

### **Functions of AHRC Care:**

- (a) conferred by 4 Act- Age, disability, Racial and Sex discrimination Acts
- (aa) see definition in S3 of Act to determine if discrimination was unlawful
- Function inquire into incidences of unlawful discrimination
- Part 2 of Disability Discrimination Act: links what constitutes disability discrimination- e.g. discrimination in employment, against commission agents and in partnerships, includes harassment in education and in relation to the provision of goods and services and employment
- Part 4 of age discrimination Act: what constitutes this discrimination? E.g. in employment (Aus abolished binding retirement age), against commission agents, against contract workers, facilities and cth laws discrimination programs
- Prohibitions of Racial Discrimination Act (Part II/IIA): relate to racial discrimination being unlawful, rights to equity before the law, access to places, provision of goods and services and employment
- Sex discrimination Act: Part 2: discrimination in employment and superannuation, in public, and harassment in the workplace. Religious bodies are exemptions as well as acts under statutory duty

### **PART C: SPECIAL CASE: CHARTER OF RIGHTS**

#### **Comparative perspectives:**

- Statutory rights are based on statute, not constitution- found in VIC, ACT, NZ and UK

#### **NZ:**

- Bill of rights (BOR) Act 1990- ordinary statute overview S3-7
- NZ bill started for courts to strike down legislation
- Interpretive judgement for courts- guidance of legislature
- Claimed to have improved legislation processes
- Content: democratic and civil rights, political rights and rights when dealing with the state
- Rights in this bill are affirmed
- Only applies to legislature, executive and judicial branches- public dealings
- Does not give judges to repeal/constitutionally strike down other laws if inconsistent with BOR
- S5: limitations on rights in BOR
- Rights are not absolute
- A.G require to report where Bill appears to be inconsistent with B.O.R
- Largely follows articles in ICCPR

#### **Remedies:**

- Provision was removed from original version of BOR
- Yet now, damages are rewarded in many cases

**Dialogue model:**

- Judges cannot overrule invalid act
- Cant act as constitutional court
- Provide interpretation of law in relation to HR
- Parliament can refer to court decision if needed
- Put issue into public debate

**Culture in which BOR introduced**

- Culture wanting constitutional change
- Willingness to engage positively in new reforms
- Case of BORA very important

**Aus charter of rights****CTH:**

- Recommendations for charter did not occur
- Preceding Howard government opposition to rights charters
- Articles 'charting opposition to rights charters'- new arguments on re-cycled objections
- Negative effects on Rudd's charters

**2009 report- response to the HR consultative Committee Report**

- Recommended statute charter of rights
  - Recommended more information on HR- education
  - Federal Bill of rights requested? Not granted
  - Rudd government committed in the protection of HR
  - Many ways to protect rights including through improved parliamentary scrutiny
  - Debate: not about protecting HR, but how we go about it- emphasis on parliament sovereignty any education and democratic norms/culture
  - Brennan report: enhanced parliamentary scrutiny
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- Shift from meaning of HR from Labour to coalition
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- Aus HR Commissioner: Tim Wilson, various consultations conducted- focused on similar areas that law reform commission focused on
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- Tim Wilson argued to balance back to traditional rights and freedoms

**Rights and responsibilities consultation report**

- Examined how well people think their HR and freedoms are protected in Aus
- 2015- focal points/recommendations
- HR Commissioner will prioritise the following: Freedom of expression, religious freedom, property rights (native title holders), freedom from arbitrary detention
- ALRC asked to identify cth laws encroached upon traditional rights, freedoms and privileges

- Today- no visible action by government in relation to this report as government had many breaches against its nature

Article by Greg Carne: don't need BOR due to responsible, representative government- good will of citizens and common law- does this aim to restrict HR?

Tim Wilson wanted to go back to old HR law and not introduce any new laws

- 2 jurisdictions where BOR have been introduced: ACT and VIC

## ACT

- ACT HR Act 2004
- Territory, not state- s122 of constitution
- Creates social and political dynamic- more acceptances for charter of rights
- Act has proved history of protecting rights

## 2005 debate: cth preventative detention and control orders legislation impact of ACT HR Act (2002)

- Reform of anti-terrorism laws in Aus cth after 2005 London Bombings
- Spurred public debate to HR model- Howard placed in public arena to begin the debate
- HR must be central to discussion
- Public debate is essential to the charter of rights
- Made ACT government follow provisions
- When making legislation with respect to the BOR
- Under 2002 COAG agreement, relevant sections of Criminal Code Act
- Dealing with terrorism are underpinned by S.51 (xxxvii) cth constitution reference of state power
- S.100.8 (2) of Criminal Code Act 1995
- Cth does not have any constitutional power itself to amend legislation, must be approved of by majority of states

Phillip Rudock: debate act has statement that cth can intervene here to make legislation

Hard to say why ACT is only State with BOR

## COAG review of terrorism legislation including HR principles in terms in reference

- HR friendly inspired by ACT charter
- Terms of reference drawn from key HR terms
- Look for further capacity by setting up review principles and restraint
- Drafting of legislation creates more safeguards

## HRACT (ACT)

- Numerous reviews of this Act
- First review: **First five years of operation**
- Built into legislation
- Reviewing charter of rights act 2004

- First five years of HRA's operation illustrates both the potential and the limits of a dialogue model of HR protection
- Positive impact on legislative processes, have made reference to charter principles
- Public aware of document
- Quality of lawmaking have also changed- qualitative improvement
- Urge of more education in these matters
- SC displays lack of understanding by the legal profession or the provisions of the HRA- court role minimum
- HRA in 5yrs, has overall succeeded in creating a HR culture in ACT

#### **Government response to above review (2012)**

- HRA has had a real impact in generating a dialogue on HR between each of the arms of government
- Report provides a framework for the progress
- There is an ongoing task of establishing a HR culture in ACT and by developing the framework for its delivery i.e. step by step approach needed for law decision makers
- Need to promote a greater understanding of the HRA by the general community and legal professionals and public authorities

#### **Report #3 protecting economic, social and cultural rights**

- In original draft, these rights didn't exist, should they be included?
- Controversial issue
- If implemented- likely impact of this is considered
- Report claimed: many of these rights desirable i.e. right to adequate housing and education
- Still evolving matter- HRA not a static document

#### **ACT responds to above report**

- Number of social, cultural and economic recommendations decided that including a right to education in HRA is appropriate
- Only right included
- Rights to self-determination, protection of family and children are highlighted by not being appropriate for inclusion
- Progressive realisation will not apply to right of education at this time
- Modest initial step
- HRA can be amended as a normal statute as it is not constitutional- no upper house so simple streamline
- HR Amendment Act
  - Installed right to education in ACT HRA 'right to have access to free, school education, appropriate to their needs' 'right to further education and continuing education

#### **Terms of reference 2014 review**

- Should include:
  - Other economic, social or cultural rights in this Act
  - Part 5A should apply to economic, social and cultural rights in Part 3A
  - 3A should be subject to progressive realisation
- Responses limited, cautious about accepting further changes

- E.g. government will not include housing as it would risk complication existing government scheme
- Same as 'health' - would introduce burden on territory
- Government held charter has no jurisdiction as this field is expressly/exhaustively covered by cth laws
- Cultural life- no reason to be implemented, already protected in HRA- no need to duplicate this, yet indigenous people warrant special consideration