

## **Jurisdiction Report — Australian Capital Territory**

### **Part 1 — Committee overview**

#### **The Committee**

- 1.1 Standing committees for the current Assembly were established in November 2012, one being the Standing Committee on Justice and Community Safety (JACS). In addition to its general investigatory role, the JACS committee is also charged with a legislative scrutiny role to examine primary and subordinate legislation.

#### **Legislation considered**

- 1.2 The JACS committee, in its legislative scrutiny role, examines and reports on all primary and subordinate legislation presented to the Assembly, including bills from non-executive members. Further, it is required to report on proposed government amendments to government bills (apart from amendments which are urgent, minor or technical, or have arisen as a result of committee comment) and the standing orders prevent amendments from being moved unless the committee has reported.

#### **Membership**

- 1.3 The committee is comprised of 4 members — 2 government and 2 opposition members. The Chair is an opposition member. While the JACS committee is staffed from the Assembly's Committee Office, when in its legislative scrutiny role the committee is supported by a secretary and an assistant secretary, both drawn from the Chamber Support Office. The committee has 2 contracted legal advisers, one for bills and the other for subordinate legislation.

#### **Terms of reference**

The Standing Committee on Justice and Community Safety when performing its legislative scrutiny role shall:

- (1) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and/or disapproval by the Assembly (including a regulation, rule or by-law):
  - (a) is in accord with the general objects of the Act under which it is made;
  - (b) unduly trespasses on rights previously established by law;
  - (c) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
  - (d) contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly;
- (2) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee;

- (3) consider whether the clauses of bills (and amendments proposed by the Government to its own bills) introduced into the Assembly:
  - (a) unduly trespass on personal rights and liberties;
  - (b) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;
  - (c) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;
  - (d) inappropriately delegate legislative powers; or
  - (e) insufficiently subject the exercise of legislative power to parliamentary scrutiny;
- (4) report to the Legislative Assembly about human rights issues raised by bills presented to the Assembly pursuant to section 38 of the *Human Rights Act 2004*;
- (5) report to the Assembly on these or any related matter and if the Assembly is not sitting when the Committee is ready to report on bills and subordinate legislation, the Committee may send its report to the Speaker, or, in the absence of the Speaker, to the Deputy Speaker, who is authorised to give directions for its printing, publication and circulation.

Pursuant to standing order 182A, an amendment proposed by the Government to a Government initiated bill must be considered and reported on by the Committee, with exemptions being allowed for amendments which are urgent, minor and technical, or in response to Scrutiny Committee comment.

## **General approach**

The Committee considers and reports on all bills (ie, including non-government bills) and subordinate legislation presented to the Assembly. It does not hold inquiries; rather, it sees its role as facilitating a discussion for Members of the Assembly (and the wider community) on the “rights” issues raised in legislation. It reports to the Assembly at the beginning of each sitting week, its report containing an analysis of the legislation presented during the previous sitting period.

## **Part 2 — Trends in Legislation**

### **A – Scrutiny of Bills and the *Human Rights Act 2004* (ACT)**

#### **Introduction**

Australian scrutiny committees have generally been required to consider whether a provision of a proposed law “unduly trespasses on personal rights and liberties”. They take their view of what rights are significant by reference to the traditional common law rights that inform the application by the courts of the presumption of liberty. From the 1980’s onwards, Australian courts have taken international treaties such as the *International Covenant on Civil and Political Rights* statements of rights as relevant to the task of reading statutes so that the extent to which they infringe on rights is kept to a minimum. Some scrutiny committees followed suit. The matter was taken further in the ACT by the *Human Rights Act 2004*, which commenced on 1 July 2004. The terms of reference of the Territory Scrutiny Committee have been expanded by section 38 of the Act, so that it must now “report ... about human rights issues raised by bills”. The relevant rights are, however, only

those stated in the Act. The following reflects on the experience of the Scrutiny of Bills Committee in the light of this task.

