I refer to it as 'the Charter' and not 'the Charter Act' or some other inelegant title because the Charter itself allows me to do this. Unusually for Victorian legislation, there is a citation clause. For the record, s 1(1) provides that 'this Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The cross-references in the Act in fact favour the abbreviated term, 'the Charter'.

One of the common features of human rights legislation throughout the world is that on their terms they appear deceptively simple – indeed, they have, ostensibly, a charming simplicity about them. Statements like those that appear in New Zealand and the ACT that 'Everyone has the right to freedom of peaceful assembly'[5] or 'Everyone has the right to freedom of association'[6] are bald and grand. The legislation is typically short – they often cover no more than a few pages.

My first note of warning is: do not be deceived. They are conceptually complex instruments – they are powerful instruments in part because of their simplicity. They are designed not to cover a single subject-area of law, as does an income tax Act or even the WorkChoices Act[7] (which I think I am allowed to describe in public as at least constitutionally *stretched*). By contrast, the human rights instruments may potentially affect any subject-area of law and any area of public administration. In this sense they have a special and distinctive status. This is reflected by the title of the Charter which I've mentioned. It also means that much of the learning associated with human rights instruments lies outside their text – to a much greater degree than with the ordinary laws with which we are all familiar.

My second note of warning is this: any examination of the legislative protection of human rights will take you immediately on a journey into comparative and international law. Even if you have managed to lead a sheltered life until now – innocent of comparative or international law - there is now no option when considering the human rights protected by the Charter but to acquire an understanding of how those rights have been interpreted at international law and in comparative jurisdictions. This is apparent when opening any academic text on human rights legislation – and there are now plenty of texts of high quality available in Australia. Not only will those texts discuss their own legislation – whether it be, for example, the *New Zealand Bill of Rights Act* or the *Canadian Charter of Rights and Freedoms* – but they will immediately discuss and compare jurisprudence from other jurisdictions and commentary available from the United Nations or other international sources.

In my view, this is a journey to be welcomed. It reflects the fact that the Charter invites a connection – in many instances, a re-connection – with the legal learning and scholarship in other jurisdictions.

My third note of warning is this: while human rights legislation warrants and rewards intellectual immersion, it is advisable to digest that legislation in chunks. This applies as much to the Charter as to any of the other instruments.

With that particular caution in mind, I thought I might introduce you only to two particular 'chunks' or component parts of the Charter – the first concerned directly with public governance and the second concerned with a role to be played by the Charter in court proceedings.

The first relevant aspect of the Charter I wish to discuss is the requirement imposed on the Legislature to prepare and table compatibility statements; that is, statements which assess whether a Bill introduced into the Parliament is compatible with the human rights protected by the Charter.

OUTSOURCING LEGAL SERVICES – THE ROLE OF THE INFORMED PURCHASER

Denis O'Brien*

Background

When I began to practise law in Canberra, legal services to Commonwealth agencies were provided through the Attorney-General's Department and the Office of the Crown Solicitor within that Department. To the extent that work of a legal nature was done in-house by government agencies, that work was not done by 'legal officers'. Only within the Attorney-General's portfolio were 'legal officers' recognised as doing legal work.

The first significant change to these arrangements occurred when agencies such as the Department of Social Security and the Department of Immigration and Multicultural Affairs were permitted to establish their own in-house legal units specialising in the legal issues relevant to those agencies.

Government business enterprises, on the other hand, had had access to private sector legal providers since the 1970s.

On 1 July 1995 a significant change occurred concerning the provision of legal services to Commonwealth agencies. From that date, for the first time, Commonwealth Departments and FMA Act agencies were able to use private sector lawyers for:

- general legal advice;
- general legal agreements; and
- work in tribunals.

Court litigation remained the province of the Legal Practice within the Attorney-General's portfolio.

The changes which occurred in 1995 were the first stage of outsourcing arrangements.

