

## The ACT Human Rights Act – The Second Year

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The *Human Rights Act 2004* (ACT), came into force on 1 July 2004, and has now been in effect in the ACT for almost two years. While the impact of the Act in the first year may not have been as profound as predicted by either its supporters or its critics, the Act has gathered momentum in its second year and has received more attention in the courts, the legislature and the executive. In the time available it is not possible to provide a comprehensive survey of each area, but this paper will attempt to highlight some of the most interesting developments in the second year.

### 1. Impact in the Courts

Our research project is aware of 18<sup>1</sup> cases in which the Act has been considered since 1 July 2005, compared to 14 in the first year of the Act. These are summarized in the case database on our website <http://acthra.anu.edu.au> with links to full text where available.

The majority of these cases (13 of 18) have been in the Supreme Court or the Court of Appeal, but there have been two decisions in the Administrative Appeals Tribunal, two in the Residential Tenancies Tribunal, and one in the Childrens Court. It is more difficult to gauge the use of the Act in the Magistrates Court, and in bail applications in the Supreme Court as these decisions are not reported.<sup>2</sup>

I noted at last year's conference that the cases in the first year generally involved a fairly superficial consideration of the Human Rights Act, and that the Act could not be said to have been decisive in any of these matters. While this trend has not completely disappeared in the second year, there have been some more interesting decisions where the Act has received detailed analysis, and which have included references to comparative and international case law.

One of the most interesting is the recent case of *Perovic v CW*, No.CH 05/1046 (1 June 2006), an unreported decision of the Children's Court. This case involved the criminal prosecution of a young person for a sexual offence, where there had been considerable

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<sup>1</sup> One further decision of *Stevens v McCallum* [2006]ACTCA 13 (30 June 2006) was handed down by the ACT Court of Appeal after the conference, bringing the total for the second year to 19. This case dealt with the right to a fair trial, and the circumstances in which the incompetence of counsel will amount to an appellable error.

<sup>2</sup>In hearings on the 2004-2005 Annual Reports, the then ACT Shadow Attorney-General Bill Stefaniak stated that: "*I have heard—admittedly, mostly anecdotally—that there have been at least two bail applications which have been successful in the Supreme Court when the act has been mentioned, whereas that would not have occurred had there not been the Human Rights Act.*" The Director of Public Prosecutions, Richard Refshauge responded: "*There may have been a couple of bail applications. I can think of one where the Human Rights Act was mentioned and bail was refused,*[The case of *R v Le* [2004] SCC No 181 (Unreported, Connolly J, 13 August 2004) summarized on our website] *but there may well have been others. I am not aware of them and I try to keep ahead of that so that we can feed the material into the ANU project.*" Hansard Transcript, Standing Committee on Legal Affairs, 10 November 2005, at p 110.

delay between the complaint and the charge, and a total of 16 months before the matter was brought to hearing.

The child's representative submitted that proceedings should be stayed because of the quality of the investigation, which prejudiced the child's ability to defend the charges, and because of a breach of section 20 (3) of the *Human Rights Act* which states that "A child must be brought to trial as quickly as possible."

The special rights of children in criminal proceedings are set out in section 20 of the Human Rights Act which states that:

- (1) An accused child must be segregated from accused adults
- (2) An accused child must be treated in a way that is appropriate for a person of the child's age who has not been convicted
- (3) A child must be brought to trial as quickly as possible
- (4) A convicted child must be treated in a way that is appropriate for a person of the child's age who has been convicted.

Magistrate Some noted that while the other subsections refer to an "accused child", subsection 20(3), which deals with delay refers simply to a "child." This distinction was not made in Article 10 of the ICCPR on which the Human Rights Act was based. He stated that "*The effect of this difference is in my view to indicate that subsection 3 requires a child to be brought to trial as quickly as possible, and that the time begins to run when the child is first suspect or alternatively first involved in the police investigation.*"

Magistrate Some noted that both the defence and the prosecution counsel had provided him with a considerable number of European decisions on human rights. His Honour cited the decision of *Eckle v Germany*<sup>3</sup> in which the Strasbourg Court held that the moment at which the 'clock starts running':

..may precede the trial and could be the 'date of arrest', the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened.

