FEDERAL DIMENSIONS TO THE ACT *HUMAN RIGHTS ACT*

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1 Introduction

The enactment of the *Human Rights Act 2004* (ACT) has significant implications for policy-making in the ACT government and the ACT Legislative Assembly. It also has significant implications for the way in which the ACT Supreme Court is to interpret Territory law, and locates that Court in a broader legislative and executive scheme for the protection of rights. The intention that rights be taken into account in the development and interpretation of Territory law will have implications for the way in which Territory policy and legislation is designed and enforced, and for the exercise of power by ACT officers and agencies.

Less apparent is the federal context in which the legislation operates. The policy design and implementation of the *Human Rights Act* largely proceeded on the basis that the legislation would have a discrete operation within the ACT, and apply only to the ACT legislative, executive and judicial arms of government. However, the ACT government has very close constitutional and statutory links with the Commonwealth government, and two overlapping dimensions of these connections will be explored in this paper: first, the exercise of Commonwealth judicial power and federal jurisdiction by the ACT Supreme Court and, secondly, the existence of co-operative arrangements for the exercise of ACT powers by Commonwealth officers and agencies. The paper will explain that there are at least two important consequences of these constitutional and statutory connections. First, the judicial provisions of the *Human Rights Act* (particularly the declaratory provision) might be largely ineffective in a significant number of cases. Secondly, the *Human Rights Act* may potentially affect Commonwealth officers and agencies in important ways. These observations are relevant not only for the ACT *Human Rights Act*, but also for proposals for similar State rights-protective legislative initiatives.[1]

2 Overview of the Human Rights Act

Part 3 of the *Human Rights Act*[2] sets out a range of civil and political rights: right to recognition and equality before the law; right to life; right to protection from torture and cruel, inhuman or degrading treatment; protection of the family and children; right to privacy and reputation; freedom of movement; freedom of thought, conscience, religion and belief, peaceful assembly and freedom of association; freedom of expression; right to take part in public life; right to liberty and security of person; right to humane treatment when deprived of liberty; various rights of children in the criminal process; right to a fair trial; various rights in criminal proceedings; right to compensation for wrongful conviction; right not to be tried or punished more than once; freedom from retrospective criminal laws; freedom from forced work; and rights of minorities. These rights, the Act says, are not absolute, but may be subject only to 'reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society' (s 28). It is also said that only individuals possess human rights (s 6) and that the Act is not exhaustive of the rights an individual may have under domestic or international law (s 7).

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Part 3 of the Act does not purport to have a free-standing substantive operation.[3] Instead, the Act goes on to set out two ways in which the human rights impact of Territory laws is to be considered: first, the scrutiny of bills prior to enactment (Part 5) and, secondly, in the course of proceedings before the Supreme Court (Part 4). The scrutiny of bills stage involves two mechanisms. The Attorney-General is required to present to the Legislative Assembly a compatibility statement indicating whether a bill is consistent with human rights and, if not, 'how it is not consistent' (s 37). Additionally, a standing committee must report to the Legislative Assembly 'about human rights issues raised by bills presented to the Assembly' (s 38). A failure to comply with either requirement 'does not affect the validity, operation or enforcement of any Territory law' (s 39).

The judicial proceedings stage also involves two mechanisms. First, an interpretive rule requires the Supreme Court, '[i]n working out the meaning of a Territory law',[4] to prefer as far as possible 'an interpretation that is consistent with human rights' (s 30).[5] Secondly, where an issue arises in a proceeding being heard by the Supreme Court 'about whether a Territory law is consistent with a human right', the Supreme Court has the power to declare that it 'is not consistent with the human right' (a declaration of incompatibility – s 32). Importantly, a declaration does not affect 'the validity, operation or enforcement of the law, or the rights or obligations of anyone' (s 32(2)). Instead, the Attorney-General must present a copy of the declaration and a response to the Legislative Assembly (s 33).