The HRA states a number of rights – such as “[e]veryone has the right to freedom of expression” (section 16(2)) – but then permits the legislature to limit those rights on a very wide basis (section 28). The Act does not constrain the legislative power of the Legislative Assembly. It does permit a person to seek a declaration of incompatibility from the Supreme Court, and the Attorney-General must report this matter to the Assembly. It is however a matter for it to decide whether to change the relevant law. The HRA also states a rule for the interpretation of legislation designed to protect human rights, but this adds little to the common law approach.<sup>1</sup>

The HRA was promoted as a “dialogue model” for the protection of rights. Its provisions contemplate two kinds of dialogue. The first is that between the Executive and the Assembly, prior to a decision of the latter to pass the bill into law or not. The second is that between the Assembly and the Supreme Court which follows the court’s making of a declaration of incompatibility. In this second sense, to speak of a dialogue is somewhat artificial and for this paper may be left aside.

Dialogue between the Executive and the Assembly prior to the enactment of a law may result in the provisions of a bill undergoing modification that better protects rights. The HRA is designed to enhance this prospect. Part 5 is headed “Scrutiny of proposed Territory laws”, but the operative provisions apply only to bills (and not to proposed subordinate laws), and, furthermore, only to bills presented to the Assembly by a minister. The Attorney-General “must prepare a written statement (the compatibility statement) about the bill for presentation to the Assembly” (section 37(2)), which must state “whether, in the Attorney-General’s opinion, the bill is consistent with human rights” (section 37(3)(a)), and, “if it is not consistent, how it is not consistent with human rights” (section 37(3)(b)). Section 38 is headed “[c]onsideration of bills by standing committee of Assembly” and section 38(1) provides that “[t]he relevant standing committee [which at present is the Scrutiny Committee] must report to the Legislative Assembly about” human rights issues raised by bills presented to the Assembly”.

This process has led to some very positive outcomes. At least in respect of the HRA rights, the relevant Minister must now proactively address human rights issues raised by provisions of the Bill before the bill is considered by the Committee. This puts the Committee in a better position when it discharges its task. Sometimes it is made aware of issues that might otherwise have been overlooked. At times – with growing frequency – it is able to simply refer the Minister’s analysis to the Legislative Assembly without further comment, thereby allowing the Committee to devote more time to consideration of rights issues it considers were not dealt with fully – or at times, even at all – in the Minister’s analysis. Where the Committee does report on such issues, it calls on the Minister to respond to the Committee’s comments or questions, and almost invariably a response is given. This response is provided to the Assembly in a Committee report that follows its receipt by the Committee.<sup>2</sup> In addition, it commonly occurs that at the conclusion of the in principle (aka second reading) stage of the relevant bill, the Minister will address the issues raised by the Committee.

This interchange between the Committee and the Minister enhances the quality of the Committee’s report to the Assembly. The Committee does not generally take a positive view of whether a clause of a bill should be passed into law. Rather, the point of the exercise is that the Assembly members will have before them an exchange of views between the Committee and the Minister concerning the human rights issues thrown up the Bill, and thereby be better placed to decide whether to pass a particular provision into law.

---

<sup>1</sup> Formerly spoken as the ‘presumption of liberty’, but now more commonly as the ‘principle of legality’.

<sup>2</sup> It is the case, however that this response is made public in this way after the debate on the bill, and in some cases after the debate itself.

Another by-product of this process is that the ACT Public Service is made more easily aware of the need for careful consideration of the significance of human rights at those points where drafting instructions are considered and formulated. It is hard to quantify the extent to which this is the case, but it is of potentially great significance in developing a human rights culture in the public service.

Experience indicates however a number of problems in this scheme. There is room for improvement.

### **The first problem: inadequate Explanatory Statements**

Contrary to practice in other jurisdictions, Territory compatibility statements invariably are limited to a simple statement by the Attorney-General that in his opinion the provisions of “the Bill, as presented to the Legislative Assembly, is consistent with the *Human Rights Act 2004*”. The ACT Executive has chosen rather to address compatibility in the Explanatory Statement to the Bill.