His Honour considered that the wording of section 20(3) of the ACT *Human Rights Act* clearly indicated the intent of the legislature "*that the time must begin to run as soon as the Young Person becomes aware that he is the subject of a police investigation.*"

In considering the assessment of the period of delay, Magistrate Some cited the test in *Philis v Greece (No 2)*<sup>4</sup> that:

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<sup>3</sup> 5 EHRR 1

<sup>4</sup> (1998) EHRR 417

the reasonableness of the length of proceedings must be assessed in the light of the particular circumstances of the case and ... in particular the complexity of the case and the conduct of the applicant and of the relevant authorities.

He considered that the present case could not be regarded as complex, and that the child had not been in any way responsible for the delay. His Honour noted that:

The authorities particularly from Strasburg make it clear that the absence of proper resources is not a valid reason for delay. The prosecuting authorities have a responsibility to ensure that all agencies are adequately supported so that proper consideration can be given to the expedition of criminal charges especially involving children...The requirements of the HR Act in my view impose a very substantial onus on the investigating authorities to ensure that the child is brought before the court “as quickly as possible.”

In the circumstances, Magistrate Somes found that the child was not brought to trial as quickly as possible and that this amounted to a clear breach of the *Human Rights Act*. His Honour accepted that the *Human Rights Act* does not provide specific remedies for breach. Nevertheless he noted that:

It is, in my view, consistent with the principles of the HR Act, to consider that a breach of that Act, when the breach occurs in relation to criminal charges, may give rise to a situation in which an injustice would occur if the breach was, in effect, accepted and notwithstanding that breach, charges were heard and determined by the Court. One of the specific considerations in *DPP v Shirvanian* [(1998) 102A Crim R 180 which dealt with the power to stay proceedings] was, as I have already quoted “*that every court has either inherent or implied power to prevent its own processes being used to bring about injustice.*”

Magistrate Somes found that the delay was significant in this case, given the ages of the accused and the complainant, and the seriousness of the allegation. The delay also caused unfairness and injustice for the child complainant, who should not be required to give evidence so long after the event when the delay need not have occurred. His Honour considered that injustice which would result from the breach of s20(3) was such as to make it appropriate to stay the proceedings, and ordered that the proceedings be permanently stayed.

This case is significant as the first in the ACT where international human rights case has been applied, and one where the Human Rights Act was the sole basis for the decision. The case clearly presents a challenge to the prosecution of child defendants, as it makes it clear that a lack of resources for investigation cannot be relied upon as an excuse for delay. The case goes further than the Supreme Court decisions of *R v Upton* [2005] ACTSC 52 and *R v Martiniello* [2005] ACTSC 9, where delay in prosecution of adult defendants was considered to breach the right to be tried without unreasonable delay under section 22 of the *Human Rights Act*. In those cases, a stay of proceedings was

granted, but the proceedings could be re-instated upon payment of the defendant's legal costs by the prosecution, rather than the matter being permanently barred.

A stay of prosecution is one example of the potential for the courts to use their inherent powers to enforce human rights protected under the *Human Rights Act*. In a recent speech to new practitioners, the ACT Chief Justice Terry Higgins suggested that injunctive powers might also be used to restrain breaches of the Human Rights Act, although this has not yet been utilised:

As lawyers, you ought to appreciate the breadth of power within this Court's inherent jurisdiction in both its criminal and civil jurisdictions... There are, therefore, conceivable modes of urgent injunctive relief that may be available to restrain breach of Part 3 human rights beyond the ancient writ of habeas corpus. Perhaps an employee could apply for an injunction against his or her employer allowing an employee to engage in prayer on the work premises during his or her lunch break in circumstances where the employer had otherwise forbidden it.<sup>5</sup>

The Chief Justice also presided over another major case in the second year of the Act, that of *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125 (2 December 2005) (*I v S*). This case was the first, and so far the only, case in which a declaration of incompatibility has been sought under s32 of the *Human Rights Act*.<sup>6</sup>

This case was brought on appeal from the Magistrates Court, in relation to a final protection order made against a child without a hearing, purportedly pursuant to s51A of the *Domestic Violence and Protection Orders Act 2001* (ACT). This newly introduced provision requires a person subject to an interim protection order to return an endorsement copy of the order to the court at least 7 days before the hearing, if he or she wishes to challenge the order. Section 51A (3) provides that if the respondent fails to return the endorsement copy, "*the interim order becomes a final order against the respondent*" and that under subsection (4) such final order comes into force "*on the return date for the application for the final order.*"

In *Iv S* the appellant child had sought legal advice after receiving the interim order, but his legal aid solicitor was not aware of this new regime and did not advise him of the need to return the order. When he and his mother attended Court on the hearing date, they were informed that they could not be heard as the order had automatically become final "at one minute past midnight" that morning. The final protection order was for a period of one year. It was signed by a Deputy Registrar.