3 The exercise of federal jurisdiction by the ACT Supreme Court and its consequence for the effectiveness of the ACT Human Rights Act

In its report on the Human Rights Bill 2003, the Legislative Assembly Standing Committee on Legal Affairs identified a number of constitutional problems with the proposed legislation. First, that the conferral of the declaratory power on the ACT Supreme Court might be invalid as either contrary to the *Kable* doctrine[6] or outside the scope of authority conferred by the *Australian Capital Territory (Self-Government) Act 1988* (Cth).[7] Secondly, that it may not be possible to appeal an exercise of power under the declaration provision to a federal court.[8] Thirdly, that following the High Court decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[9] Federal Court judges could not sit as judges of the ACT Supreme Court when called upon to exercise the power in s 32.[10]

Central to all three constitutional problems is the proposition that an exercise of power under s 32 does not involve the exercise of Commonwealth judicial power.[11] Whatever may be the merits of the constitutional problems raised by the Committee, the central proposition identified in the Committee's Report has much broader implications for the effectiveness of the *Human Rights Act* when the Court is exercising federal jurisdiction. Whether the judicial provisions of the *Human Rights Act* will be effective to any extent depends upon the unresolved and difficult constitutional question of what jurisdiction is exercised by the ACT Supreme Court.

(i) All Supreme Court jurisdiction in relation to matters is federal jurisdiction

It has been argued that all the jurisdiction of the ACT Supreme Court *in relation to matters* is federal jurisdiction.[12] Although the ACT Supreme Court is not a federal court for the purposes of Ch III of the *Constitution*,[13] it seems reasonably clear following the decision of the High Court in *Northern Territory v GPAO*[14] that the Supreme Court would be exercising federal jurisdiction in relation to matters arising under a Commonwealth law enacted under s 122 of the *Constitution* and falling within s 76(ii) of the *Constitution*.[15] The position, however, is 'uncertain' in relation to matters arising under Territory laws or under the common law in the ACT.[16] Both Professor Leslie Zines and Stephen McDonald have argued that in both cases, the Supreme Court should be seen as exercising federal jurisdiction, as those matters can be sourced ultimately to Commonwealth legislation and, therefore, fall within s 76(ii) of the *Constitution*.[17]

If these contentions were accepted by the High Court, the declaratory provision of the *Human Rights Act* might be entirely ineffective for two related reasons. First, when exercising federal jurisdiction in relation to matters, the Supreme Court could not be empowered by the ACT Legislative Assembly to exercise non-judicial power. However, as the ACT Standing Committee on Legal Affairs foreshadowed,[18] the power to grant a declaration which does not affect the validity, operation or enforcement of the law or the rights or obligations of anyone may well involve the exercise of power which is not Commonwealth judicial power.[19] The resolution of a controversy is central to the exercise of Commonwealth judicial power.[20] The fact that the declaratory power only arises when a proceeding is before the Supreme Court is no answer to this difficulty. Although the Supreme Court may purport to exercise the declaratory power in the course of hearing a controversy, it could not be said that the controversy extends to include a declaration about compatibility with rights. Nor could it be said that the power is an administrative function incidental to the exercise of Commonwealth judicial power.

The second difficulty is really another way in which the High Court has explained the first. If it is assumed that all the jurisdiction of the ACT Supreme Court in relation to matters is federal jurisdiction derived from ss 75 or 76 of the *Constitution*, such jurisdiction can only be conferred and exercised in relation to 'matters'. It is settled constitutional doctrine that a 'matter' requires there to be a justiciable controversy between the parties. In other words, there needs to be an 'immediate right, duty or liability to be established' by the determination of the court exercising federal jurisdiction.[21] Although a claim under the *Human Rights Act* for a declaration of incompatibility might arise in the context of a 'matter', there would be no right, duty or liability determined by the declaration which would comprise part of the matter before the Court.[22]

The question then would be whether the interpretive rule set out in s 30 could be severed from the declaratory provision in s 32 and applied separately. It may be argued that the interpretive rule and the declaratory provision are integral parts of the legislative scheme for the protection of rights in the *Human Rights Act*, and, thus, were intended to operate together. In the ACT Bill of Rights Consultative Committee Report, much was made of the model of institutional 'dialogue', to be created by the *Human Rights Act*, on human rights issues 'between the three arms of government and the community'.[23] The interpretive rule was identified as one of the major features of the legislation giving effect to that model. Arguably, to apply s 30, but not s 32, would alter the policy or operation of the Act.