To assist this process, the Committee has issued a *Guide to writing an Explanatory Statement* which, among other matters, provides advice as to how the issue of HRA compatibility might be addressed.<sup>3</sup> It is in particular emphasised that the Explanatory Statement make its assessment according to the framework stated in subsection 28(2) of the HRA (see below). In its reports, the Committee will commend an Explanatory Statement which provides assistance to the Committee and to the Assembly, but more often than should be the case, a Statement falls short, and sometimes well short of an adequate standard.

The Explanatory Statement to the bill may (and often does) contain statements in support of the HRA-compatibility of a clause identified as having limited an HRA right. This is sometimes done by way of a separate section of the Explanatory Statement headed “human rights implications” or some such title. Sometimes, in contrast or in addition to this, analysis may accompany a description of each clause of the bill.

Section 28(2) states that all relevant factors and those specifically identified “must be considered”. It is more often than not the case however that an Explanatory Statement justification does not identify each of the considerations stated in section 28(2), and more particularly not in a way that could amount to a demonstrable justification for limiting the relevant HRA right.

### **The second problem: lack of reference to other relevant legislative history**

Dialogue will also be enhanced if the Committee and the Assembly is referred to the legislative history insofar as that comprises reports, submissions and advices directed to the object of a bill and to any consideration of the rights issues arising. This step is often taken, but not at a level approaching a uniform approach. Of particular interest to the Committee has been the advice and commentary the government receives from its Directorate of Justice and Community Safety (its Attorney-General’s department) and the ACT Human Rights Commissioner (HRC). This information will often be relevant not simply for its own sake, but because some Explanatory Statements have justified provisions of a bill that limit HRA rights solely or in part on the basis that one or other of these bodies has signified that the bill is HRA compatible.

In 2005, the Attorney-General rejected a Committee request for access to these advices, on the ground that HRC advice was mostly “given in the form of comment on cabinet submissions. It

---

<sup>3</sup> [http://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf](http://www.parliament.act.gov.au/__data/assets/pdf_file/0006/434346/Guide-to-writing-an-explanatory-statement.pdf)

would be inappropriate to release this advice as it is clearly subject to executive privilege”.<sup>4</sup> The letter also said that it “would be counter-productive to the policy and legislative development process to disclose advice given for the purpose of assisting agencies to identify human rights concerns”.

### **The third problem: the HRA states only a limited range of the traditional common law rights**

The range of rights stated in the HRA falls short, and in some significant respects, from the range of common law rights.<sup>5</sup> For non-exhaustive examples, it is under the traditional terms of reference that the ACT Scrutiny Committee must consider the impact of a bill on the right to property, the privilege against self-incrimination in contexts other than when a person has been charged with a criminal offence,<sup>6</sup> and the right not to be affected by a retrospective law other than a criminal law.<sup>7</sup>

The Scrutiny Committee does not overlook the whole range of common law rights, in particular in its assessment of whether a clause in a bill “unduly trespasses on personal rights and liberties”. On the other hand, it is very rare to find an Explanatory Statement that addresses a common law right against this term of reference.

The Attorney-General has justified this practice by arguing that “[t]he rights in the Human Rights Act are the rights that have been specifically adopted and incorporated into ACT domestic law (and) it is that Act under which I am obliged to issue a certificate of compatibility and it is the rights as formulated under that Act that the Courts will consider when considering human rights compatibility issues”.<sup>8</sup> The Chair of the Committee responded to this advice as follows.

The committee is concerned at the view that a government explanatory statement will only address any rights issues in terms of the rights stated in the ACT Human Rights Act.

From 1989 the committee has had the role of considering whether clauses in bills and subordinate laws “unduly trespass on personal rights and liberties”. For this purpose the committee drew on the way the courts applied the presumption of liberty in the interpretation of statutes and the rights stated in international human rights instruments. While it was uncommon for an explanatory statement to proactively raise and deal with rights issues, the minister responded to issues identified by the committee. There was no difference of view about how the concept of personal rights and liberties should be understood.

It is undesirable that an explanatory statement should not proactively address rights issues apart from those raised under the Human Rights Act. This is not helpful to the committee, to members or to the public. They should not need to refer firstly to the explanatory statement and then to any other discussion in a response to a committee report.<sup>9</sup>

---

<sup>4</sup> Letter of the Attorney-General of 20 July 2005 to the Chair of the Standing Committee on Legal Affairs of the Legislative Assembly.

