatibility is simply a statement (as significant as it is) that it has been unable to do so. The interpretive rule and declaration of incompatibility are *intimately* connected and, provided a controversy exists in relation to the operation of the interpretive rule, a declaration of incompatibility cannot properly

¹⁰ *Hansen v R* [2007] 3 NZLR 1; *R v Fearnside* [2008] ACTCA 3.

¹¹ *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232, 282-283 per Deane, Gaudron and McHugh JJ; *Mellifont v Attorney General (Qld)* (1991) 173 CLR 289, 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ and *Abebe v The Commonwealth* (1999) 197 CLR 510, 528 per Gleeson and McHugh JJ.

¹² *Sheldrake v Director of Public Prosecutions*; [2005] 1 AC 264, per Bingham LJ at 304, referring to the opinions of Lord Nicholls, Lord Steyn and Lord Rodger in *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557.

¹³ *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557, per Steyn LJ at 577 [50].

be divorced from that controversy so as to deprive the court of exercising judicial power.

12. In summary, in order to characterise a declaration of incompatibility by omission as an exercise of judicial power, the legislation ought to contain these elements:
 - (1) It must, by the right created, only enable a person with sufficient interest and standing to come before the court;
 - (2) It must, by the right created, allow a controversy to be readily identified relating to the interpretation of a law, or of a policy or program under a law;
 - (3) It should provide some elementary standards by which the content of the relevant right is determined or matters of proportionality are assessed; and
 - (4) It must permit a real remedy to be given in order to quell the controversy, whether by application of the interpretive rule or duty on public authorities, which, *if refused*, gives rise to a declaration of incompatibility by omission.

E. Commonwealth v Territory

1. At the federal level a strict separation of powers is implied in the Constitution.
2. There is no strict requirement for separation of powers in the Self-Government Act. There is, of course, debate as to the precise degree of separation required in the Territory,¹⁴ but the better approach is that a clear separation is not required. It is certainly the premise upon which the local judiciary and legislature operate and has been the subject of authoritative comment by the Supreme Court itself.¹⁵
3. Similarly, as judicial power is not conferred on the Supreme Court in terms of a list of "matters", there may be no requirement to establish the existence of a "matter" in order to link standing, controversy and remedy with an exercise of judicial power.¹⁶
4. Accordingly, cases dealing with separation of powers, and judicial power per se, recognise that some principles *may* have limited application to non-federal courts.
5. One of the principles that *does* apply to non-federal courts is the requirement that a power conferred upon it cannot impermissibly interfere with its independence.¹⁷ It must be acknowledged, however, that the authorities that have dealt with this principle since its inception have generally limited expectations about its reach.¹⁸ To establish such an impermissible interference, legislation conferring a power on a court must substantially impair the proper exercise of power according to

¹⁴ See for example, *Northern Territory v GPAO* (1999) 196 CLR 553; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 and *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146.

¹⁵ *De Domenico v Marshall* (1999) 142 ACTR 1.

¹⁶ *Pangallo v Actew Corporation Limited* [2002] ACTSC 15, per Miles CJ at [23]; *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20 per Taylor J at 37.

¹⁷ *North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146.

¹⁸ *Fardon v Attorney General (Qld)* (2004) 223 CLR 575; *Thomas v Mowbray* (2007) 233 CLR 307; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2007] WASCA 49; *Totani & Anor v South Australia* [2009] SASC 301; *International Finance Trust Company Ltd v NSW Crime Commission* (2009) 240 CLR 319.

traditional judicial procedures and remedies. There may be a developing trend in the Courts to limit the incursions of the Executive upon the independence of the Courts, but this is unlikely to be reflected in a consideration of the grant of particular powers to courts in the implementation of human rights legislation.

F. Conclusions

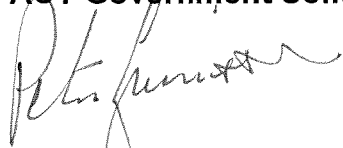
1. You ask specific questions around the broader issue of whether the adjudication of economic, social and cultural rights is consistent with an exercise of judicial power. These questions have been asked in the context of a debate over a national bill of rights where the primary focus has been upon the enactment of certain civil and political rights. While the relevance of this debate may be limited, or diminished, for the Territory, the issues raised by the contributions to that debate have parallels with the issues that may face the Legislative Assembly should it seek to enact the Model Bill.
2. Doubtless it would be possible to draft an advice around the differences between the constitutional framework which governs the Commonwealth and the Territory. Relying on the apparent lack of an implied requirement for separation of powers in the Self-Government Act, and the absence of implied requirements as to "matters", such advice would focus primarily on limitations arising from *Kable* and *Bradley*.
3. There is a strong case in my view that conferral of a power to make declarations of incompatibility, or a power to make declarations of incompatibility by *omission*, would not impermissibly undermine the independence of the Supreme Court. I believe that the prospect of a constitutional challenge being brought and being successful, however, would be diminished if the power was conferred in a way that responds to the arguments that have been put in the context of the debate over a national bill of rights.

Please do not hesitate to contact me if you should require any further clarification.

I would be pleased to provide further advice, if required, on the terms of any legislation proposed to be introduced into the Legislative Assembly to implement the Model Bill.

Yours sincerely

ACT Government Solicitor



Peter Garrisson
Chief Solicitor