



**HUMAN RIGHTS &  
DISCRIMINATION COMMISSIONER**  
ACT Human Rights Commission

# Look who's talking

A SNAPSHOT OF TEN YEARS OF DIALOGUE UNDER THE HUMAN RIGHTS ACT 2004  
BY THE ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

Copyright 2014

ACT Human Rights and Discrimination Commissioner

[human.rights@act.gov.au](mailto:human.rights@act.gov.au)

[www.hrc.act.gov.au/humanrights](http://www.hrc.act.gov.au/humanrights)

# Look who's talking

A SNAPSHOT OF TEN YEARS OF DIALOGUE UNDER THE HUMAN RIGHTS ACT 2004

## Contents

---

Introduction .....	3
Courts and Tribunals .....	4
First five years (2004-2009) .....	4
Second five years (2009-2014) .....	5
Ten years in the courts and tribunals .....	5
Areas for improvement .....	5
The Legislature .....	12
First five years (2004-2009) .....	12
Second five years (2009-2014) .....	13
Areas for improvement .....	13
The Executive Government .....	15
First five years (2004-2009) .....	15
Second five years (2009-2014) .....	16
Areas for improvement .....	17
Human Rights Commissioner .....	20
Economic, Social and Cultural Rights.....	24
Right to education .....	24
Right to housing.....	25
Other ESC rights.....	25

## Introduction

---

The ACT's pioneering *Human Rights Act 2004* is ten years old. As a non-entrenched law, based on a dialogue model of human rights protection, the HR Act is unique in that it has not remained a static document but has been incrementally improved over the years. The Act has been subject to three mandated reviews in the course of the last decade, the most recent of which was tabled in the ACT Legislative Assembly on 25 November 2014.

The first two reviews offered an opportunity to reflect on whether the HR Act had been living up to its overarching goal of 'bringing rights home' to Canberrans, and the chance to improve its provisions and related processes in light of identified shortcomings. Following the 12-month review, which was completed in 2006, the HR Act was amended to, among other things, introduce a duty on public authorities to comply with human rights, and an independent right of action in the Supreme Court for breaches of this duty.<sup>1</sup> The review on economic, social and cultural rights in 2010 resulted in the introduction of a right to education, the first express recognition of a socio-economic right in the HR Act, albeit in limited form.<sup>2</sup>

The Government's third and current Review Report, which is available on the website of the ACT Justice and Community Safety Directorate (JACSD), sets out its views in relation to various matters relating to the operation of the HR Act and whether it should be extended to include additional economic, social and cultural rights.<sup>3</sup> The Government has said that it proposes to extend public authority obligations to the right to education, and to progress express recognition of indigenous cultural rights. Both are welcome, but modest changes. Disappointingly, however, the Report, overall, recommends retaining the status quo, with little consideration or engagement with the evidence to date.

Coinciding with the 10-year milestone of the HR Act, the third and current review presents an important opportunity to begin a conversation about the roadmap for the next decade. The Government has said that it intends to undertake a more extensive process of public consultation on its proposals next year. As a first step towards contributing to that process, the Human Rights Commissioner has prepared this paper with the aim of identifying some of the strengths and weakness of the human rights dialogue to date, and the ways in which that dialogue may be deepened, strengthened and broadened over the next 10 years. The HR Act's credentials as ground-breaking legislation is beyond question, however, now is not the time to become complacent about its achievements.

---

<sup>1</sup> ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) and '*Human Rights Act 2004* Twelve Month Review – Discussion Paper' (2006).

<sup>2</sup> ANU, '*ACT Economic, Social and Cultural Rights Research Project*', *Australian Research Council* (2010), and Government response to the review (2012). See also ANU Human Rights Research Project Report, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) and related Government response in 2012; available at: [http://www.justice.act.gov.au/protection\\_of\\_rights/human\\_rights\\_act](http://www.justice.act.gov.au/protection_of_rights/human_rights_act)

<sup>3</sup> ACT Directorate of Justice and Community Safety (JACS), '*Economic, Social and Cultural Rights in the Human Rights Act 2004 – s 43 Review*', November 2014.

## Courts and Tribunals

---

The *Human Rights Act 2004* invests a number of duties and functions on courts and tribunals:

- Under s 30 of the HR Act, courts and tribunals (and other decision-makers) must adopt, where possible, a human rights consistent interpretation of ACT laws.
- Under s 32 of the HR Act, the Supreme Court is empowered to issue a declaration of incompatibility, declaring a law incompatible where such an interpretation cannot be adopted.
- Under s 40C of the HR Act, a person who alleges that a public authority has breached a human right can apply to the Supreme Court for relief, and the Supreme Court may grant 'the relief it considers appropriate' except for damages. A person may also rely on the unlawfulness of the conduct of the public authority in other legal proceedings in ACT courts and tribunals.

Consistent with a dialogue-based model of rights protection, the courts are not the final arbiter of whether laws are consistent with human rights, but rather one participant in a discussion which also involves the executive and the legislature.

So how active a participant have the courts and tribunals been in the human rights dialogue to date?

### First five years (2004-2009)

From July 2004 – June 2009, the HR Act was referred to in some 76 cases in the ACT Supreme Court (including in 10 instances in the ACT Court of Appeal – see chart below). It was also mentioned in approximately 10 cases in the former Administrative Appeals Tribunal and the Residential Tenancies Tribunal. There were no declarations of incompatibility issued by the ACT Supreme Court in the first five years of the HR Act's operation.

**The one-year stage:** The 12-month review of the HR Act noted that the Act had resulted in 'only a small impact in a handful of cases where parties have specifically argued human rights issues', and that it could not be said to have been a 'decisive factor' or to have been considered in 'any great depth' by the courts so far. At most, it had been used 'to lend support to a conclusion already reached by other reasoning'. The review concluded that 'the courts and tribunals have arguably been the least affected by the [HR Act]'. As a result of the 12-month review, a number of amendments were made to the HR Act which were aimed at improving its operation, including clarifying the interpretive provision in s 30; creating a duty on public authorities to comply with the rights under the Act; and creating a direct right of action to the Supreme Court for a breach of those rights, without entitlement to claim damages. The latter two amendments commenced on 1 January 2009.

**The five-year stage:** The 5-year review of the HR Act, which was concluded in June 2009, however, did not identify any significant improvement in the involvement of the courts and tribunals in the human rights dialogue:

With some exceptions, the courts have, for the most part, remained a spectator to the HRA dialogue thus far. While ... there is some indication that its application in the Supreme Court is increasing, in most instances its use has been perfunctory and/or displays a lack of understanding by the legal profession of the provisions of the HRA, and their potential application.

The review concluded that '[un]til the courts fully grasp their part in the human rights conversation, there will remain some question as to the HR Act's ability to generate dialogue between the courts and legislature, and to provide accountability for the Government's implementation of human rights'.

## Second five years (2009-2014)

In its second five years, from July 2009 to November 2014, the HR Act was referred to in some 110 cases in the ACT Supreme Court (including on 17 occasions in the ACT Court of Appeal) and in some 41 cases in the ACT Civil and Administrative Tribunal. The ACT Supreme Court issued one declaration of incompatibility (without any legislative response by the Government to date; see further below). The duty on public authorities, which came into effect on 1 January 2009, has been considered by the Supreme Court in approximately 14 cases, including on a handful of occasions, in the context of the new direct right of action.

## Ten years in the courts and tribunals

Overall, in its first ten years of operation, the HR Act has been mentioned in approximately 50 cases in the ACT tribunals (6.6% of published decisions), 164 cases in the ACT Supreme Court (9.2% of 1846 published decisions) and in 29 cases in the ACT Court of Appeal (7.6% of 371 published decisions) – see chart below. As recently noted by Chief Justice Murrell,<sup>4</sup> after a peak in 2009 (which coincided with the HR Act being raised unsuccessfully in a number of bail applications), there has been a decline in the percentage of cases in which it has been raised in the Supreme Court. In her view:

[T]he HRA has had little direct impact on the outcome of cases. The enactment of the HRA was a powerful symbolic statement, and it was predicted that the Supreme Court would play an important role in increasing human rights compliance in the ACT. But despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome.

## Areas for improvement

### Improving HRA accessibility

When the public authority obligations were introduced, the Attorney-General expressed the hope that the new right of action when it commenced in 2009 would stimulate renewed interest in the HR Act amongst the

---

<sup>4</sup> Chief Justice Helen Murrell, ACT Supreme Court, '*The judiciary and human rights*', paper presented at Ten Years of the ACT Human Rights Act: Continuing the Dialogue Conference, ANU, 1 July 2014; available at: <http://www.hrc.act.gov.au/content.php/content.view/id/385>

legal profession and turn the trickle of human rights case law into a stream.<sup>5</sup> Compared to the Victorian Charter, the HR Act has been routinely raised in a higher percentage of cases in the ACT courts and tribunals (see chart below). However, the stream cannot be said to be very deep, and as noted by the Chief Justice, the HR Act has rarely made a difference to the outcome of cases. The direct right of action in the HR Act also remains under-utilised and it may be a remedy that is out of reach for the vast majority of people in the community.

(i) Clarification of section 40C - application of the HR Act in the lower courts and tribunals

A key factor that may be contributing to the limited success of the HR Act before the ACT courts and tribunals is the lack of clarity regarding the extent to which ACAT and lower courts may assess and remedy breaches of public authority obligations under the HR Act.

In *LM v Children's Court* [2014] ACTSC 26, Master Mossop of the Supreme Court considered the ability of the Children's Court (and ACAT and courts other than the Supreme Court) to assess whether a public authority had breached its human rights obligations. The Master also considered the nature of any remedy such bodies could provide for a breach. This is a matter of concern because the Supreme Court's jurisdiction is an expensive and lengthy process for plaintiffs, who will often be vulnerable members of the community.

Master Mossop confirmed in *LM* that an express power to grant relief under the HR Act is given only to the Supreme Court via s 40C(4). However, his Honour also suggested that inferior courts and tribunals (and the Supreme Court) retain their inherent, statutory or common law jurisdictions to grant remedies otherwise available to them other than under the HR Act. Therefore a person may rely on their rights under the HR Act in lower courts and ACAT, but lower courts and ACAT cannot grant a remedy under the HR Act for that breach, unless it falls within the existing rules of that remedy. This creates a risk that HR Act arguments before a lower court or ACAT may be pointless, if any remedy for a breach is subject to the requirement of the non-HR Act matters before the court anyway. Master Mossop in *LM* did suggest that the consideration of a remedy by a lower court and ACAT for a HR Act breach may include factors beyond the traditional scope of that remedy, however this remains unclear.

In contrast to *LM*, a recent decision by the Victorian Supreme Court in *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014), confirmed that a lower court's or tribunal's jurisdiction to consider the question of lawfulness under the Charter was not lost when the original ground for making an application was not determined or rejected. Justice Bell considered that the tribunal in this case had erred because it had considered itself relieved of the responsibility to exercise the jurisdiction in section 39(1) of the Charter because it had rejected the non-Charter discrimination claim. The decision clarifies the previous Court of Appeal decision in *Sudi*, that the key issue is whether the Tribunal is already considering unlawfulness in the proceedings, in order to enliven the Charter consideration of the matter.

---

<sup>5</sup> Attorney-General Simon Corbell, ACT Legislative Assembly, *Parliamentary Debates* (6 December 2007) p 4031.