<sup>5</sup> There are however some significant additions. These are (i) the right to take part in public life (section 17); the right to compensation for wrongful criminal conviction (section 23); the freedom from forced work (section 26); the rights of minorities (section 27); and the right to education (section 27A).

<sup>6</sup> Compare to HRA section 22(2)(i).

<sup>7</sup> Compare to HRA section 25(1).

<sup>8</sup> Letter of Attorney-General of 1 May 2012, appended to *Scrutiny Report No 52 of the 7<sup>th</sup> Assembly* (7 May 2012).

<sup>9</sup> Legislative Assembly for the ACT, Seventh Assembly, *Debates* 2074 (8 May 2012).

The HRA does not suggest that the rights it states are exhaustive of the rights of an individual,<sup>10</sup> and there is nothing to prevent an Explanatory Statement taking up a rights issue arising under a constitutional restriction, the presumption of liberty, or an international treaty to which Australia is a party. Some recent Statements have taken up the common law right to protection of property.

### **The fourth problem: justification for derogation of a right is seen as an exercise in legal analysis**

It is hardly surprising that a justification for a derogation from an HRA right often takes the form of a legal opinion. There is vast body of case-law ("jurisprudence") addressed to the scope of rights similar to those in the HRA and to the bases for their derogation. There is however a tendency to rely on a legal opinion as concluding the question of whether a provision of a bill is justifiable. There is reason to be wary of this approach.

Legal opinions are written for a client - the Minister - and not for the Assembly. Parliamentarians may wish to know what might be said to the contrary, in particular upon the issue of whether the derogation clause can be properly invoked to support the law.

While lawyers do have something to say about what the court might say about how the derogation clause will be applied, its application in the end turns, as a New Zealand judge said, on "public policy analysis and value judgements".<sup>11</sup> Legal training does not equip a lawyer for this task. The bare opinion of a lawyer that some provision is justifiable under the derogation clause deserves little or no weight. Where it is reasoned, it should carry no weight beyond the force of the reasoning.

In this conversion of a policy analysis into a legal analysis, the government lawyers draw (sometimes solely) on decisions of courts that lie outside the Australian hierarchy. The opinion may marshal a body of statements made by judges in various jurisdictions and on this basis assert that the 'international jurisprudence' tends to suggest that a provision of the proposed law does or does not derogate from a right stated in the HRA, or, that if it does, the provision is or is not justifiable. There are several problems in this approach.<sup>12</sup>

First, it is apparent in some instances that the minister's lawyers have 'cherry picked' the case-law to support the conclusion that the limitation of a right is justified (or at least have ceased their research at the point where favourable case-law has been discovered). Secondly, and more fundamentally, in particular from the standpoint of a scrutiny process, there are limitations to analysis that looks to the international jurisprudence. At the outset, there is the question of what body of foreign case-law is relevant to the exercise. There is an enormous body of case-law to draw upon, ranging from supra-national courts such as the European Court of Human Rights, to many domestic courts. Which of these courts deserve to be respected and why?

One can understand that an Australian court would look to decisions of the Canadian, New Zealand and United Kingdom courts, given the close textual similarity between the respective bills of rights, shared common law heritage, and the relatively high degree of similarity between the social and political conditions prevailing in these countries and Australia. But even between these

---

<sup>10</sup> Indeed, HRA section 7 states that "[t]his Act is not exhaustive of the rights an individual may have under domestic or international law".

<sup>11</sup> *Ministry of Transport v Noort* [1992] NZLR 260 at 283 (Richardson J).

<sup>12</sup> HRA section 39(1) states that "[i]nternational law, and the judgments of foreign and international tribunals, relevant to a human right may be considered in interpreting the human right". The words "may be" do not mandate this approach, and in any event it cannot be read as excluding more conventional ways of assessing what an ACT court might do in the way of applying section 28. The law of *stare decisis* is not displaced, including its rules about the weight of precedents according to the earlier court's place (if any) in the ACT hierarchy.

jurisdictions there are significant structural and textual differences between the bills of rights, in particular on the issue of permissible limitation. The further one moves away from these common law jurisdictions, the greater should be the care with which decisions of foreign courts should be regarded as useful sources for understanding how the HRA should apply. This applies to the European Court of Human Rights, given that its decisions are often influenced by the often very different character of the legal systems of European countries.