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<sup>5</sup> Chief Justice Terry Higgins, Address to New Practitioners, 21 April 2006, p 5 (available at <http://acthra.anu.edu.au/resources/>)

<sup>6</sup> For a more detailed analysis of this case, and the submissions of the interveners, see the Project Working Paper No 2. Comment on *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125, May 2006 available at <http://acthra.anu.edu.au/publications/>.

Both the Attorney-General and the Human Rights Commissioner intervened in this case and made detailed submissions about the way in which interpretation and declarations of incompatibility should be approached under the *Human Rights Act*.<sup>7</sup>

The Chief Justice granted the appeal, and set the final protection order aside. He found that the *Domestic Violence and Protection Orders Act*, correctly construed, did not authorize the Deputy Registrar to make the final order. Higgins CJ did not find it necessary to consider a declaration of incompatibility as he considered that s 51A of the DPVO Act could be interpreted to be consistent with the Human Rights Act.

Relying on the fact that the amendments introducing s51A had been certified by the Attorney-General to be compatible with the Human Rights Act, and some general comments in the second reading speech, Higgins CJ determined that the Legislative Assembly had not intended s51A to derogate from the right of a person to question his liability to be subjected to a protection order, and to have that liability determined by a magistrate. He considered that orders which came into effect automatically would necessarily breach the right to a fair trial under s21 of the *Human Rights Act*, and noted that the right to a fair trial is simply a re-statement of the due process rights in the *Magna Carta*, which still has legal effect in the Territory.

Higgins CJ also considered that an interpretation which allowed for automatic or administrative final orders would breach the separation of powers doctrine adopted by the High Court in *Kable v DPP (NSW)*,<sup>8</sup> if there was no right of review by a Magistrate.

In light of these findings, the Chief Justice found that s51A should instead be construed as providing the courts with discretion to make (or not to make) a final order against a respondent where the endorsement copy had not been returned within the time allowed.

While *I v S* is an important case under the *Human Rights Act*, the decision is also remarkable for some of the questions it leaves unanswered. In particular, the scope of section 30 of the *Human Rights Act*, which sets out the power of the Courts to interpret legislation to be consistent with human rights, was not explicitly considered in this judgment, even though the interpretation of section 51A which was adopted by the Chief Justice involved re-writing of the natural meaning of the section. Although the parties and the interveners provided detailed submissions and cited international and comparative human rights jurisprudence on the application of the interpretation power, and the power to grant a declaration of incompatibility under s32 of the *Human Rights Act*, these arguments are not reflected in the judgment.

In the more recent case of *Pappas v Noble* [2006] ACTSC 39 (27 April 2006) Master Harper considered the interaction between the interpretation power in section 30 of the *Human Rights Act*, and the power to grant a declaration of incompatibility under section 32, although no declaration was specifically sought by the parties.

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<sup>7</sup> The submissions of the Human Rights Commissioner are available the Human Rights Office website at <http://www.hro.act.gov.au/newsevents.html>

<sup>8</sup> (1996) 189 CLR 51

This decision concerned an application by a plaintiff in a personal injury case to tender notes from the plaintiff's treating general practitioner. The defendant objected, on the basis that section 84 of the *Civil Law (Wrongs) Act 2002* (ACT) prohibited the admission of medical evidence in personal injury cases unless from a medical expert agreed upon by the parties or appointed by the Court.

Although it does not appear that the issue was raised by the parties, Master Harper considered whether section 84 could be inconsistent with the right to a fair trial under the *Human Rights Act*, concluding that:

a plaintiff who is not permitted to call evidence from a treating medical practitioner of that practitioner's opinion, so that the Court is limited in relation to medical opinion as to diagnosis and prognosis to that of a single expert, may well complain that he or she has not had a fair trial.

He went on to consider whether this issue could be resolved by interpretation under section 30 of the *Human Rights Act*, or would require a declaration of incompatibility under section 32 of that Act. He stated that:

...it seems to me that section 84 cannot be described as ambiguous or obscure, nor as a provision having an apparent meaning capable of being displaced by interpretation. The apparent meaning does not in itself lead to a result that is manifestly absurd or is unreasonable, simply to a result which is inconsistent with a right established by the *Human Rights Act*. In the circumstances it does not seem to me that section 84 is capable of being interpreted in such a way that it is consistent with the right to a fair trial under section 21 of the *Human Rights Act*.