The Commissioner considers legislative reform is needed to clarify these questions, particularly in light of the recent Victorian decision on the operation of s 39(1) of the Victorian Charter, which is similar but not identical to s 40C(4) of the HR Act. If s 40C(4) precludes inferior courts and tribunals from issuing a direct remedy (as the Master of the Supreme Court found in *LM*), then applicants are likely to be disadvantaged. Inferior courts and tribunals offer applicants a more cost-effective path to remedying wrongs. Tribunals and lower courts offer significant benefits with specific jurisdictional expertise, such as tenancy matters in ACAT, and the Children's Court. They are familiar with the subject matter and particular legal framework, thus able to weigh up the impact of a public authority's breach of the individual's rights in light of all relevant factors in the proceeding. They are well-placed to issue an effective remedy under the HR Act. It has been noted in various forums, including most recently at the HR Act's ten-year anniversary seminar that such a reform would encourage the use of human rights arguments in 'far more cost-effective and accessible jurisdictions, in a much broader range of cases, argued by a larger number of advocates'.

The 2014 ACT Government Review Report takes the view that any amendments to these provisions are unnecessary because the courts have already clarified their operation. However, there is still considerable uncertainty about the operation of these provisions and the Commissioner has previously written to the Attorney General about these concerns, which in her view, were not resolved completely by the Supreme Court's decision in *LM*. Part of the confusion is how Government agencies are seeking to respond to human rights pleadings in the Magistrates Court, Children's Court and ACT Civil and Administrative Tribunal.

It would be helpful for the Government's position on these matters to be clearly articulated during the forthcoming consultation process. It would also be beneficial for the Government to undertake to monitor the application and use of these provisions in practice and to take the step of instructing all relevant agencies as to its position. Absent legislative amendment, this should include amending Government policy so that agencies agree that they consent to courts and tribunals, other than the Supreme Court, considering if they have complied with obligations under the HR Act.

## (ii) Damages

The Commissioner remains of the view that the availability of damages under the HR Act would assist genuine claimants who may otherwise be deterred by the cost and time involved in pursuing test case litigation. Excluding the possibility of damages being awarded may deter would-be claimants, including those with meritorious claims, from bringing them to court because of the cost and stress associated with litigation. The ACT remains one of the few human rights jurisdictions in the world to not offer damages to victims of human rights breaches.

## Declaration of incompatibility

The Government has yet to legislatively respond to the first declaration of incompatibility issued by the Supreme Court *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147. The Commissioner believes further reform to bail laws are needed as a result of the decision.

Table 1: HRA cases/mentions per calendar year

YEAR	ACT Court of Appeal	Total ACTCA	% ACTCA cases	ACT Supreme Court	Total ACTSC	% ACTSC cases	ACAT (AAT/RTT prior 2009)	Total tribunals	% tribunal cases
2004 (Jul-Dec)	0	15	0	5	79	6	1	26	4
2005	1	49	2	11	138	8	0	54	0
2006	2	28	7	11	90	12	4	57	7
2007	4	25	16	12	99	12	2	44	4
2008	1	21	5	13	143	9	2	54	4
2009	3	23	13	26	161	16	4	53	7
2010	2	28	7	17	162	10	8	86	9
2011	2	27	7	19	199	9	6	80	7
2012	8	57	14	16	204	8	8	75	11
2013	2	52	4	17	284	6	7	83	8
2014 (Jan-Nov)	4	46	9	17	287	6	8	69	12
<b>TOTAL</b>	<b>29</b>	<b>371</b>	<b>7.636364</b>	<b>164</b>	<b>1846</b>	<b>9.272727</b>	<b>50</b>	<b>681</b>	<b>6.636364</b>

Table 2: ACT Supreme Court - HRA cases/mentions by year of operation

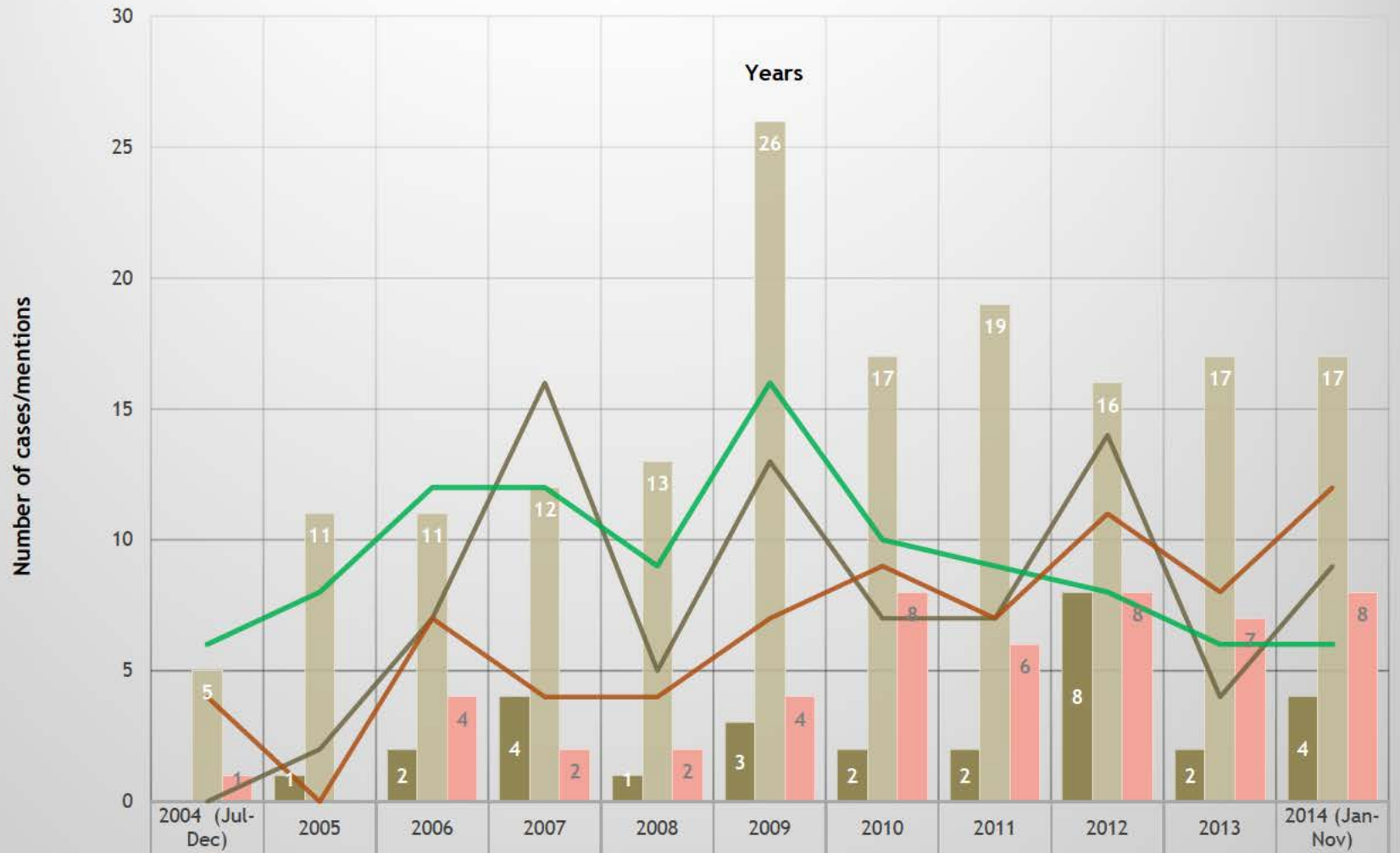
Year	ACT Court of Appeal	ACT Supreme Court	Total
1st year Jul '04 - Jun '05	1	10	11
2nd year Jul '05 - Jun '06	2	12	14
3rd year Jul '06 - Jun '07	2	8	10
4th year Jul '07 - Jun '08	3	13	16
5th year Jul '08 - Jun '09	2	23	25
6th year Jul '09 - Jun '10	3	21	24
7th year Jul '10 - Jun '11	0	20	20
8th year Jul '11 - Jun '12	4	18	22
9th year Jul '12 - Jun '13	6	14	20
10th year Jul '13 - Jun '14	4	20	24
<b>TOTAL</b>	<b>27</b>	<b>159</b>	<b>186</b>

Table 3: Victorian Supreme Court and VCAT: Charter Cases/Mentions per year

	Vic Court of Appeal	Total VCA cases	% VCA cases	Vic Supreme Court	Total VSC cases	% VSC cases	VC AT	Total VCAT cases	% VCAT cases
2007	0	319	0	8	564	1	6	2367	0.2
2008	8	284	3	16	607	3	15	2553	0.6
2009	3	322	9	20	650	3	27	2656	1
2010	10	360	3	21	650	3	39	2077	2
2011	10	447	2	14	660	2	24	2376	1
2012	5	328	1	18	626	3	20	1982	1
2013	8	376	2	18	677	3	43	2190	2
2014 (Jan-Nov)	8	284	3	16	517	3	18	1395	1
<b>TOTAL</b>	<b>52</b>	<b>2720</b>	<b>2.875</b>	<b>131</b>	<b>4951</b>	<b>2.625</b>	<b>19</b>	<b>17596</b>	<b>1.1</b>