There is then the more fundamental question of why should this case-law be given much weight. Where the judicial decision cited is that of a domestic court, and in particular where it would be binding the ACT court hierarchy, then of course it deserves some weight in the parliamentary debate on the proposed law, not least because the parliamentarian may wish to know whether the proposed law will be found to be HRA-compatible.

Statements by foreign courts deserve much less weight, in particular in relation to the application of the limitation clause, given that its application involves the making of value judgements taking into account competing public interests. Explicitly or implicitly, this is what a foreign court will have done, but by reference of course to how those matters are viewed in the particular foreign jurisdiction. In contrast, a domestic court – and of course a parliamentarian – must have regard to those matters in the domestic jurisdiction. It cannot be assumed that the relevant public interests in play in an Australian jurisdiction are the same or even substantially the same as in say even a common law jurisdiction.<sup>13</sup>

The government lawyer's response might be that he or she is merely marshalling together holdings and dicta of those foreign courts that they think will have persuasive weight in the domestic court to the end of advising their client that if the issue came before a domestic court, their educated guess is that that court would follow the foreign courts. One could not tell how good the guess was until the local court ruled on the issue.

If that is the objective, and undoubtedly in many cases it is, it is surprising that so little use is made of Australian jurisprudence, and of the High Court in particular. The High Court has often addressed the content of the common law presumption of liberty, and one would expect what it has had to say will have a strong bearing on what the latter rights mean where the issue is raised in an Australian court. What the High Court or another Australian court has had to say will often be developed in the context of conditions prevailing in the jurisdiction in which the bill of rights issue arises.<sup>14</sup>

The scrutiny committee has found that judicial opinions as to the relevance and content of common law rights are valuable, inasmuch as they offer reasoned and impartial analysis, but they present a difficulty, largely because they can be taken to settle the debate. There are two clear instances where they are particularly useful.

The first is where the decision clearly addresses the rights issue and it is binding on a court in the relevant jurisdiction.<sup>15</sup> A scrutiny committee should of course warn the legislature that it is asked to enact into law a clause in a bill that might be found to be invalid, or incompatible with the HRA by a competent court in the relevant jurisdiction. While the legislature should be informed that

---

<sup>13</sup> A point acknowledged, although in only a limited way, by Penfold J in *In the matter of an application for bail by Islam* [2010] 147 [146].

<sup>14</sup> See *Scrutiny Report No. 10 of 2001*, concerning the Crimes Legislation Amendment Bill 2001, wherein the Committee cited at length contrasting views of the High Court judges in *Davern v Messel* (1984) 155 CLR 21 concerning the in scope of the principle against double jeopardy, in particular whether it was limited by a law that permitted the Crown to appeal against an acquittal.

<sup>15</sup> Binding, that is, according to the law of *stare decisis* and the conventions about just what elements of a decision are binding. In addition, the scrutiny committee might have regard to a decision that might be 'strongly persuasive'.

there is an obvious problem, it would be wrong to suggest that it should yield to some legal opinion.

Secondly, any judicial decision (or combination of decisions) is particularly valuable where it or they can be drawn upon as a source of competing viewpoints on the value judgments involved in the resolution of the rights issue. It is in this way – and not as a body of precedent – that the international jurisprudence (or case-law) may be useful. It should not be a matter of adding up the pronouncements of constitutional courts to see what proposition commands support and ignoring minority viewpoints on the issue.

In the end – that is, at the point where an Assembly member decides whether to vote to pass the particular clause of a bill in question – any kind of legal opinion should be treated as only of limited assistance. By this point, the committee's job has been to identify a rights issue and say something to assist each member to decide. Where an HRA right is identified, HRA section 28 provides a framework for decision-making, and in this regard the members of the Assembly have the authority and the competence to make their own judgement. Indeed, it may be said that they are, by reason of having been democratically elected, uniquely placed to determine what is justified or not in a democratic society. The members of the Assembly should not feel – or be told – that they should yield to a legal opinion about how a court might rule upon them. It is, moreover, open to a member to reason that he or she will pass the clause into law even if it appears to be HRA-incompatible, or to decline to pass the clause if it appears to be HRA-compatible.