However, in this respect I think there is significant room for debate. There is an equally strong claim that s 30 is a separate dimension of the scheme which is capable of operating in the same way as it would have if not for the severance. In other words, s 30 could fully and completely operate as originally intended without the presence of the declaratory provision in the legislation. The fact that the provisions are in separate parts of the Act may support such a contention.

In summary, if it were accepted that all the jurisdiction of the ACT Supreme Court *in relation to matters* is federal jurisdiction, there is a strong argument that the declaratory provision is entirely ineffective to the extent of federal jurisdiction. It is possible that the interpretive rule could be applied separately from the declaratory provision. It also probably leaves the scrutiny of bills provisions fully effective. But, if the High Court were to hold that the Supreme Court exercises federal jurisdiction in relation to all matters, a significant component of the human rights scheme may well be wholly ineffective.

Despite the position *in relation to matters* before the ACT Supreme Court, it is clear that the Supreme Court is not a federal court and, consequently, it may be possible for the Court to exercise jurisdiction that does not derive from Ch III of the Constitution where 'matters' are

not involved.[24] On that basis, it may have been possible for the legislative scheme in the *Human Rights Act* to have been designed to confer the declaratory power in the Court's non-federal jurisdiction. However, as the legislation currently operates, the application for declaration can only be made where a proceeding is being heard by the Court and, therefore, is likely to involve the resolution of a 'matter' in most cases.

(ii) Not all Supreme Court jurisdiction in relation to matters is federal jurisdiction

If the argument above is incorrect, and the Supreme Court exercises Territory jurisdiction in most cases, it is important to appreciate that there will remain a significant number of cases in which the Court will exercise federal jurisdiction. And, as the recent High Court decision in *Aftrack* highlights, a court may often proceed without realising that federal jurisdiction has been engaged.[25] Again, on the analysis outlined above, in the cases where federal jurisdiction is being exercised, at least the declaratory provision may well be ineffective.

The clearest conferral of federal jurisdiction on the ACT Supreme Court is by s 68(2) of the *Judiciary Act*, which confers criminal jurisdiction in relation to federal offences. When exercising that jurisdiction, a range of Territory procedural and substantive laws respecting matters such as arrest, custody, bail, examination, commitment, conviction, sentencing, imprisonment and appeal, will be picked up as surrogate federal laws by a combination of ss 68(1) and 79 of the *Judiciary Act*.[26]

In addition to federal criminal jurisdiction, it has been accepted that the Supreme Court can exercise federal jurisdiction in other cases, although it is not entirely clear how this jurisdiction has been conferred.[27] For example, the Supreme Court will be exercising federal jurisdiction in matters where a question arises under the Constitution,[28] or where the Commonwealth is named as a party.[29] Wherever the jurisdiction is federal, Territory laws are picked up and applied by s 79 of the *Judiciary Act* as surrogate federal laws.[30] To emphasise the potential consequences of this point, it would be sufficient to attract federal jurisdiction in the context of Territory criminal proceedings if a constitutional claim were made.[31] Similarly, if a Territory offence were to be prosecuted together with a related federal offence,[32] the Territory offence may well fall within the accrued federal jurisdiction of the ACT Supreme Court.

In all of these cases, the ACT Supreme Court would be applying Territory legislation which potentially impacts upon a range of human rights set out in the *Human Rights Act.* Because the Court would be exercising federal jurisdiction, for the reasons explained above, there would be difficulties with the Court picking up and applying the declaratory provision in s 32 of the *Human Rights Act*. Whether the Court could pick up the interpretive rule in s 30 would, again, depend upon its severability.[33]

4 Application of the Human Rights Act to Commonwealth officers exercising Territory powers and functions

(i) Cooperative governmental arrangements for the exercise of Territory powers and functions

It appears that the enactment of the *Human Rights Act* proceeded largely on the basis that the legislation would have a discrete operation within the ACT. On the question of whether the ACT should 'go it alone', the ACT Bill of Rights Consultative Committee said:

An ACT bill of rights could not, of course, directly affect Commonwealth or State agencies or action and would have direct impact only on areas of ACT law.[34]

Certainly, that appears to be the case on the face of the legislation. The scrutiny of bills provisions apply to bills presented to the ACT Legislative Assembly (s 37), and the judicial

provisions apply to Territory laws (s 29). However, there is a significant degree of legislative and executive coordination and cooperation between the ACT and Commonwealth governments. Some of this intergovernmental activity is specific to the ACT government and the Commonwealth government, while other activity is part of broader Commonwealth/State/Territory cooperative schemes.