Instead Master Harper considered that such an inconsistency would normally need to be dealt with by a declaration of incompatibility. The use of this procedure would, however, require the notification of the Attorney-General and the Human Rights Commissioner, who might wish to intervene in the proceedings. In the event, Master Harper found that it was not necessary to go this far, as he had determined that the operation of section 84 could be excluded on another basis.

Although it was not necessary for Master Harper to go into the issues in more detail, it appears that he took a more restrictive approach to the scope of the interpretation power under section 30 of the *Human Rights Act* than the Chief Justice in the *I v S* case discussed above. While in this case s84 of the *Civil Wrongs Act* might also have been made human rights compliant by the interpolation of a discretion to allow the evidence, (in a similar way to the discretion found by Higgins CJ in the protection orders legislation) Master Harper did not consider that re-interpretation could play a role where the meaning and intent of the provision were clear. In such circumstances, he considered that a declaration of incompatibility may be the most appropriate remedy.

In the second year, the Human Rights Act has also been raised in a range of criminal matters, in relation to issues such as admissibility of evidence obtained under defective

search warrants,<sup>9</sup> the right of the accused to give the final address,<sup>10</sup> and the need for procedural fairness where a Griffith remand is used as a sentencing option.<sup>11</sup>

The right to protection of the family has been considered in an application for adoption,<sup>12</sup> and in care and protection proceedings, where the Supreme Court has noted that failure of a decision maker to consider this right could amount to an error of law.<sup>13</sup>

In other civil cases the Act has been raised in matters such as the standard of proof in discrimination matters;<sup>14</sup> whether a prohibition on fencing of residential property breaches the right to privacy<sup>15</sup> and whether restrictions on the poker machines which are available to pubs (which are not as exciting as those machines available to clubs) breach the right to equality.<sup>16</sup> In the Residential Tenancy Tribunal the right to equality has also been considered in the calculation of rent reduction for public housing tenants.<sup>17</sup>

There is currently an interesting discrimination case proceeding against the Canberra Times for homosexual vilification, based on derogatory comments posted on a bulletin board on the newspaper's website in a debate on the Civil Union laws. It appears somewhat ironic that Canberra Times Editor Jack Waterford, who has been a staunch critic of the Human Rights Act, now intends to rely on the Act in the Canberra Times' defence, arguing that the vilification legislation needs to be re-interpreted so as to be consistent with the right to freedom of speech which is protected under the *Human Rights Act*.<sup>18</sup> The matter will go to hearing in July this year.

While there have been more cases under the *Human Rights Act* in the second year, there is still some reticence amongst the legal profession in the ACT to actively apply the Act. This in part may reflect the lack of a specific right of action in the *Human Rights Act*, which means that practitioners need to use existing avenues to bring a case before the Courts, and then rely on an interpretation argument under section 30 of the Act (ie that relevant legislation should be interpreted in particular way, which is favourable to their client, so as to be consistent with the *Human Rights Act*).

It seems possible that the current review of the first 12 months of the Human Rights Act may lead to the introduction of a direct right of action. In recent annual reports hearings the ACT Chief Minister Jon Stanhope noted comments by the Director of Public Prosecutions regarding the lack of use of the Act by practitioners, and stated:

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<sup>9</sup> *R v Khajehnoori* [2005] ACTSC (9 Aug 2005); *R v PJ* [2006] ACTSC 37 (2 May 2006); *R v Caruso* [2006]ACTSC 45 (15 May 2006).

<sup>10</sup> *Skaramuca v Craft* [2005] ACTSC 61 (22 Jul 2005)

<sup>11</sup> *Taysaving v Mazlin* [2006] ACTSC 41 (24 Apr 2006)

<sup>12</sup> *Re Adoption of TL* [2005] ACTSC 49 (1 July 2005)

<sup>13</sup> *A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43 (10 May 2006)

<sup>14</sup> *IF v ACT Commissioner for Housing* [2005] ACTSC 80 (26 Jul 2005)

<sup>15</sup> *Vosame Pty Limited and ACT Planning & Land Authority* [2006] ACTAAT 12 (2 May 2006)

<sup>16</sup> *Bragon Traders Pty Ltd and ACT Gambling & Racing Commission* [2006] ACTAAT (7 Feb 2006)

<sup>17</sup> *Peters v ACT Housing* [2006] ACTRRTT 6 (18 January 2006) and *Kiternas v Watts* [2006] ACTRRTT 4 (8 Jan 2006).

<sup>18</sup> See Waterford's editorial "In Freeze Speech" Canberra Times, 22 April 2006.