The second stage of outsourcing arrangements came with the acceptance by the Australian Government of the March 1997 *Report of the Review of the Attorney-General's Legal Practice* (Logan Review). As a result of the Logan Review, the government's legal policy functions remained in the Attorney-General's Department but the Legal Practice was re-established as a government business enterprise and was consolidated under the Australian Government Solicitor (AGS). The Office of Legal Services Coordination (OLSC) was established within the Attorney-General's Department to develop and administer the government's legal services policy. This second stage of outsourcing arrangements began to operate on 1 September 1999.

The result is that private firms now compete with the AGS for most of the legal work available from government agencies, although there are some categories of tied work (constitutional, Cabinet, national security and public international law) which are not open to private sector firms.

* *Partner, Minter Ellison: AIAL Seminar, Canberra, 24 October 2006*

As was said in Auditor-General, Audit Report No 52, 2004-05, 'Legal services arrangements in the Australian Public Service' (at paragraph 1.8):

> Opening the Government's legal services market to competition from the private sector was aimed at introducing the following benefits:
> - giving agencies greater freedom of choice when purchasing their legal services;
> - stimulating competition amongst private and public providers to contain or reduce their costs and increase their quality of services;
> - enhancing the ability of agencies to ensure that they receive value for money in the purchase of their legal services; and
> - giving private firms the opportunity to contribute their expertise to the delivery of government legal services.

Today's seminar

The topic of today's seminar is 'Outsourcing legal services – boon or bane?' That provocative title is essentially asking whether the objectives of outsourcing I have described have been or are being achieved. It seems to me that that is something which can only be judged, and should only be judged, by government clients. It is perhaps a pity that the panel today does not include someone who can give the client perspective.

Obviously from the point of view of private firms, outsourcing has been a benefit in that it has expanded the market for the delivery of legal services. Whether firms choose to seek to enter the government sector of that market, or particular areas of it, is a matter for them but at least outsourcing has opened the doors of what was previously a closed shop.

That having been said, it is worth noting that smaller firms are probably not as well placed as the larger national firms to derive benefit from outsourcing opportunities. But, as I said, the appropriate perspective from which to judge whether outsourcing has been successful is the perspective of government clients.

Some observations: in what follows, I make a few brief observations about the current arrangements.

The informed purchaser

The recent ANAO better practice guide, 'Legal services arrangements in Australian government agencies' said that it is better practice in legal service arrangements for an agency to have an informed purchaser, ie an identified person or unit to act as a coordination point in the agency for obtaining legal services. I am very much in agreement with the ANAO about the need for agencies to have an informed purchaser. My impression is that some agencies have been much better than others in managing the acquisition of legal services and the delivery of those services to the agency. Agencies in which the arrangements have worked well are invariably those in which a single person or unit has been the informed purchaser in managing the obtaining of legal services for the agency.

Even the Department of Defence is now moving to an informed purchaser model. I am confident that that will lead to greater efficiencies for Defence in the obtaining of legal services.

An informed purchaser is also required even in small agencies that do not, because of their size, have an internal legal unit. If there is a person within such an agency who develops a thorough knowledge of the legal services market and is designated as the coordination point for the obtaining of legal services, a more efficient outcome is likely to result for the agency.

SOME REFLECTIONS ON VICTORIA'S CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

Pamela Tate SC*

Introduction

The famous English administrative lawyer, Stanley de Smith said:

> [i]n all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public [officials] of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public.[2]

This recognition of the need for public powers and functions to be exercised in a principled way has increased in part because of the growth of government's powers and activity. No longer can it be said, as it was in the early twentieth century that 'a sensible law-abiding [citizen] could pass through life and hardly notice the existence of the state, beyond the post office and the policeman.'[3] This was unlikely to be true even then. As Sir William Wade observed:

> [B]y 1914 there were already abundant signs of the profound change in the conception of government which was to mark the twentieth century. The state schoolteacher, the national insurance officer, the labour exchange, the sanitary and factory inspectors, with their necessary companion the tax collector, were among the outward and visible signs of this change. The modern administrative state was already taking shape.[4]

There is no doubt that the State of Victoria in the early stages of the twenty-first century is a modern administrative state. There are few areas of activity by citizens which are not now regulated by legislation or affected by decisions or actions taken by departmental officers, agencies, boards, or specialist tribunals in the exercise of their statutory powers and functions.