The clearest example of the former type of arrangement is the 'unique'[35] arrangement whereby Commonwealth officers are used for policing services in the ACT. The Australian Federal Police (AFP) is authorised to undertake police services in the ACT,[36] and AFP members have the powers and duties conferred or imposed by Territory legislation.[37] As the ACT Bill of Rights Consultative Committee highlighted, the exercise of these powers by AFP officers has clear potential to affect the human rights in the *Human Rights Act*.[38] For example, Part 10 of the *Crimes Act 1900* (ACT) sets out a range of AFP powers in relation to criminal investigation. Statutory powers of entry, search and seizure, detention and arrest are all capable of affecting the human rights set out in the *Human Rights Act*, in particular those relating to the right to liberty and security of person (s 18) and to privacy (s 12).

A good example of wider Commonwealth/State/Territory cooperative arrangements with the potential to impact upon human rights is the Australian Crimes Commission legislation.[39] The *Australian Crime Commission Act 2003* (ACT) confers investigative and intelligence gathering functions on the Australian Crime Commission, a body established by the *Australian Crime Commission Act 2002* (Cth). The ACT Act also empowers an examiner – a person appointed under the federal Act – to conduct an examination for the purposes of certain ACC operations/investigations. The examiner may regulate the conduct of examination proceedings as she/he considers appropriate, and has the power to summon witnesses, take evidence and obtain documents (Part 3). Provision is also made for the issuing of arrest warrants (s 27) and search warrants (Part 4). Various offences are created for non-compliance with statutory requirements (ss 25 and 26). The conferral of these powers and functions on the ACC and federal examiners is made possible by the *Australian Crime Commissions Act 2002* (Cth) (s 55A). As with the exercise of power by AFP officers, there are human rights implications for ACT ACC Act provisions: right to liberty and security of person, to privacy and to a fair trial.

(ii) Disputes in the ACT Supreme Court arising from cooperative arrangements

These cooperative governmental arrangements - whether specific to the Commonwealth and the ACT or part of a broader Commonwealth/State/Territory cooperative arrangement - can give rise to a range of judicial disputes which will require the application of the relevant Territory legislation. In some circumstances, proceedings may be instituted in the ACT Supreme Court. For example, in relation to the AFP, litigation in the ACT Supreme Court can raise the interpretation of provisions of the ACT *Crimes Act* in the context of prosecutions under that Act or tort claims for trespass, unlawful detention, detinue or conversion. Similar proceedings may be instituted following an exercise of power conferred by the ACT ACC Act. In all these circumstances, the *Human Rights Act* purports to require the ACT provisions to be interpreted consistently with the human rights set out in the ACT *Human Rights Act* and, if they cannot be, for a declaration of incompatibility to follow.

Two important consequences follow from the creation of intergovernmental arrangements for the exercise of Territory powers. First, the identification of an officer or agency of the Commonwealth, or the Commonwealth itself, as a party to the suit may attract federal jurisdiction. As explained above, the circumstances in which the ACT Supreme Court would be exercising federal jurisdiction are unclear, and the point would be much clearer for a State purporting to adopt a similar scheme to that in the ACT *Human Rights Act*, as s 39 of the *Judiciary Act* expressly vests that head of federal jurisdiction (ie, s 75(iii)) in State courts. To the extent that the ACT Supreme Court would be exercising federal jurisdiction, the

difficulties identified above would frustrate the intended operation of s 32 of the *Human Rights Act* (and perhaps the interpretive rule in s 30). Secondly, if it is possible for the interpretive rule to be picked up and applied in federal jurisdiction separately from the declaration power, the exercise of the power in s 30 will affect the scope of power exercised by the relevant Commonwealth officer or agency.