It is a big message to the profession to get off their horse and understand how the *Human Rights Act* operates and what human rights are, to get stuck in there and drag a bit of case law out of Terry Higgins and the other judges. If the profession won't take the strong message that Mr Refshauge is sending, I am inclined to introduce a personal right of action into the legislation just to gee them up a bit.<sup>19</sup>

While this might have been dismissed as simply a light-hearted remark intended to enliven a long hearing session, the Chief Minister re-iterated this point in responding to questions at this conference this morning, which might give us more cause for cautious optimism.

The ACT Human Rights Act Research Project is also co-convening a legal practice network for lawyers and others interested in the application of the ACT Human Rights Act (with a similar aim to 'gee up' the profession). The Network has an interactive mailing list, where we post updates of the latest cases and other matters of interest. Please contact the project ([Gabrielle.McKinnon@anu.edu.au](mailto:Gabrielle.McKinnon@anu.edu.au)) if you would like to join the network and be subscribed to the mailing list.

## **2. Impact in the Legislature**

### **Debate in the Assembly**

While the use of the *Human Rights Act* in the Courts has been sporadic, the Act has had a more profound impact on the legislature, with issues of human rights, and the application of the *Human Rights Act*, raised in debate in most sitting days of the Legislative Assembly.

The Act is often referred to by the Liberal opposition, who have used it to criticize the government for perceived breaches of human rights, for example in the failure to segregate different categories of detainees at the Quamby youth detention centre:

What we have in Quamby at the moment of particular concern is the mixing of remandees with inmates who have been convicted of crimes. This breaches subsection (19) (2) of the *Human Rights Act*.

... Whether we agree with the law or not at first blush—and we may well have agreed with particular aspects of the *Human Rights Act*—we expect the government, particularly a government that touts itself as having these fantastic human rights credentials, to comply with its own laws.<sup>20</sup>

However the opposition also regularly castigates the government for its perceived 'obsession' with human rights, which is seen to be indulged at the expense of worthier issues:

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<sup>19</sup> Jon Stanhope, Standing Committee on Legal Affairs, Reference on Annual Reports 2004-05, Transcript of Evidence, 10 November 2005.

<sup>20</sup> Zed Seselja, Hansard, 29 June 2005, p 2479

We have seen over these last few years of government a gradual gravitation by government towards human rights, as a priority, which has occurred at the growing expense of the delivery of essential services and good governance to the ACT.<sup>21</sup>

Some issues which have produced serious debate in human rights terms over the second year of the Act have included:

- the framing of offences against pregnant women, and whether the right to life under the *Human Rights Act* prevents appropriate protection of the unborn fetus;<sup>22</sup>
- the use of privative clauses and call in powers which are intended to prevent litigation (and thus potentially infringe the right to a fair trial and access to the courts);<sup>23</sup>
- the use of strict liability offences;<sup>24</sup>
- A proposal by Greens member Dr Deb Foskey to lower the compulsory voting age in the ACT to 16, in accordance with the right to equality, and the rights of children.<sup>25</sup>

The new counter-terrorism regime proposed by the Federal government, and the ACT's Terrorism (Extraordinary Temporary Powers) Bill 2006 generated heated debate in the Legislative Assembly over the implications of the *Human Rights Act* for preventative detention laws. The ACT government had been critical of the Federal *Anti-Terrorism Act (No 2) 2005*, maintaining that many provisions of this act were in breach of the right to liberty under the International Covenant on Civil and Political Rights. The ACT government was determined to introduce a more transparent process of consultation for its own preventative detention legislation, and referred an exposure draft bill to the Standing Committee on Legal Affairs.

The final Bill which was presented to the Assembly differed in many aspects from the Federal regime, with judicial oversight of preventative detention orders, and the omission of draconian penalties for disclosure of the fact of detention. The Bill was tabled with an advice on human rights compliance from Sydney barrister Kate Eastman, who considered that overall the Bill was compatible with the *Human Rights Act*.

The Liberal opposition did not support the Bill, preferring instead the legislation introduced in NSW. The opposition criticised the restrictions imposed by the ACT *Human Rights Act* in addressing the threat posed by terrorism, but also considered that the government took too narrow a view of the Act. They argued that community interests should be given more weight under section 28, which allows limits to be imposed on

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<sup>21</sup> Zed Sesleja, Hansard, 23 November 2005, p4493

<sup>22</sup> Debate on the Crimes (Offences against Pregnant Women) Amendment Bill 2005, Hansard 16 February 2006 from p 264.