It is perhaps more important than ever, in the context of public administration, that the exercise of powers and the performance of functions be governed by principles which promote consistent, fair and rational decision-making.

The Victorian *Charter of Human Rights and Responsibilities* passed through the Legislative Assembly on 15 June 2006 and the Legislative Council a month later (20 July 2006). It is the intention of the Charter that it should contribute to principled, rational and good public administration.

What I wish to explore in tonight's seminar are some of the central features of the Charter and to give you an indication (albeit a preliminary one) of how the Charter is designed to operate and what its effect might be.

---

* *Paper delivered by Pamela Tate SC, Solicitor-General for Victoria, for the Victorian Chapter of the Australian Institute of Administrative Law.*

49 The terms of reference of the Committee follow the usual form of requiring the Committee to report on whether a clause of a Bill unduly trespasses on personal rights and liberties.
50 *Report No 49 of the Fifth Assembly*, concerning the Gungahlin Drive Extension Authorisation Bill 2004.
51 See *Report No 11 of the Sixth Assembly*, concerning the Water Resources Amendment Bill 2005.
52 See *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. A broad view of the effect of s 48A(1) might be implicit in the judgment of Higgins CJ in *SI bhnf CC v KS bhnf IS* [2005] ACTSC 61. See too *Commissioner for Housing v Ganas* [2003] ACTSC 34 [12]-[14] per Crispin J.
53 Compare the first response (found in *Report No 13 of the Sixth Assembly*) to *Report No 11 of the Sixth Assembly*, concerning the Water Resources Amendment Bill 2005, where HRA 28 was invoked to justify a privative clause, to the later response to be found in *Report No 14 of the Sixth Assembly*.
54 See too HWR Wade and C Forsyth, *Administrative Law* (OUP, 8th ed, 2000) p 441, noting criticism of Art 6(1) of the European Convention.

I agree with the ANAO that the informed purchaser role should not be delegated out. The informed purchaser should be an employee of the Department. Delegating the role to someone who is contracted from a legal practice may give rise to perceptions of partiality in the purchasing decisions the agency makes.

The informed purchaser needs to devote time to getting to know the major players in the firms and gaining an understanding of the strengths and weaknesses of the firms, in terms of subject matter expertise, delivery of services and management of the legal services relationship. The informed purchaser should read firm publications and newsletters, attend firm seminars and engage with colleagues and providers through participation in industry forums such as the Australian Institute of Administrative Law and the Australian Corporate Lawyers Association. The informed purchaser should also take an interest in the outcomes of market surveys of the delivery of legal services to get a feel for where things are being done well and where things are not being done so well. It is also not a bad idea to keep up with legal news and gossip through the Friday legal affairs pages of *The Australian Financial Review* and *The Australian*.

Managing the outsourcing process

In what I am next about to say, I do not wish to be overly critical. I fully appreciate the difficulty of framing a tender for the supply of professional services to an agency. A tender for the supply of widgets of one sort or another is considerably easier to frame than a tender for the supply of legal services. However, one does wonder from time to time whether those who frame some requests for tender in the legal services area really have a clear understanding of the tender process they have embarked upon.

Let me give you some examples:

- One from time to time sees tenders for legal services which require the bidders to warrant that they are not in breach of certain pieces of Commonwealth legislation. Perhaps one can understand the Age Discrimination Act and the Crimes Act being included in the list of legislation in relation to which such a warranty is required to be given. However, it is very difficult to understand what is meant when the tendering agency lists the Freedom of Information Act as one of the Acts in relation to which a no breach warranty is sought. (In one case bidders were asked to warrant that they had never breached any Commonwealth law. At least I suppose we could safely give that warranty for the 74 years of our existence as a firm that pre-dated federation.)
- Other tenders require us to give details of our ownership structure. We do that by listing our 200 plus partners. What comfort that gives the agency is not that clear to me. But then the request for tender may go on to indicate that the agency requires us to notify them of any change that occurs in the ownership structure. I have to tell you that, in a large firm like ours, if this requirement were to be taken seriously, we would be giving a notification almost once a month of a partner being admitted to, or leaving, the firm. Again, what is the utility of this requirement?
- Another bane of some RFTs is the requirement to include a statutory declaration in which the partner responsible for the tender response is required to make a solemn declaration as to particular facts or beliefs. While I have no objection to making a declaration that no collusive conduct was involved in the preparation of the tender, I do object to the required statutory declaration being framed in such a way as to include warranties as to particular matters, eg a warranty that no conflict of interest is likely to arise which would affect the performance of our obligations to the agency. Those who require statutory declarations to be prepared in this form demonstrate that they really have little understanding of the legal nature of a statutory declaration.