(iii) Disputes in federal courts arising from cooperative arrangements

There are also circumstances in which proceedings may be instituted in a federal court which might raise a question about the applicability of the *Human Rights Act*. The most obvious case is where judicial review proceedings are instituted in the High Court under s 75(v) of the *Constitution* or the Federal Court under s 39B of the *Judiciary Act* against an officer of the Commonwealth exercising powers conferred by Territory legislation.[40] The question then is whether the *Human Rights Act* could be picked up and applied by a federal court in a judicial review proceeding under s 79 of the *Judiciary Act*. On the one hand, it is quite clear that the textual reference to the 'ACT Supreme Court' in s 32 of the *Human Rights Act* does not prevent the application of the *Human Rights Act* by a federal court.[41] However, on the other hand, s 32 may impose a function beyond the reach of s 79.[42] The declaration provision is the central component of an ACT legislative scheme for informing the Legislative Assembly about the human rights implications of ACT law. The Registrar of the ACT Supreme Court is required by s 32(4) to give a copy of the declaration to the Attorney-General who, in turn, is required to present a copy to the Legislative Assembly (s 33). There is strength in an argument that s 79 would not operate to substitute a federal court into that scheme for institutional 'dialogue'. In any event, as explained earlier, s 79 would not operate to pick up s 32 (and possibly s 30) if it were characterised as a non-judicial power.

(iv) Consequences for the effectiveness of the Human Rights Act in the context of cooperative schemes

The consequences of these conclusions are significant for the effectiveness of the *Human Rights Act* in the context of cooperative governmental arrangements involving the Commonwealth government. If Territory powers had been conferred upon Territory officers, proceedings arising from an exercise of that Territory power would be more likely to be heard by a Territory court and, in hearing such proceedings, it is less likely that federal jurisdiction would be triggered (on the assumption that some jurisdiction is capable of being non-federal). Leaving aside other arguments about the constitutional validity of the *Human Rights Act*, the ACT Supreme Court would be required by that Act to give a rights sensitive interpretation to Territory provisions and, if it could not do so, to make a declaration of incompatibility. Instead, by entering into a cooperative arrangement and conferring those powers on federal officers, the application of s 32 (and possibly s 30) of the *Human Rights Act* would be frustrated in a range of cases.

There are four further points that should be emphasised. First, if some or all of the arguments in section 3 were not accepted, the *Human Rights Act* might be applied in full or in part, by either or both the ACT Supreme Court or a federal court, when federal officers or agencies exercise Territory powers. The relevant court would have to give those Territory provisions a human rights sensitive interpretation and, if unable to do so and if the declaratory provisions could be picked up, would issue a declaration of incompatibility. If that were the case, it is clear that the *Human Rights Act* would have significant implications for Commonwealth officers and agencies exercising Territory powers, and for Commonwealth policy makers when designing cooperative schemes.

Secondly, there are other ways in which the *Human Rights Act* may impact directly upon Commonwealth officers and agencies. ACT laws of general application which seek to apply,

and are capable of applying, to Commonwealth officers and agencies would be within the scope of the *Human Rights Act.* This is particularly important in the ACT given the significant presence of the Commonwealth government. Although perhaps rare, it is possible that, in its application to Commonwealth officers and agencies, such legislation could have human rights implications. Additionally, there are other cooperative arrangements which use ACT governmental mechanisms for the administration of federal law. For example, Territory remand centres are used for the detention of federal prisoners and unlawful non-citizens.[43] Again, the *Human Rights Act* would require rights sensitive interpretations of these Territory provisions where proceedings are instituted in the ACT Supreme Court.

Thirdly, because of the power of the Commonwealth Parliament to enact laws for the ACT under s 122 of the *Constitution*, there are ways in which the *Human Rights Act* can be side-stepped by the enactment of federal legislation. As indicated, the *Human Rights Act* only applies to Territory laws, not Commonwealth laws. Thus, for example, the AFP Act sets out powers for AFP officers to use surveillance devices in relation to ACT offences.[44] If those powers were conferred by Territory legislation, those provisions would be subject to the *Human Rights Act*. However, because they are conferred by federal legislation, the provisions of the *Human Rights Act* are avoided. Another example is the Commonwealth *Evidence Act 1995* (Cth) which applies to proceedings in an ACT Court until a proclamation is made displacing the operation of that Act.[45] Again, if the ACT Legislative Assembly were to enact its own evidence legislation mirroring the federal provisions, the provisions of the *Human Rights Act* would be triggered.