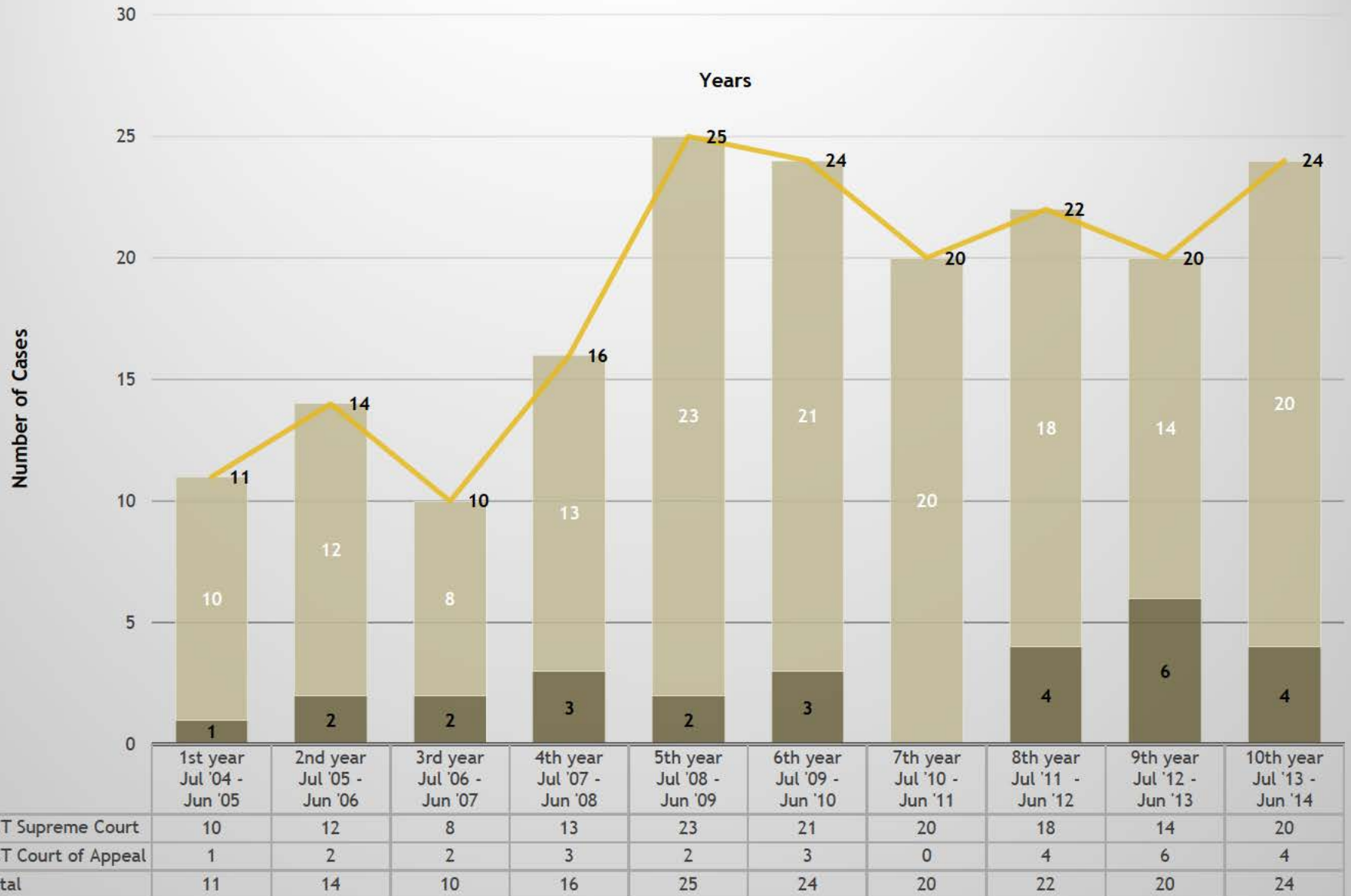


### Courts and tribunals: HRA cases/mentions per calendar year



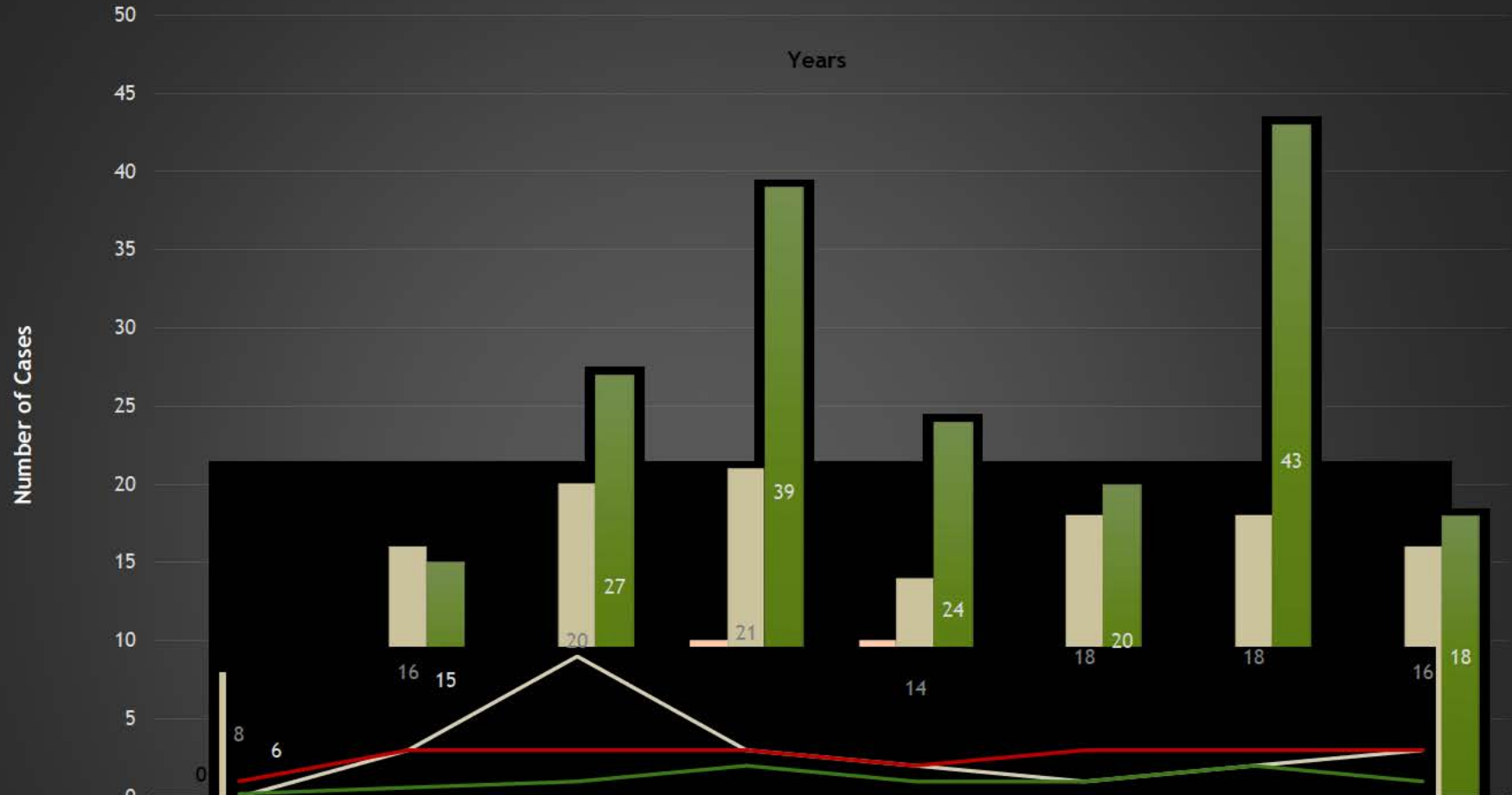
	2004 (Jul-Dec)	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014 (Jan-Nov)
ACT Court of Appeal	0	1	2	4	1	3	2	2	8	2	4
ACT Supreme Court	5	11	11	12	13	26	17	19	16	17	17
ACAT (AAT/RTT prior 2009)	1	0	4	2	2	4	8	6	8	7	8
% ACTCA cases	0	2	7	16	5	13	7	7	14	4	9
% ACTSC cases	6	8	12	12	9	16	10	9	8	6	6
% tribunal cases	4	0	7	4	4	7	9	7	11	8	12

### ACT Supreme Court: HRA cases/mentions by year of operation



ACT Court of Appeal    ACT Supreme Court    Total

## Victorian Supreme Court and VCAT: Charter cases/mentions per calendar year



	2007	2008	2009	2010	2011	2012	2013	2014 (Jan-Nov)
Vic Court of Appeal	0	8	3	10	10	5	8	8
Vic Supreme Court	8	16	20	21	14	18	18	16
VCAT	6	15	27	39	24	20	43	18
% VCA cases	0	3	9	3	2	1	2	3
% VSC cases	1	3	3	3	2	3	3	3
% VCAT cases	0.2	0.6	1	2	1	1	2	1

■ Vic Court of Appeal   
 ■ Vic Supreme Court   
 ■ VCAT   
 — % VCA cases   
 — % VSC cases   
 — % VCAT cases

## The Legislature

---

The ACT Legislative Assembly is at the centre of the HR Act dialogue model, which is designed to preserve parliamentary supremacy over human rights matters. The Act invests a number of duties and functions on the Assembly, and utilises various mechanisms to facilitate dialogue on human rights both within and with the Legislative Assembly:

- the *compatibility statement* by the Attorney-General, which informs the Legislative Assembly that Government bills have been assessed for HR Act consistency before being introduced (s 37);
- the *pre-enactment scrutiny role* of the Scrutiny of Bills Committee which reports to the Legislative Assembly on human rights issues raised by Government and private member's bills (s 38);
- the express invitation to benchmark the interpretation of rights, including any limits on rights placed by the Legislative Assembly, against *international human rights standards* (s 31);
- the obligation to present a *declaration of incompatibility* of the Supreme Court in the Legislative Assembly (via the Attorney-General) for consideration if any remedial action is necessary (s32(4) and s33);
- the requirement for the Attorney-General to table human rights audit reports by the *Human Rights Commissioner* in the Legislative Assembly (s 41);
- the requirement for the Attorney-General to conduct mandatory reviews of the HR Act and report to the Legislative Assembly (s 44); and
- the *annual reports obligation*, where Government departments and public authorities are accountable to the Legislative Assembly by reporting on the steps taken to implement the HR Act.<sup>6</sup>

### First five years (2004-2009)

**The one-year stage:** The 12-month review noted that it was 'clear' that the HR Act was achieving results within the Legislature, and that 'the Assembly had been engaged in an intense 'pre-enactment dialogue' prior to the passing of a Bill.' It also noted that the Act had brought a 'new focus and workload' for the Scrutiny of Bills Committee:

Section 38 [of the HR Act] has brought about a significant change in the task of the Committee. It must now assess clauses in bills from a rights perspective on a much broader basis than is the case under its terms of reference as provided for in a resolution of the Assembly. ... A report on a human rights issue is not confined to making a comment that some clause is, or even may be, in conflict with some rights standard. The Committee might report that a bill enhances rights protections. [It] is aware that its reports may be

---

<sup>6</sup> Consequential amendments to the *Annual Reports (Government Agencies) Act 2004*, s 5 and s 9(3).

consulted by members of the Assembly for the purposes of debate on a bill. A report may thus provide explanation, and outline different points of view, in a way that will facilitate a debate about rights.

**Five-year stage:** The five-year review was similarly positive about the impact of the HR Act within the Legislature:

One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory. The development of new laws by the executive has clearly been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of Government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner.

The report noted that there were signs that the Scrutiny of Bills Committee's work was being taken seriously, citing examples of Government amendments to legislative proposals in light of the committee's criticisms. The committee's concerns with regard to strict liability offences provisions also resulted in the issue being referred for inquiry by the ACT Standing Committee on Legal Affairs, and the recommendation that ACT laws be audited to determine the prevalence of such offences and their appropriateness in each case. That in turn resulted in the Government developing comprehensive guidelines for framing offences, which were published in 2010.

## Second five years (2009-2014)

By all accounts, the HR Act's main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work. The Act and the standards that it upholds are frequently invoked in parliamentary debates by members across the political divide.

Significantly, and in contrast to comparable human rights scrutiny committees in Victoria and the Commonwealth, the Scrutiny of Bills Committee's reports are routinely referred to in second reading debates of bills. The committee's concerns are also often cited as the basis for Government amendments to bills. In 2014 alone, close to 100 Government amendments in relation to 7 bills were moved, ostensibly in response to comments made by the committee. In contrast, Victoria's Scrutiny of Acts and Regulations Committee has identified only 8 instances over a period of eight years, where its Charter reports had resulted in a house amendment to a bill. While there are positive signs that the Commonwealth's Parliamentary Joint Committee on Human Rights's work is being taken into account in the development of legislation, its reports have not to date resulted in any amendments to bills in the course of their passage through the Parliament.

## Areas for improvement

The five-year review made various recommendations which concerned strengthening the statement of compatibility requirement in the HR Act. None of these recommendations were accepted by the Government for reasons that ranged from considering a particular change to be unnecessary, to

concerns that they would involve the need for additional resources. The Government has repeated those concerns in the current Review Report.

The Commissioner, however, considers that the current review provides an opportune time to revisit some of these issues.

(i) Compatibility statements for secondary legislation

Explanatory statements for regulations and other secondary legislation, which the HR Act does not subject to the statement of compatibility requirement, have nevertheless occasionally included human rights analysis. This *ad hoc* process, while welcome, could be greatly improved if the HR Act were amended to require statements of compatibility for legislative instruments as well as bills.

The present system which exempts secondary legislation from any systematic human rights scrutiny and review reduces the thoroughness of the ACT's pre-legislative human rights scrutiny regime. As the Commonwealth model has demonstrated, such a model is feasible and also necessary, given the range of amendments which have an impact on human rights that can be promulgated through secondary legislation.