- A further feature of some tenders is that they do not limit themselves to requiring referees to be nominated but ask for written references to be supplied in which the referee is asked to address the capacity of the firm concerned to meet the selection criteria. What a waste of the time of busy senior officers of agencies it is to have them prepare such written references! What little value such written references are really likely to provide!

Yet another problem that can sometimes be seen with the tendering process is that evaluations are conducted solely on the basis of the paperwork, without due weight being given to relationship issues. A contract for the supply of legal services is, I would suggest, a more complex matter than a contract for the supply of widgets in that a productive relationship between lawyer and client requires the gaining by the lawyer of a thorough understanding of the client's business and the development of trusting relationships at the personal level. For the client to derive benefit from the relationship, the lawyer must become and must be allowed to become, the client's trusted adviser. Paper evaluations which fail to give weight to relationship issues are unlikely to result in the best outcomes.

The final area of difficulty that I wish to mention is a tendency of some tendering agencies to establish panels that are larger than the volume of outsourced work warrants. Unless panel firms get a reasonable volume of work, they will lose interest. As a result the agency is unlikely to gain the benefit of value-adds (e.g., seminars, secondments) that firms are generally happy to provide in a steady work-flow environment.

Office of Legal Services Coordination

In my experience, OLSC has performed well in monitoring and coordinating the provision of legal services to the Commonwealth. It has also performed a useful role in addressing whole of government and public interest issues in relation to the provision of those services. It could, however, develop more of a leading role in the area of tendering for legal services. I know that it is trying to develop a model RFT approach for agencies that wish to go out to the market for legal services. The development of greater consistency in approach would be welcome. At present, tendering for the Commonwealth's legal services is unnecessarily expensive because of the considerable diversity in approach of agencies.

Conclusion

The outsourcing of legal services in the Commonwealth is still a relatively recent phenomenon. There is undoubtedly scope for the process to become more efficient and effective. The guidance provided in the recent better practice guide of the ANAO is a useful step in the right direction. The process will become more effective and efficient for everyone if OLSC strengthens its guidance role in the tendering process.

Rishworth, G Huscroft, S Optican, and R Mahoney, *The New Zealand Bill of Rights* (OUP, 2003) p 158. For Canada, see *Baker v Canada* [1999] 2 SCR 817 at 854, citing *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038.

19 A 'Territory law' is 'an Act or statutory instrument': HRA Dictionary.

20 Section 28 is discussed below.

21 This point is recognized in *Bragon Traders Pty Ltd and ACT Gambling & Racing Commission* [2006] ACTAAT 3 [39].

22 *Clough v Leahy* (1904) 2 CLR 139 at 157, applied in *Church of Scientology Inc v Woodward* (unreported, High Court, Aikin J, 1 November 1979), noted in (1980) 11 Fed LR 102.

23 See A Butler, 'The ACT Human Rights Act: A New Zealander's View', Ethos, no 94 (December 2004).

24 Hogg PW, *Constitutional Law of Canada* (2004 Student Edition) 767-768.

25 *R v Rahey* [1987] 1 SCR 588 at 633, per La Forest J; quoted in Hogg, above at 770.

26 The HRA may have a much wider effect. The reference in s 121 to 'everyone' raises of course the possibility that conduct by anyone is affected by the HRA.

27 The Supreme Court could under HRA s 32 entertain an application for a declaration of invalidity of the grant of power in the authorising law. If however a declaration is made, the instrument remains legally effective.

