2011

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

PRESENTATION OF DECLARATION OF INCOMPATIBILITY TO LEGISLATIVE ASSEMBLY

Tabled in the ACT Legislative Assembly on 15 February 2011 by
Attorney General
Simon Corbell MLA

Mr Speaker,

In accordance with section 33(2) of the ACT *Human Rights Act 2004*, I hereby present a copy of the declaration of incompatibility made on 19 November 2010 by Justice Hilary Penfold in *In the matter of an application for bail by Isa Islam*.

Section 32(2) states that "If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right".

On 19 November 2010, Justice Penfold in the ACT Supreme Court declared that: "Section 9C of the *Bail Act 1992* (ACT) is not consistent with the human rights recognised in s.18(5) of the *Human Rights Act*, in that 'anyone who is awaiting trial must not be detained in custody as a general rule'." The declaration was made in the course of her decision in relation to an application for bail by Mr Isa Islam. Section 9C of the Bail Act requires special and exceptional circumstances to be established before bail can be considered for certain serious offences,

The ACT has a proud history in the protection and promotion of human rights, being the first jurisdiction in Australia to enact a legislative bill of rights.

The ACT *Human Rights Act* was established as a 'dialogue' model to encourage a meaningful dialogue on human rights issues between the three arms of government – the legislature, the judiciary and the executive – and the community.

This model allows for a declaration of incompatibility made under the Act. A declaration of incompatibility provides a trigger, if you like, for further discussion between the three arms of government and the community, to consider the issues raised.

This is the first declaration of incompatibility made under the *Human Rights Act*. It therefore presents us with the first opportunity to work through our 'dialogue' model of human rights law.

As Justice Penfold noted in her decision, the declaration has no impact on the operation of, in this case, section 9C of the *Bail Act 1992*. Any decision to change the legislation in question remains a matter for this Legislative Assembly. Nor does the declaration affect the outcome of the proceedings for the individual applicant in the case.

What the declaration does do is confirm the supremacy of Parliament in determining how human rights are to be reflected in ACT laws through the legislative process. At the same time it signals a triumph for our dialogue model and gives us the opportunity for robust consideration of the issues raised and for our further development as a human rights jurisdiction.

Having said that, because the declaration is a conclusion of the court, to the extent that the Government wishes to take issue with the decision in the court, we are governed – like other litigants – by the court's timelines in relation to appeal processes. At this stage, the Government's position in relation to the litigation is that it disagrees with the conclusion that her Honour reached about this particular law and the analysis that led Justice Penfold to that decision. In the circumstances I also take this opportunity to inform the Legislative Assembly that, on 17 December 2010, I filed an appeal from Justice Penfold's decision in *In the Matter of an application for bail by Isa Islam,* that s 9C of the Bail Act is not compatible with the Human Rights Act.

As it happens, in the meantime these matters are, in part, also being addressed by the High Court in another case currently on appeal from Victoria, *Momcilovic v The Queen & others*, in relation to the operation of its human rights legislation. The ACT is an intervener in those proceedings which were heard by the High Court on 8 February 2011.

This does not mean that the government will hold off on considering s 9C of the Bail Act.

If the dialogue brought about by this declaration of incompatibility results in proposals by the Government to change the legislation, any decision on those changes will, ultimately, be made by the Legislative Assembly as the elected representatives of the people.

The government's appeal will not affect the other orders made by her Honour in *Islam*, nor does it affect my obligation to present the declaration of incompatibility to the Assembly and, in due course, a response to it.

As Attorney-General, I will prepare a written response to the declaration of incompatibility and present it to the Legislative Assembly no later than six months from today, as required by Section 33(3) of the *Human Rights Act.*

Given the *Human Rights Act* commenced operation on 1 July 2004 one might reasonably have expected that a declaration would have been made before now. The fact that none has been made is a sign that the assessment of human rights compatibility being undertaken by my department, and by other government agencies in the formulation of policy proposals, and indeed this Assembly's own Scrutiny of Bills Committee - is working well.

Now that a declaration has been made, I welcome the opportunity to engage in healthy and productive dialogue with the ACT community, other arms of government and my colleagues in the Assembly over the next six months about the human rights issues raised in this decision.