

**NATIONAL HUMAN RIGHTS CONSULTATION PUBLIC HEARING Parliament House
SESSION: Human Rights concerns that come to our attention & how we deal with
them, 3.20-4.40pm 1 July 2009**

Speech by Dr Helen Watchirs, ACT Human Rights & Discrimination Commissioner

I would also like to begin by acknowledging the traditional owners of the land on which we meet, the Ngunnawal People. Thank you for the honour of speaking today, 1 July 2009 being the actual 5th anniversary of the coming into force of Australia's first Human Rights Act, the *ACT Human Rights Act 2004*, which is derived from the International Covenant on Civil & Political Rights. There are many ways that human rights issues come to the ACT Commission's attention, and various means of dealing with them - I will highlight the 5 most common. I will not repeat in full the Commission's written submission in support of a Federal Human Rights Charter, which includes economic, social and cultural rights, and well as civil and political rights.

1. Discrimination complaints.

Like other equal opportunity bodies the Commission handles discrimination complaints on many grounds. Consistent with national trends, many cases are on grounds such as disability, race or sex, in specific areas of public life, eg service provision and employment. Under the interpretative provision of the ACT HR Act (s.30) I have been able to interpret the *Discrimination ACT 1991* and other legislation, such as the *Disabilities Services Act 1991* consistently with the most relevant human right of equality (s.8). This means that more discrimination cases are successful, by going beyond formal and towards substantive equality to enable full participation in the community, eg people with disabilities in public housing, transport, government services and education, with stronger obligations to take positive steps to accommodate needs. The impact has not been as strong in relation to the private sector, but the Commission is attempting to help build a human rights, rather than charity, model of service provision.

This 5 years experience of discrimination complaint handling, using the means of consideration and conciliation, has influenced our recommendation for the ACT Commission (and hopefully the Australian HRC) to be given HR complaint handling powers in civil cases (with criminal cases remaining *sub judice*). This issue should be addressed in 5 year review of the ACT HR Act, due for tabling next month.

2. Power to audit and inspect correctional and youth detention facilities.

The Commission has the power to systemically review the effect of any Territory laws on human rights, and the Attorney-General must table the report. We conducted audits of the former youth detention centre (Quamby) in 2005, and adult remand facilities in 2007. We made many recommendations to improve conditions of detention in order to make them more humane, most of which have been accepted and implemented by the ACT Government, especially with the opening of the new prison, Alexander Maconochie Centre ('AMC') and Bimberi Youth Justice Centre. The Commissioner also has power to

inspect adult facilities under the *Corrections Management Act 2007* and Bimberi under the *Children & Young People Act 2008*.

Although these Audits were planned because of the obvious responsibility of government and vulnerability of people being held in detention, their timing was influenced by several factors. This included inquiries by adult detainees and their lawyers/advocates or families (as we have no HR complaint handling power), & our contact with statutory oversight bodies such as the Official Visitor, Ombudsman and Public Advocate. For example, they revealed long periods of time spent inside cells (2006/07), bussing of women between remand centres (2008), and overcrowding of remand centres in summer before opening of new prison. Detainees complained about the excessive heat, lack of air condition and ventilation, prompting an inspection which confirmed overcrowding and other problems in old facilities. Both new facilities have been developed and built on the bedrock of human rights. Having the HR Act as a solid framework against which to measure conditions of detention assisted in raising the issue with government & publically, leading to the temporary reopening of Quamby to alleviate overcrowding until the new prison was open. A complaint handling function, in addition to the audit and inspection powers, would allow us to more closely monitor conditions of detention, and would assist in meeting our obligations under the Optional Protocol to the Convention Against Torture that Australia recently signed and will ratify – it covers all places of detention, such as psychiatric facilities and migration detention, as well as prisons.

3. Community Engagement – NGOs, general public, Parliamentary Inquiries & MLAs

The ACT HR Act dialogue model means interaction with the Legislature, Executive and Courts is crucial, but also community engagement is essential to build a human rights culture. Liaison with NGOs such as the Women's Legal Centre, is essential to find out what is happening on the ground in the community, as discrimination complaints and human rights inquiries tend to be made by more articulate people. For example the Disability Discrimination Legal Service alerted us to a public housing case that was not litigated - a woman was able to stay in the public housing property she shared with her children, but which was technically held in her mother's name. After her mother passed away, there was a risk she would lose the property, but DDLS successfully argued that her family should be allowed stay because of the Human Rights Act's protection of the family and children. Shelter ACT and ACTCOSS had a Rights postcard campaign in 2006 to promote the right to housing – leading causes of homelessness are domestic violence, disability and loss of income. The Commission is also regularly approached by Parliamentary Inquiries for submissions and briefings on issues of law and policy that are important to the community, such as access to mental health care and public transport.

4. Court decisions, the legal profession & court interventions

Although there have been about 80 cases mentioning the HR Act, only some have been critical in terms of being central arguments. The Commissioner has intervened or acted as amicus curiae in a number of important cases to provide submissions on complex

human rights issues: eg child protection orders (*SI BHNF CC v KS bhnf IS* [2005] ACT SC 125 where a Declaration of Incompatibility was sought), mental health (on request by the President), compensation for unlawful detention (2008), and ACAT planning law dispute on rights of third parties (arguing privacy grounds) (2009). We have also been a party to proceedings under the Discrimination Act involving important human rights issues – exemption by defence industry from race discrimination (*ACT HRC v Raytheon* [2009] ACT SC 55), and sexuality vilification on blog site. Our role has increased with stronger notification provisions in 2008 and we issue Guidelines on Intervention power. We have chosen **not** to intervene in some cases where we agree with the Attorney-General’s legal interpretation, eg *R v Fearnside* [2009] ACT CA 3 (24 February 2009).

5. Requests for advice by Ministers and Public Authorities on legislation and policies

The Commissioner plays a significant role in the human rights dialogue under the HR Act, in relation to scrutiny of legislation and policies by advising the Attorney-General, eg anti-terrorism and ‘bikie gang’ laws which make the ACT and Victoria the national leaders in avoiding draconian measures. Advice on draft Cabinet Submissions has led to amendments and additional safeguards being incorporated into laws, eg children and young people, and emergency electro-convulsive therapy. Occasionally there has been a difference of opinion in the Executive about the extent of compliance with draft amendments or legislation between the Department of Justice and Community Safety (who prepare Compatibility Statements for the Attorney-General) and agencies sponsoring the legislation, eg different interpretation on s.28 proportionality test. The growing cultural change has been stronger, with more demand for human rights education and training on compliance from 1 January 2009 because of amendments to the HR Act - its direct application to public authorities (not just through human rights interpretation of laws they operate under) and a new Supreme Court right of action.

Conclusion

The HR Act’s impact so far has been greatest in the formulation and review of legislation, eg anti-terrorism laws, as well as policy development, such as assessing the human rights impact of proposals before Cabinet. Building a human rights culture has benefitted the community in terms of increased public participation in debate about compliance and potential violations. Human Rights Audits of conditions of detention in 2005 and 2007 (see 2 above) has received the most media focus, but more importantly they have resulted in more humane treatment of young and adult detainees. This is reflected in the architecture of the new facilities at Bimberi and the AMC.

The real difference in having a Human Rights Act is supported by recent research using online surveys of the ACT Public Sector (247 respondents) and community (100 respondents), the results of which have been attached to our submission. Essentially they show that 89% of the community and 76% of ACT Public servants support a national Human Rights Charter, and 84% and 81% respectively support the ACT *Human Rights Act 2004*.