Fourthly, despite any potential invalidity or inapplicability of the *Human Rights Act* in judicial proceedings, the scrutiny of bills provisions are likely to be valid. Consequently, the human rights implications of new cooperative schemes requiring ACT legislation, or changes to existing cooperative arrangements requiring amendments to ACT legislation, would need to be evaluated by the Attorney-General and the relevant Standing Committee. The political significance at the federal level of adverse human rights findings during that process is apparent.

4 Conclusion

For the Consultative Committee, federalism in Australia was seen as allowing regional diversity and providing an opportunity for experimentation:

> … the ACT has often been in the forefront of legislative reform for Australia. Apart from better protecting human rights in the ACT, a possible outcome of the ACT adoption of a bill of rights would be to encourage other jurisdictions to investigate this initiative.[46]

However, Australian federalism is a multi-faceted structure which also imposes constraints, particularly for a Commonwealth Territory. Section 3 of this paper has explained how the constitutional scheme for the exercise of Commonwealth judicial power and federal jurisdiction by the ACT Supreme Court may deprive the *Human Rights Act* of one if its central pillars in all or at least a significant number of cases. Section 4 of this paper has explained how cooperative federalism in Australia, whereby Territory powers are conferred on Commonwealth officers or agencies, may be affected by the *Human Rights Act*. The *Human Rights Act* will affect the way that Territory statutory powers are shaped, even if exercised by Commonwealth officers and agencies. This will be the case even if the judicial provisions of the Act are held to be wholly or partly invalid or inapplicable. These federal dimensions have the potential to significantly impede, respectively, the effective operation of the *Human Rights Act* and the uniform operation of cooperative federal arrangements. They are dimensions which should be taken into account by State policy makers considering

similar schemes for the protection of rights and by federal policy makers contemplating cooperative arrangements.

Endnotes

1 The Victorian government released a *Statement of Intent* in May 2005, and set up a committee to consult with the Victorian community about human rights.
2 For a more detailed account of the provisions of the *Human Rights Act* and the report of the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003), see Carolyn Evans, 'Responsibility for Rights: The ACT Human Rights Act' (2004) 32 *Federal Law Review* 291; and Leighton McDonald [2004] *Public Law* 22. See also the collection of papers marking the first anniversary of the *Human Rights Act* in (2005) 197 *Ethos.*
3 Although it seems to have been viewed as having a free-standing operation in some cases: see *R v YL* [2004] ACTSC 115, [90] (Crispin J).
4 Subsection 30(3) provides that 'working out the meaning of a Territory law' means resolving an ambiguous or obscure provision of the law, confirming or displacing the apparent meaning of the law, finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable, or finding the meaning of the law in any other case.
5 This provision is complicated by s 30(2) which subjects the interpretive rule in s 30(1) to s 139 of the *Legislation Act 2001* (ACT) which, in turn, requires a purposive interpretation.
6 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.
7 ACT Legislative Assembly Standing Committee on Legal Affairs, Scrutiny Report No 42 (15 January 2004) 11.
8 Ibid, 12.
9 (1996) 189 CLR 1.
10 Above n 7, 12.
11 Ibid 11.
12 Leslie Zines, *Federal Jurisdiction in Australia* (3rd ed, 2002) 182, 186; Stephen McDonald, 'Territory Courts and Federal Jurisdiction' (2005) 33 *Federal Law Review* 57, 78-88.
13 *Re Governor, Goulburn Correctional Centre; ex parte Eastman* (1999) 200 CLR 322.
14 (1999) 196 CLR 553. The decision in *GPAO* established 'that a *federal* court, when deciding a matter arising under a law created pursuant to s 122, exercises "federal jurisdiction"': McDonald, ibid 82.
15 See Zines, above n 12, 179.
16 Ibid.
17 See Zines, above n 12; 179-86; McDonald, above n 12, 78-88.
18 Above n 7, 12.
19 See, by analogy, the discussion of the operation of s 79 of the *Judiciary Act 1903* (Cth) in *Solomons v District Court of NSW* (2002) 211 CLR 119, [28] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ).
20 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 335-7 [45]-[49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
21 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.
22 *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38, [29] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ). That there would be no 'matter' which could then be appealed to a federal court was a point made by the Standing Committee on Legal Affairs when it considered the Human Rights Bill: see above n 7, 12.
23 Above n 2, 61.
24 Contrast the position of a federal court: *Re Wakim;ex parte McNally* (1999) 198 CLR 511.
25 *Agtrack (NT) Pty Limited v Hatfield* [2005] HCA 38, [32] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ).
26 See *Putland v The Queen* (2004) 204 ALR 455. Other federal provisions, like Part 1B of the *Crimes Act 1914* (Cth), operate in a similar way. For a detailed discussion of federal criminal jurisdiction in Australia, see Australian Law Reform Commission, *Sentencing of Federal Offenders*, Issues Paper 29.
27 The position is much clearer for State courts which have been expressly vested with federal jurisdiction in relation to a range of matters by s 39 of the *Judiciary Act*.
28 *John Pfeiffer Pty Ltd v Rogerson* [19] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
29 *Blunden v Commonwealth of Australia* [9] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
30 See *Solomons v District Court of NSW* (2002) 211 CLR 119, [21] (Gleeson CJ, Gaudron, Gummow, Hayne, Callinan JJ). In relation to State offences committed in Commonwealth places within States, the same analysis applies. Section 4 of the *Commonwealth Places (Application of Laws) Act 1970* (Cth) picks up applicable State legislation, and s 7 of that Act invests the relevant State court with federal jurisdiction: see *Cameron v The Queen* (2002) 209 CLR 339; *Pinkstone v The Queen* (2004) 206 CLR 84.
31 *Agtrack Pty Ltd v Hatfield* [2005] HCA 38, [30] (Gleeson CJ, McHugh, Gummow, Hayne, Heydon JJ).
32 There appear to be arrangements in place for the prosecution in one trial of sufficiently related federal and Territory offences: see ALRC, *Sentencing of Federal Offenders*, above n 27, 58.