### **The fifth problem: – the derogation clause makes it easier to justify legislative limitation of rights**

The HRA statement of rights is for the great part lifted from the International Covenant on Civil and Political Rights, to which is tacked on a derogation clause based on the New Zealand and Canadian models. By section 28(1), “[h]uman rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society”. Section 28(2) stipulates a non-exhaustive framework for determining whether the dispensation in subsection 28(1) applies.<sup>16</sup> Section 28 is the basis of justification for the frequent limitations of HRA rights found in bills.

In contrast to the common law approach, the HRA offers a legal basis for limiting rights as well as a basis for asserting those rights. While the HRA's long title proclaims it to be “[a]n Act to respect, protect and promote human rights”, section 28 gives it a quite different aspect. Section 28 explicitly authorises the Assembly to limit rights. The Human Rights Act is as much about authorising the displacement of the HRA rights as it is about stating those rights.

The essence of the common law approach is that where, by reason of their ambiguity or lack of clarity, the words of a statute permit more than one construction, a court will proceed on the basis that “the presumption is always in favour of liberty”.<sup>17</sup> It will adopt that construction that best

---

<sup>16</sup> 28(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

<sup>17</sup> *Commonwealth v Progress Advertising & Press Agency Company Pty Ltd* (1910) 10 CLR 457, 460 (Griffith CJ).

enhances or protects the liberty that is affected by the statutory provision.<sup>18</sup> The court does not engage in any assessment of whether there was any justification for the abrogation of the relevant common law right. If the relevant common law right is expressly displaced, that is the end of the court's inquiry. Where a common law right is taken as the yardstick, the executive cannot point to any support in the law for its derogation of that right.<sup>19</sup> It must rely – in the parliament or in public – on justifications that go to the merits of the derogation.

Where justification of an HRA right is in issue, the executive is more favourably placed in two respects. The first is that it can point to a legislative warrant to derogate. The second is that the terms of this warrant are such that it is very easy to point to some plausible basis for derogation, and, of more concern, it is open to it to express its justifications substantially in the language of section 28, thereby avoiding a merits based argument.

The inclusion of section 28 in the HRA marks a distinct shift in the significance to be attached to a right protected by law. In contrast to the presumptions of liberty, the scope of an HRA right cannot be ascertained by analysis of what the protection entails. An HRA right is infringed only where the proponent of the bill cannot demonstrate that it is not a “reasonable limit” “that can be demonstrably justified in a free and democratic society”.

It is not difficult to make out plausible section 28 justifications. In practice, the only point of difficulty is to demonstrate that there is no “less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve” - less restrictive, that is, of the HRA right in issue. This particular issue is often only identified by the committee in its report, and often met in response by an assertion that there is “no less restrictive means”. Occasionally, (although taking a view in mid-2016, more frequently), there is reasoned analysis of the available alternatives, and/or of a suggestion made by the committee of a less restrictive means for achieving the object of the bill.

The ease with which a justification may be advanced by a minister defending a clause in a bill that clearly limits an HRA right has the result that rights may come to be taken less seriously than they should. If they can be easily displaced, and that displacement is expressly authorised by the HRA, respect for these rights may diminish. This result would in turn diminish the role of the Scrutiny Committee.

## **Conclusion**

The enactment of the *Human Rights Act 2004* has reframed the significance of legal protection to human rights, in particular in the context of scrutiny of bills. There is now a hierarchy of rights, with those adopted by the HRA having a greater prominence than those other rights that give concrete expression to the presumption of liberty. The HRA rights however lack the absolute quality of the presumption of liberty rights, for it may be argued that the HRA rights cease to be relevant once a plausible argument that they are ‘proportionate’ under the derogation clause is offered. The common law does not view rights in this way, but the influence of the thinking that rights may be limited where they are proportionate is such that this view will be overtaken. This line of argument takes away the force of an objection that a proposed law offends a human right. In this way, the work of a scrutiny committee is more easily put aside by the proponents of bills.