<sup>23</sup> See eg the debate on the use of the *Land (Planning and Environment) Act* in relation to the Alexander Machonochie prison, Hansard 16 February 2006 from p248.

<sup>24</sup> See eg the debate on the Criminal Code Harmonisation Bill , Hansard 20 October 2005, from p3928

<sup>25</sup> Hansard, 29 March 2006 at p798 - 805

human rights in legislation, provided that the limitations are demonstrably justified in a free and democratic society:

Sadly, the biggest problem with this bill is that the government was not listening and seems to have been absolutely blinkered by its own *Human Rights Act* and a misinterpreted approach to that. The ACT is an obvious target for terrorist activity because it is the nerve centre of the Commonwealth government and home to around 90 embassies.

...Even in looking at your own *Human Rights Act*, section 28 refers to laws that need to be done to protect society, that can be ticked off on the basis that the overall community need overrides the human rights of individuals. The individuals we are talking about here are pretty horrible individuals who have no compunction about killing and maiming tens, hundreds or thousands of people. Human rights is a balancing act and here I think you have failed in that act.<sup>26</sup>

However, others in the Assembly, including the Greens and Labor MLA Wayne Berry expressed concerns that the bill went too far in its incursions on the right to liberty and security of person, without sufficient justification. Dr Foskey noted that while Kate Eastman's advice concluded that the bill was compatible with the *Human Rights Act*, the detail of the advice suggested that there were some areas of concern:

The advice goes on to say that on balance, having regard to all the safeguards et cetera, the incommunicado nature of the detention may be a justified limitation on the rights afforded by section 18 (1) of the *Human Rights Act*. Well, I would have thought that to get a compatibility statement it would either be justified or not. There should not be any "mays" about it. But Ms Eastman gives no such unqualified approval.

The new counter-terrorism regime was one area in which the ACT was able to have some influence over the debate at national level, with the Chief Minister releasing both the draft federal laws and his advice about the human rights compatibility on his website, galvanizing opposition to the national laws.

However, the fate of the *Civil Unions Act 2006* (ACT), which was intended to better promote the right to equality under the *Human Rights Act*, shows the limitations of the legislative power of the Territory to protect human rights. This law, which recognized civil unions between gay and lesbian couples and allowed them to enjoy the same legal rights as married couples under Territory law was overridden by the Federal Government, relying on its power under the Constitution to legislate for the Territories.

### **Scrutiny Committee**

The Standing Committee on Legal Affairs, performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee (the Scrutiny Committee), continues to play an important and active role in assessing human rights issues raised by bills and subordinate

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<sup>26</sup> Bill Stefaniak, Hansard, 9 May 2006 at p 1335.

legislation and engaging in dialogue with the executive government. The Committee is a non-partisan body, comprised of representatives from the government, opposition and cross bench, and is currently chaired by opposition leader Bill Stefaniak.

The Scrutiny Committee has issued 15 Scrutiny Reports in the second year of the *Human Rights Act* in which it raised a range of concerns over the potential infringement of rights under the *Human Rights Act*.

One ongoing theme of the Scrutiny Committee reports is the inclusion of, and justification for strict liability offences in bills and subordinate legislation. Such offences, which do not require the prosecution to prove that the defendant intended to commit the relevant act, have the potential to infringe the right to liberty and security of person, particularly if they carry a penalty of imprisonment. The Committee has commented at length on these matters in a number of reports, and continues to note the inadequacy of explanatory statements in addressing these issues. They summarized their views in Report No 15 of the Sixth Assembly (22 August 2005) as follows:

[W]here a provision of a bill (or of a subordinate law) proposes to create an offence of strict or absolute liability (or an offence which contains an element of strict or absolute liability), the Explanatory Statement should address the issues of:

- why a fault element (or guilty mind) is not required and, if it be the case, explanation of why absolute rather than strict liability is stipulated;
- whether, in the case of an offence of strict liability, a defendant should nevertheless be able to rely on some defence, such as having taken reasonable steps to avoid liability, in addition to the defence of reasonable mistake of fact allowed by section 36 of the Criminal Code 2002.