The Government's 2014 Review Report states that a requirement for statements for secondary legislation would involve a significant increase in resources even if the responsibility was devolved to the agency developing the legislative proposal. But it does not explain why or how this would be the case. If human rights factors were properly taken into account throughout the legislative development process, then the requirement for a statement at the end of that process should not present any undue burden. Alternatively, consideration could be given to including appropriate human rights analysis in the explanatory statements for secondary legislation, similar to that which is required for bills.

(ii) Compatibility statements for private members bills

The continued exemption of private member's bills from the statement of compatibility requirement is undesirable as it creates a two tier system for the human rights scrutiny of proposed legislation. In principle, there is no reason why private member's bills should be subjected to lower or different standards of scrutiny. Both Victoria and the Commonwealth have extended the requirement for statements of compatibility to all bills, regardless of whether the proponent is the Government or a private member.

The Government's 2014 Review Report rejects the proposal on the basis that it is inappropriate for Government to make determinations based on the policy behind private members bills. It does not, however, explain why it would not be feasible for private members to prepare their own statements, similar to the Victorian and Commonwealth models, and/or include appropriate human rights analysis in the accompanying explanatory materials.

## The Executive Government

---

The *Human Rights Act 2004* invests the executive Government with several duties and functions, including:

- the requirement for the Attorney-General to present a written statement on the human-rights compatibility of each Government bill presented to the Legislative Assembly (s 37);
- the requirement for the Attorney-General to report the Government's response to any declaration of incompatibility issued by the Supreme Court to the Assembly within six months (s 33);
- the requirement for the Attorney-General to review and report to the Legislative Assembly on the operation of the HR Act (s 43);
- the positive obligation on public authorities to comply with human rights in decision-making (Part 5A).
- the obligation for Government Directorates and other public authorities to report on their implementation of the HR Act in their annual reports (*Annual Reports (Government Agencies) Act 2004*, ss 5, 9(3)).

### First five years (2004-2009)

**The one-year stage:** The 12-month review considered that the HR Act was having its most significant impact at the level of policy formation in the executive (along with the legislature). But the review found that the Act had not equally penetrated all levels of the bureaucracy, and that further support and training was required to clarify its implementation to public servants. The review also recognised that there was still much work to be done to develop a culture of human rights in the ACT community.

**Five-year stage:** Many of the issues identified in the 12-month review were still present at the five-year stage. The five-year review noted that the compatibility statement requirement had played an important role in fostering awareness of human rights, and that overall the Act was having a beneficial impact on Government culture in some areas. However, its effect was neither consistent, nor widespread across Government, and there was still inconsistent engagement with the Act at a practical level.

The five-year review assessed the impact of the HR Act on the work practices, attitudes and culture of the ACT Government through a series of interviews with a range of ACT public servants from different departments and agencies between April 2006 and October 2008. It found that:

[S]everal participants from different departments and agencies demonstrated a very high level of engagement with the HRA and the scrutiny process, and had a sophisticated understanding of the Act and the human rights issues raised by the policies and legislation they were responsible for developing. However, others who were also involved in the preparation of legislation, and thus subject to the compatibility statement and cabinet submission requirements, had less engagement with the Act, considering that detailed human rights scrutiny and analysis remained the responsibility of the HRU. These

officers generally relied on either the Office of Parliamentary Counsel or the HRU to pick up human rights breaches.

There is also some complacency about existing legislation and practices, and an assumption that these already meet human rights standards, along with the tendency to equate human rights with ordinary morality or common sense. There is limited awareness of the HRA amongst frontline decision-makers and some officers who administer legislation have not appeared to appreciate the requirements of the s 30 obligation to interpret legislation consistently with human rights. In part, this is because of a lack of training, information and accessible resources for public servants.

## Second five years (2009-2014)

A noticeable improvement over the last five years has been the consolidation of practices around the statement of compatibility requirement. The statement itself has remained simply a one-line confirmation of the Attorney-General's opinion that a bill is compatible with human rights (there has yet been no statement of incompatibility issued by the AG). However, the Government has followed through on its commitment to ensure that appropriate analysis of human rights issues continues to be included in the explanatory statements to bills.<sup>7</sup> In 2012, JACS published a factsheet to provide guidance on how to address human rights issues in explanatory statements.<sup>8</sup> For every Government bill, the responsible agency must address the issue of compatibility with the HR Act in the explanatory statement to the bill, including:

- identification of any rights protected under the HR Act engaged by the bill;
- the specific clauses of the bill that engage such rights;
- whether the bill limits those rights; and
- an analysis of whether any limits are reasonable in accordance with the factors set out in section 28 of the HR Act.

This approach appears to have largely satisfied the expectations of the Scrutiny of Bills Committee, which had initially been critical of the absence of detailed reasons in the statement of compatibility itself. While the committee still usefully draws attention to analysis that falls short of its expectations, the overall quality of the human rights analysis included in explanatory memoranda has undoubtedly improved.

The Act's impact on departmental practices and culture, however, is more difficult to assess, due in part to the absence of any ongoing or systematic initiative by the Government to measure the HR Act's influence in this area. Directorates have also for most part continued to provide only perfunctory accounts of their efforts to implement the HR Act in their respective annual reports, despite the promulgation of directions requiring

---

<sup>7</sup> In accordance the ALP/Greens Agreement for the 7<sup>th</sup> Assembly.

<sup>8</sup> JACS, 'Addressing human rights in explanatory statements of bills: Fact Sheet'; available at: <http://www.justice.act.gov.au/publication/view/1904/title/addressing-human-rights-in-explanatory>



more detailed information.<sup>9</sup> As a result, there are a few public examples to draw on, as to whether the HR Act is genuinely a starting point for Government agencies when developing policies, programmes and procedures that do not require a legislative expression. The Government's 2014 Review Report is a missed opportunity in this regard, as it did not canvass the question of whether there had been improvements (or otherwise) in the last five years in terms of how the Act is perceived and used within Government.

## Areas for improvement

Drawing on some of the markers used by the five-year review, however, some observations may be made. The five-year review emphasised the requirement of sustained and strategic leadership and commitment, particularly by JACS as the lead agency for the implementation of the HR Act, in order to ensure the Act's successful uptake within Government. Among other things, the five-year review recommended that:

- The role of the Human Rights Unit within the Justice and Community Safety Directorate should be enhanced, with more staff and resources to provide a centralised focus of expertise on human rights which can be drawn upon by other agencies. The HRU should be primarily responsible for arranging training for other agencies and for providing and maintaining human rights resources. The different roles and responsibilities of the HRU and the Human Rights Commissioner should be made clear to all agencies.
- Intensive and ongoing training on the HR Act should be implemented across all levels of Government. To be most effective, this training should be tailored to specific agencies and roles and should provide detailed and practical examples of the application of the HR Act to the particular work of those agencies and officers. This training should cover the new public authority obligations and also support the guidelines for departments' annual reports, so that there are more sophisticated HR Act reports.
  - The Commissioner notes that it was initially intended that the ACT Government would provide such training, in later years, however, the Commission has offered this training (for a fee), but this has been taken up in piecemeal fashion. The Commission has developed generic e-learning to address this lack of engagement, but tailored training, whether provided by the Government or the Commission is still needed.
- An accessible and up to date resource should be created to assist public servants to understand human rights principles and developments. This resource could complement formal training sessions. This could build upon existing materials available on the JACS website, and should be intelligible to those without formal legal training. This resource could also provide a guide to research and links to other sources of more detailed information and human rights cases from Australia and overseas.
  - The Commissioner notes that it would not be appropriate for the Commissioner, as an independent office holder who at times scrutinises the Government's human rights compliance, to develop this material. Further, the Human Rights Unit is uniquely placed to develop this

---

<sup>9</sup> See Chief Minister's Annual Report Directions since 2007.

material, given its understanding of the cabinet and legislative processes as part of the Legislation Branch of the Justice Directorate.

- Each Government agency should be strongly encouraged to audit its legislation and policies for human rights compliance, and to identify practices which may be inconsistent with human rights. Human rights compliance should be integrated into the practices and procedures of each agency, and should be incorporated into induction training.

The Government's response to the five-year review, which was tabled in the Legislative Assembly in March 2012, supported these recommendations either in full or in-principle. Specifically, the Government said that:<sup>10</sup>

The HRU is currently developing a web-based plain-English Human Rights Toolkit to assist ACT public authorities to comply with their obligations under the HRA, incorporate human rights into public policy at an earlier stage and reduce the risks associated with non-compliance such as legal action and reputational damage. The Toolkit will include information about each right protected under the HRA, the scope of protected rights and good practice approaches to assist agencies to develop human rights compatible legislation and policies. It will also address the obligations of public authorities under the HRA.

The Toolkit will enhance the range of available human rights information maintained by HRU, serving as a first point of reference for policy and decision-makers in ACT public authorities to assist them to recognise when a policy or decision may engage a protected right. The HRU will promote awareness of this new resource across the ACT Government.

Once the Human Rights Toolkit is completed, JACS will explore opportunities for publicising the Toolkit, including incorporating information into induction and staff development programs.

The Toolkit will complement formal training sessions already conducted by the HRC and existing human rights materials on the HRA, such as the information sheet addressing the statutory obligations of public authorities available on the HRC's website.

In addition to guidance materials on the HRA, the JACS website also contains links to the case law of comparative jurisdictions, Government resources published by jurisdictions that have human rights acts, charters or bills of rights as well as links to the external websites of institutions specialising in international human rights law.

The Government's response also said that:<sup>11</sup>

There are a number of educational initiatives currently being pursued by the HRU in furtherance of the objective of ensuring community organisations are provided with support and resources to enable them to

---

<sup>10</sup> See Government Response to the ANU Human Rights Research Project Report, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009), March 2012, pp 28-31; available at: [http://www.justice.act.gov.au/protection\\_of\\_rights/human\\_rights\\_act](http://www.justice.act.gov.au/protection_of_rights/human_rights_act)

<sup>11</sup> *Ibid*, p 20.

comply with their statutory obligations under the HRA. For example, as part of the Toolkit a fact sheet is being developed which addresses the obligations of public authorities under Part 5A of the HRA and measures that public authorities can take to comply with these obligations. Any increase in support for community organisations provided will be subject to resourcing considerations.

The HRU will explore opportunities to publicise the Toolkit to community sector groups to enable them to more effectively implement HRA obligations in organisational policy, practice and service delivery.

Similarly, in response to the five-year review Report's recommendation that the opt-in provision be promoted more widely, the Government said that:<sup>12</sup>

[JACS ] will prepare a web-based information sheet, to form part of the human rights related resources maintained by the HRU. The information sheet would set out how the opt-in scheme works, clarify the procedure required to be followed if an entity is seeking to opt-in and explain the benefits of opting in. This information sheet will be able to be circulated to community sector organisations which have capacity to distribute it more broadly to other interest groups and organisations. It could also be circulated to private industry through, for example, the ACT Business Council.

Almost three years later, these materials have not yet been made available, and regrettably, the current Review Report provides no update on these matters. It is also unfortunate that JAC's online presence is represented in the main by HR Act publications that were developed some ten years ago, and which are no longer current. Similarly, the links to comparative case law and resources have not been updated to include later developments such as the introduction of the Victorian Charter or the Commonwealth *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Commissioner considers that it remains important for the Government, and JACS in particular, to address the continued lack of systematic education inside the bureaucracy and to play a role in disseminating knowledge about the operation of the HR Act more broadly where appropriate. In this regard, the Commissioner considers that the ACT Government Solicitor can also be an important resource. As stated in successive Annual Reports, the ACTGS 'is at the forefront of a growing jurisprudence in relation to human rights in Australia and maintains a strong engagement with practitioners and academics in this developing area.' It would therefore be ideally placed to share its expertise more broadly, for example, via an online presence, similar to its Victorian counterpart, by providing short updates on legal developments that may affect agencies' program or policy planning.