33 See *Solomons v District Court of NSW* (2002) 211 CLR 119, [24] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).
34 Above n 2, 38. However, as will be discussed further below, even the Committee recognised the potential impact on the Australian Federal Police, an agency established under Commonwealth legislation.
35 *Lissner v Commonwealth* [2002] ACTSC 53, [7] (Connolly M).
36 *Australian Federal Police Act 1979* (Cth) ('the AFP Act'), s 8(1)(a) and (1A).
37 AFP Act, s 9(1)(b).
38 Above n 2, 77. The Consultative Committee pointed the potential difficulty for the ACT Legislative Assembly seeking to require federal officers to act consistently with human rights: 77.
39 The observations in this section are not limited to co-operative schemes for law enforcement. Other examples of co-operative schemes include the *Human Cloning and Embryo Research Act 2004* (ACT); the *Gene Technology Act 2003* (ACT) and the *Drugs in Sport Act 1999* (ACT). All of these legislative schemes confer powers and functions on federal officers and agencies and have potential human rights implications.
40 *Re Cram; ex parte NSW Colliery Proprietors' Association Ltd* (1987) 163 CLR 117. It may also be that the exercise by a Commonwealth officer of power conferred by a Territory law to make a decision is a decision 'under an enactment' for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and judicially reviewable by the Federal Court. Although there is some support for that proposition in the decision of von Doussa J in *Pancontinental v Burns* (1994) 124 ALR 471, 480), the conclusions in that decision may be contrary to the way in which the High Court in *Griffith University v Tang* (2005) 213 ALR 724, [89] (Gummow, Callinan and Heydon JJ) addressed the question of when a decision will be 'under an enactment'. I am very grateful to Graeme Hill for this point.
41 *ASIC v Edensor Niminees Pty Ltd* (2001) 204 CLR 559, 593-4 [72]-[74] (Gleeson CJ, Gaudron and Gummow JJ).
42 Ibid.
43 *Remand Centre Act 1976* (ACT), s 15.
44 See *Surveillance Devices Act 2004* (Cth), Schedule 1, Item 3, saving s 12L of the AFP Act in relation to the use of listening devices in respect of ACT offences.
45 *Evidence Act 1995* (Cth), s 4(6).
46 Above n 12, 38.