28 The Standing Committee on Legal Affairs of the Legislative Assembly of the ACT undertook a full analysis of the task of assessing justifiability under s 28 in *Scrutiny Report No 25 of the Sixth Assembly*, concerning the Terrorism (Extraordinary Temporary Powers) Bill 2006. http://www.parliament.act.gov.au/downloads/reports/6scrutiny25.pdf

29 Hogg PW, 'The Law Making Role of the Supreme Court of Canada' (2001) 80 Can Bar Rev 171 at 177.

30 This is quite speculative, and Canadian law does not suggest this outcome; see n 25 at 176.

31 See A Conte, S Davidson and R Burchill, *Defining Civil and Political* Rights (2004) at 118-119, and S Joseph, J Schultz, and M Castan, *The International Covenant on Civil and Political Rights* (OUP, 2nd ed, 2004) [14.07]. Commentary on s 27 of the New Zealand Bill of Rights sees this language as confirmatory of the scope of judicial review of administrative action; see G Guscroft, 'The Right to Justice', in Rishworth et al, n 18, at 760-765.

32 This problem is illustrated by *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113.

33 The Explanatory Statement to the Human Rights Bill contains no commentary on s 21.

34 It does *not* say that s 21(1) applies only where a 'court or tribunal' makes a decision of the kind described.

35 It might be noted that the narrow use of the word 'tribunal' in ACT statutes should not control its use in HRA s 21(1). This will follow if ACT Supreme Court adopts the principle that the words of the HRA must be given an autonomous meaning, in the sense that their meaning cannot be controlled by another ACT law unless the other law is clearly designed to amend the HRA, (and excepting of course other laws - such as a Commonwealth statute - of higher status to the HRA). This principle will enhance the status of the HRA as a statute designed to set limits to what may be provided for by other statutes.

36 *R (on the application of Thompson) v Law Society* [2004] 2 All ER 113 at 129, per Clarke LJ.

37 Citing the decision of European Commission of Human Rights in *Kaplan v United Kingdom* (1980) 4 EHRR 64 at 90 [161].

38 Lord Hoffman perhaps meant to refer to (1980) 4 EHRR 64 at [153]-[155], and [163]-[164]. Relevant extracts from the opinion of the Commission are in S Farran, *The UK Before the European Court of Human Rights* (Blackstone Press, 1996) pp 153-157.

39 This issue was issue examined in *A v Hoare* [2005] EWHC 2161.

40 Although conceding that he had made an 'incautious remark' in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at 338 [117], which in turn was the basis for the appellant's submission concerning decisions turning on disputed questions of fact.

41 One might think that a decision on a criminal charge must be made by a court after a 'fair and public hearing' to be s 21(1) complaint. Why then s 21(1) contemplates decision of a criminal charge by a 'tribunal' is a puzzle. The answer may lie in unthinking adoption of the wording of the ICCPR by the HRA's drafters.

42 Of course, this raises the question of just what are the conventional principles, and how far they may be qualified. Whether an ACT court adopts the theory applied in *Runa Begum*, or the simpler theory of *Kaplan*, it may hold in some particular context, or even generally, that legislative restriction of its power to review findings of fact under say s 5 of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) is such as to render its power of review less than that required by HRA s 21(1).

43 Citing *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484 at 518.

44 The reference to Article 8 of the European Convention on Human Rights (right to respect for private and family life) may acknowledge that a court might, in cases in which Convention rights were engaged, quash a decision on the ground of lack of proportionality; see *R (Daly) v Home Secretary* [2001] 2 AC 532 at 547 [27] (Lord Steyn) quoted above.

45 English courts and commentators do not universally accept the notion the courts should defer to legislative judgment; see R Clayton and H Tomlinson, *The Law of Human Rights* (OUP, 2000 and Supplements) at [5.125]ff.

46 The cases are discussed in D Feldman (ed), *English Public Law* (OUP, 2004) at [12.29]-[12.36], and in P Craig, 'The Human Rights Act, Article 6 and Procedural Rights' [2003] Public Law 753.

47 See text at n 50 below.

48 In Territory practice to date, by far the greater amount of material or significant statutory change to the law of the Territory has been made by Acts of the Assembly, and not by subordinate law.