---

<sup>12</sup> Ibid, pp 9-10.

## Human Rights Commissioner

---

The ACT Human Rights Commission (the Commission) is an independent statutory agency established by the Human Rights Commission Act 2005 (the HRC Act). The HRC Act establishes five members of the Commission:

- The Children & Young People Commissioner
- The Disability & Community Services Commissioner
- The Discrimination Commissioner
- The Health Services Commissioner
- The Human Rights Commissioner

Three people are currently appointed to cover the work of the five positions:

- Mary Durkin: Disability & Community Services Commissioner, and Health Services Commissioner
- Alasdair Roy: Children & Young People Commissioner
- Helen Watchirs: Discrimination Commissioner, and Human Rights Commissioner

The Commission operates from a model of collegiality, and does not have an administrative head. All three Commissioners have equal seniority and decision making authority within the Commission.

The Human Rights Commissioner has various functions in relation to the *Human Rights Act 2004*, including:

- Providing community education and information about human rights;
- Reviewing the effect of ACT laws on human rights; and
- Advising the Attorney-General on the operation of the HR Act.

The Human Rights Commissioner may also intervene, with the leave of the court, in any legal proceedings which relates to the application of the HR Act. The Commissioner, however, does not have any jurisdiction to handle individual cases of human rights breaches. The issue of conferring a complaints handling function on either the Commission or the ACT Ombudsman was canvassed in the five-year review of the HRA. The five-year report noted that such a function would complement the direct right of action to the Supreme Court under s 40C of the HRA. The Commissioner continues to support in-principle the allocation of a complaints handling role to the Commission, particularly in light of the under-utilisation of the direct right of action in the HR Act (see discussion above).

The table below provides some brief highlights of the Commissioner's work over the last decade. Please note that it is not an exhaustive list. Some of this work was undertaken jointly between the Human Rights Commissioner and other Commissioners at the HRC.

## Work of the Office of the Commissioner for Human Rights - Highlights

<b>2004</b>	<p><b>Advice on Commonwealth Anti-Terrorism Proposals</b></p> <ul style="list-style-type: none"> <li>Utilised by the ACT Government in discussions with the Commonwealth about the breadth of the proposed limits on rights.</li> </ul>
<b>2005</b>	<p><b>Human Rights Audit of the Quamby Youth Detention Centre</b></p> <ul style="list-style-type: none"> <li>Changes to management policies and practices at the Centre.</li> <li>Informed new Children and Young People Act.</li> <li>Influenced design of new, more Human Rights compliant Bimberi Youth Detention Centre.</li> </ul> <p><b>Submissions made on Electroconvulsive Therapy (ECT)</b></p> <ul style="list-style-type: none"> <li>Ensured that the threshold for emergency ECT is 'immediate necessity' where the person's life is at serious risk'.</li> <li>ECT not to be used on children aged under 16 yrs.</li> </ul>
<b>2006</b>	<p><b>Advice on Terrorism (Extraordinary Temporary Powers) Act 2006</b></p> <ul style="list-style-type: none"> <li>Judicial overview and review of detention</li> <li>No torture evidence.</li> <li>Higher threshold for making Preventative Detention Orders (PDO), a power for police to detain terror suspects where such detention is to prevent threat of imminent attack or protect vital evidence. Other changes included a shorter duration of interim PDOs, No rolling PDOs.</li> <li>Increased provision of information to accused.</li> <li>Presumed confidential communication between accused and legal representative.</li> <li>A human rights training requirement for Australian Federal Police Officers.</li> </ul> <p><b>Submission to the 12-month review of the Human Rights Act 2004 including on the question of possible direct application of the HR Act to public authorities.</b></p>
<b>2007</b>	<p><b>Human Rights Audit into Adult Correctional Centres</b></p> <ul style="list-style-type: none"> <li>changes also to the treatment of women detainees, and in particular, a significant reduction in routine strip searching.</li> <li>informed design of new, more Human Rights based detention centre (and prison), Alexander Maconochie Centre.</li> </ul> <p><b>Advice the Chief Minister on discrimination &amp; human rights implications of Commonwealth emergency measures in NT Indigenous communities.</b></p>
<b>2008</b>	<p><b>Submission on mandatory roadside Drug testing.</b></p> <p><b>Submission on the Sexual and Violent Offences Legislation Amendment Bill 2008.</b></p>

2009	<p>World AIDS Day community survey on discrimination.</p> <p>National push to impose serious limitations on civil liberties to curb Outlaw Motorcycle Gangs.</p> <ul style="list-style-type: none"> <li>Released views that the proposals went too far, and didn't achieve their aim.</li> </ul> <p>Developed new education package and materials to explain new obligations on Public Authorities, including forum with senior executives.</p> <p>Submission to the Commonwealth Government's national human rights consultation.</p> <p>Advice to the Attorney-General on the Motor Vehicle Insurance Act.</p>
2010	<p>Intervention in court proceedings</p> <ul style="list-style-type: none"> <li>Compensation paid for wrongful detention and legislation improved.</li> </ul> <p>Advice on Gender Identity</p> <ul style="list-style-type: none"> <li>Recommendations on changes to ACT law, particularly to Births, Deaths and Marriages Act to ensure that people can have the gender of their choice (including non-binary genders) properly recorded. Ultimately supported in change to legislation.</li> </ul> <p>Submission to Joint ANU-ACT Government ARC Linkage Grant project Review of ACT Human Rights Act</p> <ul style="list-style-type: none"> <li>Contributed to ACT Government's decision to add Right to Education to ACT Human Rights Act (added in 2013).</li> </ul> <p>Advice to Attorney-General on Gender Diversity and the <i>Births, Deaths and Marriages Registration Act 1997</i>.</p>
2011	<p>Human Rights Audit of the Bimberi Youth Justice Centre as part of corresponding Review of the Youth Justice System by Children and Young People Commissioner</p> <ul style="list-style-type: none"> <li>found improved practice as a result of recommendations implemented from Quamby Audit.</li> <li>ACT Government ultimately adopted recommendations, resulting in decrease in numbers of young people in custody, and better treatment of those who are.</li> </ul> <p>Submission to the ACT Government Consultation on economic, social and cultural rights.</p> <p>Submission to the ACT Government's consultation on the ANU's Five-Year Review Report.</p>
2012	<p>Series of advices to Government about inadequacy of ACT anti-vilification law.</p> <p>Submission to the Commonwealth Attorney-General's Office consultation on the consolidation of Commonwealth Anti-Discrimination Laws.</p>
2013	<p>Submission on Review of Discrimination Act by Law Reform Advisory Committee.</p> <p>Submission to the 2013 Draft Model of Care for the new ACT Secure Mental Health Unit.</p>

	Submission to Shane Rattenbury MLA regarding criminal law amendments in relation to drug offences.
2014	<p><b>Human Rights Audit of the Womens Area of the Alexander Maconochie Centre</b></p> <ul style="list-style-type: none"><li>• Found cultural change compared to old BRC, and women treated humanely.</li><li>• Recommended better rehabilitation, employment and education options for women.</li><li>• Recommended a transitional release facility for women preparing to leave AMC.</li><li>• Government response supported all but seven of the recommendations.</li></ul> <p><b>Intervention in court proceedings</b></p> <ul style="list-style-type: none"><li>• Argued that all courts and tribunals should consider if ACT Government directorates have acted and made decisions consistent with human rights.</li></ul> <p><b>Submissions to Review of Mental Health Treatment and Care Act 1994</b></p> <ul style="list-style-type: none"><li>• Assisted in the development of a new Mental Health Act, leading to more human rights compliant mental health treatment, in a range of areas, particularly in relation to involuntary mental health treatment. The new Act includes a strong emphasis on a person's capacity to consent to treatment, with a presumption that everyone has such capacity.</li></ul>

## Economic, Social and Cultural Rights

---

### Right to education

The *Human Rights Act 2004* was amended in 2012 to include a partial right to education in new s 27A, which commenced operation on 1 January 2013. The right included was essentially a right to non-discrimination with regard to access to primary, secondary, and further education, which, for all relevant purposes, was already covered by the equality rights in s 8 of the HR Act, along with the right of parents to choose schooling to ensure the religious and moral education of their child, which is right that is recognised under the International Covenant on Civil and Political Rights in accordance with the right to religious freedom (guaranteed in s 14 of the HR Act). The Attorney-General noted that:

Whilst some may characterise it as modest, what we are doing tonight is a significant reform in the Australian human rights landscape. We will become the first jurisdiction to formally provide for the protection and recognition under law of a right to education in a human rights piece of legislation. It is a significant step, an important step in advancing potentially a range of other economic, cultural and social rights in time into a statutory form.<sup>13</sup>

The Attorney-General also noted that the limited amendment was consistent with the incremental approach towards greater rights protection that had been taken in the ACT, and that the issue would be revisited in two years.

The Commissioner therefore welcomes the proposal in the Review Report to extend the public authority obligations in Part 5 of the HR Act to the right to education. The Report, however does not propose to amend s 27A to better reflect the content of our obligations under international law, without any substantive consideration of the issues. No explanation is provided for this decision, but the Report mentions that the *Education Act 2004* already provides for free education (with certain exceptions). It is not clear whether this means that it is therefore unnecessary to revise the content of s 27A of the HR Act, or if there are separate concerns about expressly recognising the full right in the HR Act. The reasons for dismissing this proposal should be fully canvassed as part of the forthcoming consultation process.

The Review Report refers to the practice of the Education and Training Directorate charging International Students to attend public schools. The Commissioner has, since 2009, reported to ETD its concerns with these policies. The Commissioner is currently completing an own-motion Review on this subject, and has already provided a draft final copy to Government. That Report will elaborate on the Commissioner's concerns. However, at this point, it appears that references in the Report to the cost of waivers to Government are unhelpful, as they do not take into the true cost/benefit analysis of public education. In particular, such figures do not take account the negative impact on the community of students not enrolling in school because of these policies. These figures are also somewhat arbitrary, as the Government spends hundreds of millions of

---

<sup>13</sup> Attorney-General Simon Corbell, ACT Legislative Assembly, *Parliamentary Debates*, 22 August 2012, 3313.



dollars a year on public education, yet this investment is apparently not perceived as 'lost revenue' because of the benefits free education brings to the community. This creates the perception that certain international students should not also be provided with the opportunity to reach their potential and contribute meaningfully to their new home because of their visa status, including asylum seekers who have fled persecution (and are not exempted from fees until they are granted a refugee visa). It is also imperative that the community understands that this policy does not require fees from comparatively wealthy international students, such as diplomats' children, which raises clear issues of equity.

Examining such issues through a human rights lens often also reveals the economic benefit education and other economic, social and cultural rights bring to a society. The economic benefits of all human rights law are discussed further below.

## Right to housing

The Review Report does not support extending the HR Act to include the right to housing, which would appear to be contrary the Government's election commitments to legislate in this regard.

The Review Report argues against including the right to housing on the basis that the right is already provided in ACT legislation and because of the possible implications on resourcing and the operation of housing strategies and policies. The decision to exclude the right to housing appears to be largely based on a series of assertions which are not supported by reference to any relevant evidence. These arguments also appear contradictory, as it is not clear why legislating a right already protected through existing legislation would lead to a significant new resource cost.