## **B – Subordinate legislation**

The Committee's terms of reference (1) and (2) apply to both bills and subordinate legislation. Additionally, though the ACT's *Human Rights Act 2004* does not expressly give

---

<sup>18</sup> If there is no ambiguity or lack of clarity that raises a doubt as to the effect of the statute on the relevant right or liberty, the court must apply the statute in its terms.

<sup>19</sup> Apart of course from relying on its legislative supremacy.

the Committee a role in relation to human rights issues in subordinate legislation, the Committee nevertheless considers human rights issues in subordinate legislation, if they arise.

#### *Drafting quality of instruments and explanatory statements*

For each of the last 5 full calendar years, the Committee has examined an average of just under 40 subordinate laws (ie regulations) and an average of just over 320 other disallowable instruments. The Committee is pleased to observe that serious issues arising from subordinate legislation have been relatively infrequent. In particular, it is the Committee's observation that the ACT Government (with the assistance and advice of the ACT Parliamentary Counsel's Office) has been relatively successful in ensuring that (for the purposes of principle (d) of the Committee's terms of reference) subordinate legislation deals only with matters that are appropriate for subordinate legislation.

However, in the current calendar year, the Committee Chair has also taken the unusual step, when tabling the Committee's regular Scrutiny Report, of drawing attention to particular issues of concern to the Committee. On 16 February 2016, the Chair recorded the Committee's concern about the quality of the drafting on the subordinate legislation and explanatory statements dealt with in the Scrutiny Report tabled, noting that while the subordinate legislation was relatively modest in number, the Committee has identified numerous issues with the subordinate legislation (some of them recurring), some of them quite serious.

#### *Instrument removed from scrutiny*

In particular, the Committee drew attention to the Health Amendment Regulation 2015, made under the *Health Act 1993*. The Chair noted that this subordinate law made amendments to the Health Regulation 2004 that included taking an instrument that was previously disallowable by the Legislative Assembly (and subject to scrutiny by the Committee) out of that scrutiny regime and that removed existing requirements to publish another form of instrument on the ACT Legislation Register (potentially making the instrument harder for users to be able to locate). Of great concern to the Committee was that the explanatory statement for the subordinate law made no attempt to explain why the amendments were necessary and appropriate. As a result, the Committee sought the relevant Minister's urgent advice. Pleasingly, that advice (including a satisfactory explanation) was provided, before the period within which a notice of motion to disallow the subordinate law could be given had expired.

#### *Explanatory statements to "National Laws"*

In a tabling statement on 8 March 2016, the Chair raised concerns about 2 "National Laws" considered in the Scrutiny Report – the Education and Care Services National Amendment Regulations 2015 (2015 No. 804) and the Heavy Vehicle National Amendment Regulation (2015 No. 824). The Chair took the opportunity to record the Committee's concern about some ongoing issues arising from the consideration of National Laws by the Committee and, in particular, the absence of explanatory statements for National Laws.

The Chair noted at the outset that the Committee recognised that the consideration of "national scheme"-type laws has been an issue for committees such as this one, and for legislatures, for several decades, noting that the formulation of laws that are intended to be passed or promulgated across the various jurisdictions, with little or no variation from jurisdiction to jurisdiction, challenges the ability of legislative scrutiny committees to apply their scrutiny principles and the ability of legislatures to make amendments. The argument

goes that to make changes would destroy the uniformity across jurisdictions that National Laws are intended to bring. However, the Chair also noted that the 2 National Laws considered by the Committee raised another issue – the tendency for National Laws to be presented without an explanatory statement. The Chair noted that the Committee had consistently commented on the absence of explanatory statements for any law, noting also that while the Committee has always accepted that there is no formal, legal requirement that an explanatory statement be provided in relation to subordinate legislation, the Committee has always maintained that it is important that an explanatory statement nevertheless be provided. The Chair noted that, apart from anything else, principle (2) of the Committee's terms of reference required it to "consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee". The Chair noted that, if there is no explanatory statement then, clearly, the Committee cannot fulfil this role.