...The Committee accepts that it is not appropriate in every case for an Explanatory Statement to state why a particular offence is one of strict (or absolute) liability. It nevertheless thinks that it should be possible to provide a general statement of philosophy about when there is justified some diminution of the fundamental principle that an accused must be shown by the prosecution to have intended to commit the crime charged. There will also be some cases where a particular justification is called for, such as where imprisonment is a possible penalty.<sup>27</sup>

The Chief Minister has acknowledged that this is an ongoing issue in need of resolution:

[W]e appear to be having a debate around strict liability almost once a month through one bill or another.... I must say that it is an issue...which continues to cause some frustration, certainly at officer level, that we are now essentially just turning out by rote the government's response to criticisms within scrutiny of bills reports about the use of strict liability offences. There is something of an impasse and this has been the case traditionally over years.<sup>28</sup>

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<sup>27</sup> *Scrutiny Report No 15, Sixth Assembly*—22 August 2005 at p22

<sup>28</sup> Jon Stanhope, Hansard 20 October 2005, p3933-3934

One of the dilemmas which has arisen is whether the government should have to provide detailed justification for provisions in new legislation, such as the Criminal Code Harmonisation laws, which simply re-enact existing offences, but now explicitly identify those which are strict liability. Although these laws do not introduce new offences or penalties, by re-enacting the provisions, they become subject to the scrutiny and compatibility requirements under the *Human Rights Act*, and thus it seems reasonable for the Committee to expect such offences to be justified in human rights terms.

The issue of strict liability offences has now been taken up as an inquiry by the Standing Committee of Legal Affairs, which expects to report shortly.<sup>29</sup>

It is notable that over the last year the Committee has also given more detailed consideration to the application of section 28 of the *Human Rights Act*, which allows laws to impose limitations on human rights where these can be demonstrably justified in a free and democratic society. Although the Committee has stopped short of stating decisively that any provision would not comply with section 28, it has provided strong arguments on these issues for the Assembly to consider.

For example, the Committee provided very detailed reasons in its consideration of the Court Procedures (Protection of Public Participation) Amendment Bill 2005. This bill was introduced by the Greens member Dr Foskey to address the emerging problem of strategic lawsuits against public participation (which have become known as SLAPP proceedings), in the wake of cases such as that brought by forestry company Gunns in Tasmania against anti-logging protesters.

The Bill established a scheme where a defendant in certain types of litigation could apply to the court to dismiss the case, or order security for costs, where it could be established that the plaintiff could have no reasonable expectations that the litigation would succeed, and the case was brought for an improper purpose, essentially to discourage public participation.

The Committee considered that the scheme proposed by the bill would infringe upon the right to a fair hearing under s21 of the *Human Rights Act*, as the scheme was explicitly designed to dissuade a plaintiff from bringing certain types of litigation which would otherwise be lawful. The Committee then turned to the issue of whether such a limitation could be justified under section 28, and set out a number of questions for the Assembly to consider. In particular, the Committee suggested that it was necessary to ask whether the scheme was a proportionate response to remedy the SLAPP problem, and commented in detail on the proportionality of particular aspects of the regime, for example:

If a defendant applies for dismissal of the proceeding for want of prosecution, and the court does so, it may order the plaintiff to pay the defendant's costs in relation to the proceeding if "*the plaintiff does not satisfy the court, on the balance of*

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<sup>29</sup> Bill Stefaniak noted that the Committee intended to report on this issue by June 2006 :Hansard, 15 December 2005, p4716, but the report is not yet available (as at 5 July 2006) ,

*probabilities, that, when viewed objectively, the proceeding was not brought or maintained for an improper purpose*”: paragraph 37G(3)(b). The imposition on a plaintiff of a burden of proof to prove a negative might be thought to be a disproportionate response. It is generally accepted that it is very difficult to prove a negative.<sup>30</sup>

As a result of the concerns raised by the Scrutiny Committee, the bill was referred to the Standing Committee on Legal Affairs for further consideration, and this inquiry is currently ongoing.

### **Other Committees**

The *Human Rights Act* has also been considered in inquiries of other committees of the Legislative Assembly. One striking example is in the report of the Standing Committee on Planning and Environment into a proposed commercial development in the suburb of Kingston.<sup>31</sup> The Committee examined whether the development would infringe the right to privacy of nearby residents, and the right of protection of the families, devoting several pages to a detailed analysis of judgments of the United Kingdom courts and the European Court of Human Rights where these issues had been considered.<sup>32</sup> The Committee ultimately concluded that the development would not infringe these rights, but recommended that the ACT Planning and Land Authority expressly address the influence of the *Human Rights Act* on the discharge of its statutory and non-statutory responsibilities, including when proposing variations to the Territory Plan.<sup>33</sup>

### **3. Executive government**

I will touch only briefly on this area, as Renée Leon, Chief Executive Officer of the Department of Justice and Community Safety will speak in more detail about the impact of the Human Rights Act on the executive government, and some of the specific issues which have arisen for the government.