Given that consideration of the right to housing forms a key part of the Review's terms of reference, the Commissioner recommends that the Government should provide a more detailed explanation of the basis of the position taken in the Report, including the relevant evidence that was taken into account, as part of its broader consultations.

It would also be helpful to explain why there is no consideration, for example, of introducing a right to housing that is limited to the Government's immediate obligations in the first instance, particularly if it is considered that these obligations are already being met through existing legislation. As previous Reviews of the HR Act have shown, providing for the express recognition of rights is beneficial for a number of reasons, not least for its ability to improve legislative, policy and decision-making processes.

## Other ESC rights

The Review Report's treatment of whether the HR Act should include other ESC rights falls short of satisfying the terms of reference of the Review, which requires consideration of whether 'other economic, social and cultural rights should be included in [the HR] Act.' Instead, the Report essentially reiterates the Government

position which was set out in the response to the ANU report two years ago, and does not include any consideration of more recent evidence.

In the last two years, there have been notable developments at the Commonwealth level with regard to these issues, and the Commissioner had recommended that these matters be considered in light of those experiences. However, the Report does not mention or seek to draw any lessons from the Commonwealth scrutiny model, which requires statements of compatibility and systematic scrutiny by Parliament with regard to the full suite of ESC rights.

In the Commissioner's view, it will be important for the consultation process to include consideration of the viability of introducing a staged process for the recognition of additional ESC rights, which, for example, focused initially on pre-legislative scrutiny requirements, without imposing any related obligations on public authorities or creating any new role for the courts, as occurred in relation to the new right to education.

### ***Economic Outcomes***

A theme throughout the Review Report is the economic cost of change. However, no discussion is included on the economic costs of not acting, or the economic benefits of human rights law. Academic studies have shown that:

... many countries that demonstrate a higher respect for human rights experience higher economic growth.<sup>14</sup>

The Herbertson report cites research which found that the World Bank Group's investments in countries with the strongest civil liberties, such as freedom of speech and association, have an economic rate of return 8 to 22% points higher than in countries with the weakest civil liberties.<sup>15</sup> As Seymour and Pincus have also noted:

But the theoretical proposition that slavery, arbitrary arrest, restrictions on mobility, starvation and illiteracy do not undermine the social, political and legal bases of the market economy departs from a particularly blinkered understanding of the development of capitalism.<sup>16</sup>

Many of the other arguments put forward on 'economic grounds' are unsubstantiated. The suggestion that there will be 'uncertainty for investors' from the introduction of the right to housing is not immediately clear to us. Obligations for a right to housing will only be on public authorities (eg not private investors) and it highly unlikely that any interpretation of existing law through the lens of the right to housing would alter the current

---

<sup>14</sup> Kirk Herbertson, Kim Thompson and Robert Goodland, 'A Roadmap for Integrating Human Rights into the World Bank Group', World Resources Institute Report, 2010.

<sup>15</sup> Isham, Kaufmann, and Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects," World Bank Economic Review (Oxford: Oxford University Press, 1997), vol. 11, no. 2, p. 234.

<sup>16</sup> Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity', *Developmental Policy Review*, 2008, 26(4) 387-405, 400.

rules of evictions to any significant extent. It is incorrect to claim that the right to housing would lead to more discrimination claims to the Commission. The addition of the right to education has not led to such an increase, and, in recent years, the numbers of discrimination complaints made to the Commission has decreased. As Seymour and Pincus have noted:

Welfare economists are attracted to user fees because people tend to overconsume freely provided goods and services, resulting in scarcity, queues and misallocation. But human rights protagonists argue that some kinds of services, like health and education, are qualitatively different from others. Electricity and water are not the same as primary education. The point is not that a human rights framework provides an incontestable answer to the problem of achieving equity and efficiency in the provision of basic services, but that the combined application of positive economics and a normative human rights framework is superior to either approach taken in isolation. Economics helps us to understand some of the behavioural consequences of policy choices. Human rights provide the best available framework against which to judge those choices. Neither on its own is adequate for decision-making.<sup>17</sup>

---

<sup>17</sup> Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity', *Developmental Policy Review*, 2008, 26(4) 387-405, 403.



**HUMAN RIGHTS  
COMMISSION**

## **ACT Human Rights Commission**

# **Submission to the National Human Rights Consultation**

**15 June 2009**

## Glossary

<b>ACT HRA</b>	<b><i>Human Rights Act 2004 (ACT)</i></b>
<b>AHRC</b>	<b>Australian Human Rights Commission</b>
<b>CAT</b>	<b>Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment</b>
<b>CEDAW</b>	<b>Convention on the Elimination of all forms of Discrimination against Women</b>
<b>CERD</b>	<b>Convention on the Elimination of all forms of Racial Discrimination</b>
<b>Commission</b>	<b>ACT Human Rights Commission</b>
<b>ACT Consultative Committee</b>	<b>ACT Bill of Rights Consultative Committee</b>
<b>CRC</b>	<b>Convention on the Rights of the Child</b>
<b>CRPD</b>	<b>Convention on the Rights of Peoples with Disabilities</b>
<b>ECHR</b>	<b>European Convention on Human Rights</b>
<b>HRC Act</b>	<b><i>Human Rights Commission Act 2005 (ACT)</i></b>
<b>ICESCR</b>	<b>International Covenant on Economic Social and Cultural Rights</b>
<b>ICCPR</b>	<b>International Covenant on Civil and Political Rights</b>
<b>NZ Bill of Rights</b>	<b><i>Bill of Rights Act 1990 (NZ)</i></b>
<b>UDHR</b>	<b>Universal Declaration of Human Rights</b>
<b>UKHRA</b>	<b>Human Rights Act 1998 (UK)</b>
<b>Victorian Charter</b>	<b>Charter of Rights and Responsibilities 2006 (Vic)</b>

# Table of Contents

<b>A</b>	<b>Recommendations.....</b>	<b>4</b>
<b>B</b>	<b>Background .....</b>	<b>7</b>
<b>B.1</b>	<b>About the ACT Human Rights Commission .....</b>	<b>7</b>
<b>B.2</b>	<b>The Commission’s function with respect to human rights .....</b>	<b>7</b>
<b>B.3</b>	<b>Background to the introduction of the ACT Human Rights Act 2004.....</b>	<b>8</b>
a	Nature of the HR Act .....	9
b	The views of the ACT Community and ACT public service on the HR Act .....	9
<b>C</b>	<b>Which human rights should be protected and promoted? .....</b>	<b>11</b>
<b>C.1</b>	<b>A broad consideration of rights, including rights in the ICCPR and ICESCR.....</b>	<b>11</b>
a	Rights in other treaties should be considered broadly.....	12
b	The importance of including economic, social and cultural rights .....	12
c	The importance of including the rights of the child .....	15
<b>C.2</b>	<b>ACT’s experience: civil and political rights.....</b>	<b>16</b>
a	The question of responsibilities.....	18
<b>D</b>	<b>Are these human rights currently sufficiently protected and promoted? .....</b>	<b>20</b>
<b>D.1</b>	<b>Rights are not adequately protected at a Federal level .....</b>	<b>20</b>
a	Non-citizens are particularly vulnerable to human rights violations.....	21
<b>D.2</b>	<b>State and Territory level.....</b>	<b>23</b>
<b>E</b>	<b>How could Australia better protect and promote human rights? .....</b>	<b>26</b>
<b>E.1</b>	<b>A Federal Human Rights Act .....</b>	<b>26</b>
<b>E.2</b>	<b>What rights should a Federal Human Rights Act protect? .....</b>	<b>28</b>
<b>E.3</b>	<b>Who would the human rights protection apply to? .....</b>	<b>28</b>
<b>E.4</b>	<b>How would national legislation sit with State and Territory laws? .....</b>	<b>28</b>
<b>E.5</b>	<b>Constitutional issues .....</b>	<b>29</b>
<b>E.6</b>	<b>How would the legislation operate?.....</b>	<b>30</b>
a	Limiting rights .....	30
b	Obligations on public authorities .....	32
c	Cabinet decisions.....	34
d	Joint committee on human rights .....	34
e	Compatibility of bills with human rights.....	35
f	Interpretation of laws.....	36
g	Intervention in cases where human rights issues are raised.....	37
h	Remedies for breaches of human rights.....	37
i	Auditing laws for human rights compliance .....	41
j	Periodic reviews of the Federal Human Rights Act .....	42
k	Examples of how human rights legislation develops a human rights culture .....	42
I	Better protection and promotion of human rights in parliament .....	42
II	Better protection and promotion of human rights in government .....	49
III	Better protection and promotion of human rights in the courts .....	53
IV	Human rights in advocacy.....	56
<b>E.7</b>	<b>Complementary measures to accompany human rights legislation.....</b>	<b>58</b>
a	Community human rights education .....	58
b	Increased support for community advocacy organisations.....	59
c	Enhanced support for the Australian Human Rights Commission .....	59
d	Other legislative measures .....	60

## **Annexures**

Annexure 1: ACT Human Rights Commission's functions with respect to human rights

Annexure 2: ACT Human Rights Act Consultation Process

Annexure 3: ACT Human Rights Commission Survey of ACT Government

Annexure 4: ACT Human Rights Commission Survey of the ACT Community

Annexure 5: How rights protection can benefit children and young people

## A Recommendations

<b>Recommendation 1</b>	<p><b>A Federal Human Rights Act</b></p> <p>The Federal Government should introduce a Federal Human Rights Act in Australia.</p>
<b>Recommendation 2</b>	<p><b>Broad coverage of rights protected</b></p> <p>A Federal Human Rights Act should protect the rights Australia is obliged to protect at international law, including the rights in the ICCPR and ICESCR.</p>
<b>Recommendation 3</b>	<p><b>Rights for all, including children and young people</b></p> <p>Rights should apply to everyone within Australia’s jurisdiction, regardless of citizenship status.</p>
<b>Recommendation 4</b>	<p><b>A Federal Human Rights Act should have comprehensive coverage, subject to constitutional considerations</b></p>
<b>Recommendation 5</b>	<p><b>Differentiating between absolute and non-absolute rights</b></p> <p>A Federal Human Rights Act should state which rights are non-derogable and which rights can be subject to reasonable limitations.</p>
<b>Recommendation 6</b>	<p><b>General limitation clause</b></p> <p>A Federal Human Rights Act should contain a general limitation clause setting out a test for determining whether a limitation on rights is reasonable, similar to s.28 of the ACT HR Act</p>
<b>Recommendation 7</b>	<p><b>No override clause</b></p> <p>A Federal Human Rights Act need not include an ‘override provision’ to introduce legislation that is not consistent with human rights.</p>
<b>Recommendation 8</b>	<p><b>Obligations on public authorities</b></p> <p>8.1 A Federal Human Rights Act should contain an obligation on public authorities to act and make decisions in accordance with human rights, similar to s.40B of the ACT HR Act.</p> <p>8.2 The term ‘public authority’ should be drafted broadly to capture entities performing functions of a ‘public nature’, as reflected in s.40A of the ACT HR Act.</p> <p>8.3 A Federal Human Rights Act should include a direct right of action to court for someone who alleges that a public authority has breached their human rights, similar to s 40C of the <i>ACT Human Rights Act 2004</i>.</p> <p>8.4 An ‘opt in’ provision should be included in a Federal Human Rights Act to enable the non-government sector, to be involved in promoting, protecting and respecting human rights in Australia.</p>
<b>Recommendation 9</b>	<p><b>A Joint Parliamentary Committee on Human Rights</b></p> <p>A Joint Parliamentary Committee on Human Rights should be established to review existing, draft or proposed laws for compliance with human rights. The Committee should have all the powers of existing parliamentary committees, including the ability to conduct inquiries and hearings and accept written and oral submissions.</p>