As the Chair noted, both of the National Regulations dealt with in the Scrutiny Report involved retrospective operation. The Committee would ordinarily have expected this issue to be addressed in an explanatory statement and, in particular, would have expected that the relevant explanatory statement had addressed the issue of prejudicial retrospectivity, which is prohibited by section 76 of the ACT's *Legislation Act 2001*.

The Chair urged all Ministers to provide explanatory statements for any National Laws that they table in the Legislative Assembly and also urged Ministers to ensure that the Committee's requirements regarding explanatory statements (which are set out in a document on the Committee's website) are met. The Chair concluded that this could only save time, for everyone involved in the process.

The Committee's comments in relation to National Laws were the subject of a detailed response, from the Minister for Justice, Corrections, Justice and Consumer Affairs and Road Safety. Among other things, the Minister stated:

... the Scrutiny Committees [sic] guidance would be appreciated with regard to the drafting of explanatory statements for amendments of regulations under national frameworks. The drafting jurisdiction, Victoria, does not routinely provide explanatory statements for the Ministerial Council on minor amendments. Instead supporting documentation is provided which serves a similar role, Attachment A provides guidance as to the last amendments adopted. It is my understanding that when comprehensive change is required, as with the original Bill of 2011 an explanatory statement is drafted for use by all participating jurisdictions. There is an intention for Victoria to consult with jurisdictions for the development of future explanatory statements for major amendments.

Should jurisdictions independently draft individual statements there arises a real potential for inconsistent interpretation of the law. The usual requirement for explanatory statements creates a conflict with the intent of national consistency.

The Committee dealt with the Minister's response in the next Scrutiny Report. In it, the Committee noted that it was not relevant to the Committee's role that "[t]he drafting jurisdiction, Victoria, does not routinely provide explanatory statements for the Ministerial Council on minor amendments". The Committee (again) noted that it has an explicit role, under principle (2) of the Committee's terms of reference, to consider whether an explanatory statement meets the technical or stylistic standards expected by the Committee in relation to explanatory statements. The Committee noted that the fact that a particular piece of subordinate legislation is made under a "national framework" does not in any way affect the Committee's role in relation to principle (2). Further, the Committee noted that part

of the Minister's response had also referred to other National Laws addressing the particular requirements of the ACT jurisdiction, in relation to the *Human Rights Act 2004*, have previously been addressed. The Committee could identify no reason why the Committee's role in relation to explanatory statements could not also be addressed.

The Committee stated that, while it could understand that there may be an argument that the provision of explanatory material on a jurisdiction-by-jurisdiction basis may not be conducive to a consistent interpretation of National Laws, it could identify no reason why, in the case of every piece of National Law, an explanatory memorandum/statement could not be produced, for use by all jurisdictions. Indeed, the Committee noted that the Minister's response stated that "[t]here is an intention for Victoria to consult with jurisdictions for the development of future explanatory statements for major amendments". Given everything that the Committee had already stated (and especially in relation to the Committee's role under principle (2) of its terms of reference), the Committee offered its view that an explanatory statement should be provided in relation to all amendments to National Regulations. The Committee noted that, apart from anything else, the provision of such explanatory material would avoid the necessity of the Committee having to seek the advice of Ministers in relation to particular issues that have traditionally been a concern for the Committee, such as the retrospectivity issue that had been identified with the particular National Regulation.

The Committee concluded by referring to a practical issue identified by the Committee. As delegates would be aware, one of the difficulties with "National Laws" is working out the particular scheme for the making, publication, tabling, scrutiny and disallowance of a National Regulation. As delegates would be aware, these schemes vary from one National Law to another. An explanatory statement is a good place for this legislative scheme to be set out, so that the Committee (and the Legislative Assembly) does not have to research and unpick the particular scheme, in order to be able to ascertain that the particular National Regulation has been properly made, etc. As the Committee noted, the provision of this information at the time that a National Regulation is tabled would surely tend to avoid the Committee having to make at least some of the comments that resulted in a Minister having to provide a response to the Committee on matters raised by the Committee.