In its second year, it appears that the *Human Rights Act* has continued to have its greatest impact on those areas of the executive government directly responsible for the development of policy and legislation. Government officers in these areas must consider any potential human rights issues which arise in each new bill, as ultimately the Attorney-General will be required to certify whether such provisions are compatible with the Human Rights Act, and the Scrutiny Committee will closely examine both bills and subordinate legislation.

Under section 37 of the Act the compatibility statements issued by the Attorney-General are not specifically required to include reasons for the Attorney's opinion. In general the statements issued by the Attorney-General have not given the reasons for compatibility,

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<sup>30</sup> *Scrutiny Report No 16 of the Sixth Assembly—19 September 2005 at p4.*

<sup>31</sup> Standing Committee on Planning and Environment, Report 20, Draft Variation to the Territory Plan No 256 Kingston Group Centre Part Section 22, May 2006

<sup>32</sup> *Ibid* at paragraphs 3.7-3.25

<sup>33</sup> *Ibid*, Recommendation 5 at 3.29.

with the exception of the Mental Health (Treatment and Care) Amendment Bill 2005, which annexed a detailed statement of reasons to the compatibility statement, and the Terrorism (Extraordinary Temporary Powers) Bill 2005, discussed above, for which Kate Eastman's advice on compatibility was tabled separately in the Assembly.

Instead, the policy of the government has been to require that human rights issues be addressed in the explanatory statements which are prepared by the Department responsible for the bill. While this decision in part reflects the limited resources available in the Territory, the Human Rights Unit also considers that there are benefits to the quality of the human rights dialogue from sharing the responsibility for human rights compliance across government, and requiring each Department to analyse and justify its legislation in human rights terms. It appears that sometimes this process may involve challenging the pre-conceptions of public servants about the relevance of human rights to their areas of work, as Opposition leader Bill Stefaniak suggests:

I have heard from talking to public servants that even in areas where you would think that there would be virtually no relevance in terms of human rights, that it is a mere formality that they have to be consulted and a process gone through, delays are being experienced with things as basic as changes to legislation in areas where you would not expect human rights to be particularly relevant whatsoever.<sup>34</sup>

While it is sometimes thought (particularly by the Opposition leader) that the *Human Rights Act* is most relevant to the rights of defendants in criminal law, the range of rights under the *Human Rights Act* is broad, and important human rights considerations may arise in many unexpected areas, such as in the planning decisions noted above.

This need to raise awareness about the relevance of human rights to all areas of government also appears to be reflected in the statements on the implementation of the *Human Rights Act* included in the last round of departmental annual reports.<sup>35</sup> While some departments provided detailed commentary in this section, many were less fulsome. Nevertheless, it is to be expected that a human rights culture will take time to develop across the executive, and for training to be rolled out to all levels of government.

In addition to role of the *Human Rights Act* in the creation of new legislation, there have been some other important developments over the second year, particularly in relation to corrections. The audit of the Quamby youth detention centre by the Human Rights Commissioner Dr Helen Watchirs lead to a number of changes to the running of that facility to improve compliance with the *Human Rights Act*. The construction of the new adult prison, the Alexander Machonochie Centre is underway, and will be the first prison in Australia specifically designed to meet human rights standards.

The *Human Rights Act* is currently being reviewed by the government, in accordance with section 43 of the Act. A discussion paper was issued by the Human Rights Unit, and

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<sup>34</sup>Hansard, 9 May 2006, p1386-1387

<sup>35</sup> See section 5(2)(a) of the *Annual Reports (Government Agencies) Act 2004*

submissions have now closed. The report of the review will be tabled on 15 August 2006, which is the next sitting day of the Assembly after 1 July 2006.

The second year of the *Human Rights Act* has shown the potential of the Act to have a real impact in generating a dialogue on human rights between each of the arms of government. It appears that the quality of this dialogue will continue to become richer and more developed as the courts, the legislature and the executive become more familiar with the Act, and its application across a range of government activities.

Perhaps one of greatest achievements of the *Human Rights Act* in these early years has been to present a workable model of human rights legislation which has dispelled some of the fears which have surrounded bills of rights in Australia. The adoption of a Charter of Human Rights and Responsibilities in Victoria, and the momentum which is developing in other States suggests that the human rights dialogue which has begun in the ACT may soon become a much broader conversation.