<p><b>Recommendation 10</b></p>	<p><b>Statements of compatibility</b></p> <p>The Attorney-General should be required to table a detailed statement of compatibility setting out whether all bills complies with the Federal Human Rights Act, with a detailed statement of reasons.</p>
<p><b>Recommendation 11</b></p>	<p><b>Interpretation of laws</b></p> <p>11.1 A Federal Human Rights Act should contain an interpretative provision that requires anyone interpreting laws to do so in a way that is consistent with human rights, similar to s.30 of the ACT HR Act.</p> <p>11.2 If a Court makes a finding of inconsistency, the Attorney-General must table the document in parliament promptly and table a written response in parliament within 6 months of receiving the document, similar to provisions under s.33 of the ACT HR Act.</p>
<p><b>Recommendation 12</b></p>	<p><b>A broad range of remedies including damages where appropriate</b></p> <p>12.1 A Federal Human Rights Act should enable courts to award limited damages for breaches of human rights in cases where no other remedy is, of itself, appropriate.</p> <p>12.2 A Federal Human Rights Act should include cost provisions based on the presumption that parties bear their own legal costs in proceedings.</p>
<p><b>Recommendation 13</b></p>	<p><b>Human rights complaint handling function</b></p> <p>A conciliation-based human rights complaint handling mechanism should be established for civil human rights complaints. This function would best be performed by the Australian Human Rights Commission with additional resources. Complainants will also still have the option to take claims to court if resolution fails, or simply initiate court proceedings directly.</p>
<p><b>Recommendation 14</b></p>	<p><b>Power to conduct human rights audits</b></p> <p>A Federal Human Rights Act should include provision for the AHRC to review the effect of laws (including the common law) on human rights and report in writing to parliament.</p>
<p><b>Recommendation 15</b></p>	<p><b>Essential measures to complement human rights legislation</b></p> <p>15.1 Human rights education specifically targeting public officials, the legal profession, the judiciary, and community organisations is needed to ensure that there is widespread understanding of human rights and the operation of the legislation.</p> <p>15.2 Additional funding is required for community advocacy organisations and State and Territory Legal Aid Commissions and Community Legal Centres specifically for assisting to deal with human rights complaints.</p> <p>15.3 It is important that the AHRC is appropriately funded to enable it to carry out tasks necessary to develop a human rights culture – including human rights education, human rights auditing, and handling human rights complaints.</p>
<p><b>Recommendation 16</b></p>	<p><b>Other legislative measures</b></p> <p><b>The position of National Children and Young People Commissioner should be created. A Federal Equality Act should be introduced</b></p>

## **B Background**

### **B.1 About the ACT Human Rights Commission**

1. The ACT Human Rights Commission ('the Commission') is an independent agency established under the *Human Rights Commission Act 2005* (ACT) ('HRC Act'). The objects of the HRC Act include the promotion of the human rights and welfare of people living in the ACT by making recommendations to government and non-government agencies on legislation, policies, practices and services that affect vulnerable groups in the community.
2. The Commission comprises of three Commissioners:
  - Human Rights and Discrimination Commissioner, Dr Helen Watchirs;
  - Children and Young People Commissioner, Mr Alasdair Roy; and
  - Health Services Commissioner and Disability Services Commissioner, Ms Mary Durkin.
3. The Commission differs from the role and function of the Australian Human Rights Commission ('AHRC'). Whilst the AHRC has separate Commissioners performing responsibilities pursuant to the Sex, Age and Race Discrimination Acts and Human Rights and Equal Opportunity Act, in the ACT the Human Rights and Discrimination Commissioner performs all functions relating to human rights and discrimination. The other two ACT Commissioners promote the rights of users of disability services, health services, services for children and young people and services for older people. In other jurisdictions, the services review and complaints functions of the Health Services Commissioner, Disability Services Commissioner and the Children and Young People Commissioner are handled by separate entities to the bodies responsible for human rights and discrimination matters, whereas in the ACT all three Commissioners perform functions within one entity: the ACT Human Rights Commission.
4. The Commission employs the equivalent of approximately 17 full-time staff. Of these, there is the equivalent of 4.2 staff on carrying out the human rights and discrimination functions of the Commission outlined below. The Commission has a statutory oversight role in respect of service provision to people with disabilities and their carers, older people, children and young people and their carers, and health consumers. The Commission also handles discrimination complaints under the HRC Act and the *Discrimination Act 1991* (ACT), under a conciliation based complaints resolution model. Discrimination complaints that are not resolved through the Commission's processes may proceed by referral to the ACT Civil and Administrative Tribunal.

### **B.2 The Commission's function with respect to human rights**

5. The Commission has a number of functions relating to human rights, derived from the HRC Act and the *Human Rights Act 2004* (ACT) ('HR Act'). These are to:
  - provide education about human rights and the HR Act;<sup>1</sup>

---

<sup>1</sup> HRC Act, sections 27(2), 14(1)(d).

- advise the Attorney-General on anything relevant to the operation of the HR Act;<sup>2</sup>
  - collect information about the operation of the ACT HR Act and publish the information;<sup>3</sup>
  - review the effect of Territory laws (including the common law) on human rights and report to Attorney General;<sup>4</sup> and
  - intervene (with leave) in the court proceedings that involve the application of the HR Act.<sup>5</sup>
6. The statutory functions of the Commission with respect to human rights, with examples are summarised in Annexure 1.
7. The Commission is specifically required to act in accordance with the rights in the HR Act, when exercising a function.<sup>6</sup> However, the Commission is also generally required to act and make decisions in accordance with human rights from amendments taking affect on 1 January 2009.<sup>7</sup> For further details on the ‘public authority’ obligation, see heading E.6 below.

### **B.3 Background to the introduction of the ACT Human Rights Act 2004**

8. In April 2002 the ACT Chief Minister and then Attorney General Jon Stanhope appointed an ACT Bill of Rights Consultative Committee (‘ACT Consultative Committee’) chaired by Professor Hilary Charlesworth, to inquire into whether the ACT should adopt some form of bill of rights. Further background on the consultation process is outlined in Appendix 2. In May 2003, the ACT Consultative Committee presented its report recommending that the ACT adopt a bill of rights in the form of a Human Rights Act. The Government enacted a Human Rights Act in March 2004, although it did not adopt all recommendations in relation to the proposed form the Act should take.
9. The ACT HR Act came into force on 1 July 2004. The ACT HR Act protects most of the rights in the ICCPR with minor amendments. Some rights in the ICCPR were omitted including:
- Article 1, the right of peoples to self-determination (on the grounds that this is a group rather than individual right);
  - Article 20, the prohibition on propaganda for war and national, racial or religious hatred (vilification provisions in ACT discrimination legislation were considered to adequately cover this area); and
  - Article 22, the right to form trade unions (a matter that falls to the Commonwealth to regulate).<sup>8</sup>

---

<sup>2</sup> HRC Act, sections 14(1)(h), 27(2).

<sup>3</sup> HRC Act, sections 14(1)(h).

<sup>4</sup> ACT HR Act, section 41(1).

<sup>5</sup> ACT HR Act, section 36.

<sup>6</sup> HRC Act, section 15.

<sup>7</sup> ACT HR Act, section 40B.

<sup>8</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, ‘Bills of Rights in Australia – history, politics and law’ (2008) 81.

10. The new Museum of Australian Democracy at Old Parliament House has a 10-year exhibit 'Australian Democracy – more than 2000 years in the making' that opened on 9 May 2009 which features the ACT HR Act.

**a Nature of the HR Act**

11. The ACT HR Act is a 'dialogue model' of human rights legislation and aims to promote respect for human rights in legislation and policy through stimulating a 'dialogue' between the executive, the legislature and the courts as well as with the community.<sup>9</sup> The ACT HR Act included provision for a mandated review after one and five years of operation. The one year review was conducted, and in mid-2006 the Attorney-General Simon Corbell released the *12 Month Review of the Human Rights Act*. As a result of recommendations in this review, the *Human Rights Amendment Act 2008* ('HR Amendment Act') was passed on 4 March 2008 and made several important changes to the Act. Three provisions that came into force on 18 March 2008 include:
- introducing an express proportionality test for limiting rights (s.28(2), HR Act);
  - a clearer interpretation provision (s.30, HR Act); and
  - stronger notification provision, requiring both the Attorney-General and the Commission to be notified if a question in relation to the ACT HR Act is raised in a Supreme Court proceeding, or if the Court is considering making a declaration of incompatibility (s.34, HR Act).
12. The most significant amendments introduced by the HR Amendment Act was the direct obligation on public authorities to act consistently with human rights, contained in s.40B, and the direct right of action to the ACT Supreme Court for victims of human rights violations for alleged breaches by public authorities under s.40C. These two new provisions came into force on 1 January 2009 and strengthened the HR Act, as recommended by the ACT Consultative Committee in 2003, to a level comparable to the UK HRA and Victorian Charter (although the latter does not provide a direct right of action to the Supreme Court for violation).
13. A detailed consideration of the operation and impact of the ACT HR Act on protecting human rights in the ACT is included in Part E.6 of this submission.

**b The views of the ACT Community and ACT public service on the HR Act**

14. Although there was some opposition to the introduction to the HR Act, the report of the ACT Consultative Committee and results of a Deliberative Poll that was conducted to gauge the views of Canberrans (see Appendix 1) indicated strong support for the ACT HR Act at its introduction in 2004. Five years after the commencement of the HR Act, the Commission's perception is that community support for the ACT HR Act remains strong. This view is based on the media (for example, feature articles and letters to the editor in the Canberra Times and on talkback radio) and the Commission's interaction with the community at community education and outreach sessions, and at community events and forums. The Commission's Human Rights Online Survey of ACT Government ('Government Survey') (249 respondents, see Appendix 3) and Human Rights Online Survey of the ACT Community ('Community Survey') (100 respondents, see Appendix 4) support

<sup>9</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Bills of Rights in Australia – history, politics and law' (2008) 79.

this assessment. For example, 84.5% of respondents to the Community Survey and 81.0% of respondents to the Government Survey stated that they felt 'positive' about ACT having the HR Act. One respondent to the Community Survey commented:

'I feel proud that the ACT is one of the leading jurisdictions in promoting and legislating human rights. Having been an advocate for 4 years I know the usefulness of having the Act in place for meeting the needs of vulnerable people in the ACT.'

15. However, some survey respondents made comments that touched on the issue of the ACT having legislation without national human rights legislation. For example, respondents to the Community Survey stated:

'I think [the HR Act] sets a great example to the rest of the country, and I hope one day the Federal Constitution may adopt something like it.'

'[the ACT HR Act is] ...much needed – wish more Australian legislatures were developing the same kind of instrument.'

16. One respondent to the Community Survey responded to a question on their perceptions of the ACT HR Act by stating '*It would be better with ICESCR rights!*'. The issue of which rights should be protected in human rights legislation, at a national level is addressed in the next section.

## C Which human rights (including corresponding responsibilities) should be protected and promoted?

### C.1 A broad consideration of rights, including rights in the ICCPR and ICESCR

17. All of the human rights obligations that Australia has entered into at international law should be protected by domestic law in Australia. As a starting point, the rights in the two major international human rights treaties that Australia is a party to, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), should be enforceable in legislation. Together ICCPR and ICESCR reflect the rights in the UN Universal Declaration of Human Rights (1948), and together, these three documents are considered the international 'bill of rights'. The distinction between ICCPR rights and ICESCR rights is somewhat artificial, as it was influenced by historical political divisions when the treaties were drafted during the Cold War. Australia has also signed up to specific treaties which further develop the scope of protection of specific rights in vulnerable populations, namely the:

- Convention on the Elimination of all forms of Racial Discrimination ('CERD');<sup>10</sup>
- Convention on the Elimination of all forms of Discrimination against Women ('CEDAW');<sup>11</sup>
- Convention Against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').<sup>12</sup>
- Convention on the Rights of the Child ('CRC');<sup>13</sup>
- Convention on the Rights of Persons with Disabilities ('CRPWD');<sup>14</sup>

Australia ratified these treaties and hence is bound at international law to uphold them. These obligations entail a three-fold duty: to respect – abstaining from interference; to protect – preventing other's interference; and to fulfill – taking the measures necessary to ensure realization.<sup>15</sup> From this comes an obligation to take action to implement the rights in domestic law, and there is currently no Federal legislation that provides comprehensive protection for these rights.

<sup>10</sup> Opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

<sup>11</sup> Opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>12</sup> Opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>13</sup> Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>14</sup> Opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

<sup>15</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add13 (2004). See also A Eide, 'Economic, Social and Cultural Rights as Human Rights' in A Eide, C Krause and A Rosas (eds), *Economic, Social and Cultural Rights* (1995) 21 at 37-8. Eide's typology was developed in the Report by the Special Rapporteur on the Right to Food *The New International Order and the Promotion of Human Rights*, UN ESCOR, 39<sup>th</sup> Session, UN Doc. E/CN.4/Sub.2/23, para 71 (1987).

**a Rights in other treaties should be considered broadly**

18. Human Rights are universal, inherent, inalienable and indivisible.<sup>16</sup> Rights in the ICCPR should not be seen as more important or more relevant than the rights in the ICESCR. Newer treaties such as the CRC and CRPD do not distinguish between categories of rights, and nor should any mechanism for human rights protection in Australia. The Commission's view is that a broad approach should be adopted in considering which rights should be protected in Australia, including in legislative form. It is important to consider rights in the newer treaties, because in many cases, these rights provide important detail or supplement rights in the ICCPR and ICESCR.
19. The broad range of rights outlined above should be protected by law in Australia. This would improve rights protection for those within Australia's jurisdiction, allow Australia to fulfill international obligations and enable Australia to lead by example in the area of international affairs. This is especially important in the Asia-Pacific as we are the only region without a human rights regime, and our neighbours rely on our expertise and aid program assistance.

**b The importance of including economic, social and cultural rights**

20. Under the ICCPR, rights are framed in stronger language of obligation and must be implemented immediately,<sup>17</sup> and the Optional Protocol to the ICCPR provides for individual complaints to be made to the Human Rights Committee. Under the ICESCR, obligations are less emphatic and sometimes obscure, rights are more open textured,<sup>18</sup> and must be achieved progressively to the maximum of a State Party's resources.<sup>19</sup> This means to:
- 'take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'<sup>20</sup>
21. Notwithstanding the principle of 'progressive realisation', the UN Committee on Economic, Social and Cultural Rights has commented on the lack of legal protection of economic, social and cultural rights in Australia:
- 'In spite of existing guarantees pertaining to economic, social and cultural rights in the State party's domestic legislation, the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions.'<sup>21</sup>
22. The Committee strongly recommended that Australia take measures to ensure ESC rights are legally protected. In addition to enacting Federal human rights legislation to

<sup>16</sup> See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 14-25 June 1993, A/CONF.157/24 (Part I), Chapter III.

<sup>17</sup> Article 2, ICCPR.

<sup>18</sup> Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996), 15.

<sup>19</sup> Article 2, ICESCR.

<sup>20</sup> ICESCR, Article 2.1.

<sup>21</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000. E/C.12/1/Add.50, 15.

- protect ESC rights, Australia should sign the Optional Protocol to the ICESCR in 2009.<sup>22</sup>
23. It is important to note that people who experience violations of economic, social or cultural rights often also have limited capacity to exercise their civil and political rights. The Commission has had contact with many vulnerable members of the community who continue to experience these difficulties, and in many cases it is related to homelessness or lack of adequate housing.<sup>23</sup>
24. Some argue that legislative protection of economic, social and cultural rights is untenable because it requires courts to make policy judgments second guessing government decisions about allocation of resources. However it is important to acknowledge in this regard that under the common law judges often formulate law and policy. Changes to the common law can also have an immense impact on resources – for example, in the area of native title. Judicial law-making has shaped concepts and principles with crucial policy content, such as the law of negligence, discrimination and natural justice.<sup>24</sup> A decision ordering a re-trial will result in significant expense for the crown, but this does not deter judges from making such decisions in respect of respecting the civil right to a fair trial.
25. The Committee on Economic, Social and Cultural Rights in a General Comment supports the view that ESC rights can be justiciable:
- ‘In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions... There is no Covenant right which could not, in the great majority of systems, be considered to possess at least some justiciable dimensions.’<sup>25</sup>
26. Justiciability is a fluid, contingent and evolving notion, but essentially it means that a right is capable of being invoked in a legal action and thus a suitable basis on which to conduct judicial or administrative review by a court or tribunal.<sup>26</sup>
27. The right to education is protected in the UK HRA, and it has been ‘cautiously’ interpreted by the UK judiciary.<sup>27</sup> Article 2 of Protocol No. 1 of the European Convention on Human Rights provides:

---

<sup>22</sup> The Optional Protocol for the International Covenant on Economic, Social and Cultural Rights was adopted by UNGASS on 10 December 2008 (A/RES/63/117), and is open for signature in 2009. It will enable individual communications to be lodged with the Committee.

<sup>23</sup> For example, in one case, a woman who was apprehended for an offence was not granted bail as she could not provide a permanent address and so had to remain in detention. In other cases, people without a permanent address may have difficulties exercising their right to vote in elections because they may not be on the electoral roll.

<sup>24</sup> Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996) 66.

<sup>25</sup> General Comment 9, UN Doc E/1999/22.

<sup>26</sup> C Scott and P Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’ (1992) 141 *University of Pennsylvania Law Review* 1.

<sup>27</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, ‘Submission to the Review of the *Human Rights Act 2004 (ACT)*’, Australian National University Human Rights Act Research Project, 22 May 2006. Available online at <http://acthra.anu.edu.au/publications/index.html> (accessed 26 May 2009).



No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

28. The content of the right to education was identified to include a right to an effective education:
- a right of access to existing education institutions;
  - a right to be educated in the national language; and
  - a right to obtain official recognition of completed studies.
29. Given the negative formulation of the right in the European context, it has been held that states are not obliged to establish or subsidise a particular form of education at any particular level. However states are required to ensure a *right of access* to the educational facilities that already exist at the given time.<sup>28</sup> This includes the right to access primary, secondary and tertiary education.<sup>29</sup> Given that Australia already has a well-developed education system, a similar right inserted into the Federal Human Rights Act would merely oblige the State to guarantee that individuals could take advantage of the existing means of education.
30. It is generally accepted that the enjoyment of a number of civil and political rights as well as other economic, social and cultural rights are dependent on the right to education. The right to vote, freedom of expression, freedom of information, freedom of association and labour rights are all intrinsically linked to a minimal level of education having been achieved.
31. The ACT HR Act also already includes minority rights under s.27. The Commission will be recommending to the ACT Government's five-year review of the HR Act that this provision be amended to include a specific recognition of indigenous culture, similar to s.19(2) of the Victorian Charter. Currently only the preamble of the ACT HR Act refers to the special significance of human rights to indigenous people.
32. Unlike the UK HRA, s.29 of the South African Constitution provides for a positive obligation for the right to education. In the case *In Re the School Education Bill of 1995*<sup>30</sup> it was held that the state should provide basic education through the provision of functional educational institutions. This requires the state to build schools, provide teaching materials and employ teachers as well as ensuring that educational institutions are open to everyone on the basis of non-discrimination. The core content of the right to education would have to include the following four functions: be available, accessible, acceptable and adaptable.<sup>31</sup>
33. In the Commission's Human Rights Community Survey the following question was put:

<sup>28</sup> *Belgium Linguistics Case (No 2)* (1968) 1 E.H.R.R. 252 at 280-281 (paras 3-5).

<sup>29</sup> *R. (Douglas) v North Tyneside MBC* [2004] 1 All E.R. 709.

<sup>30</sup> *Gauteng* 1996 (4) BCLR 537 (CC).

<sup>31</sup> See General Comment 13, para 13 for a discussion of the essential features of education in all its forms and levels.

'The ACT Human Rights Act 2004 currently covers civil and political rights. It does not include economic, social and cultural rights such as the right to health, housing and education. Do you think these rights should be included in the ACT Human Rights Act 2004?'

34. Respondents were overwhelmingly in support of including ESC rights in the HR Act, with 82.6% responding in favour of inclusion. One person responded with '*I think that ESC Rights should be included in federal legislation primarily*'. Another stated (in relation to the ACT HR Act) that:

'The Act should also include the convention on torture, rights of the child, and on discrimination against women'.

35. A number of respondent specifically referred to the right to housing, including 'Public housing is an issue that needs support in the ACT. I believe many people do not appreciate the effects that unemployment, illness and domestic violence may have on a family's ability to keep housing.'

### c **The importance of including the rights of the child**

36. One example that illustrates the dynamic nature of human rights is in relation to the rights of the child. Article 24 of the ICCPR protects the rights of the child by providing that every child shall have 'the right to such measures of protection as are required by his status as a minor'. However, since the ICCPR was drafted in 1966, the rights of children have been construed far more broadly than simply 'protecting' children because they are children. International law on the rights of the child has evolved to consider children as more than just simply 'adults in waiting', and now recognises children, in themselves, as active participants with specific and inalienable rights.
37. For example, Article 3 of the CROC ensures a child's right to be consulted about matters affecting them; Article 13 ensures a child's right to seek and receive information; Article 15 ensures the child's right to choose their own friends; and perhaps of primary importance, Article 3 ensures that in all actions concerning children, the best interests of the child are paramount.
38. The above examples are important, as they are not reflected adequately in either the ICCPR or the ICESCR, and they represent a shift away from 'protection rights' (such as safety, freedom from sexual abuse, freedom from cruel punishment etc) to 'participation rights'.
39. In developing a Federal Human Rights Act, it is important to consider the current thinking on the rights of the child, rather than automatically adopting historical international instruments, or only certain aspects of these instruments. The broad range of children's rights outlined above - including, in particular, 'participation rights' - should be protected by law in Australia. This would further improve the rights protection for all Australian children, would allow Australia to fulfill international obligations, and would enable Australia to lead by example in the area of international affairs.
40. It is also important to recognise that the rights of the child, as articulated in current domestic and international law, are frequently directly relevant to everyday situations experienced by children. That is, the protection of a child's rights is not

some abstract concept which has little relevance to children, but rather a mechanism which can, and should, guide the provision of services for children. Appendix 5 gives a number of examples.

41. To be effective, the protection of the rights of children will require the design and implementation of a number of targeted, child focused, strategies and campaigns. For example, information will need to be provided to children in a manner which is understandable and accessible to them, and which clearly articulates what their rights are, how these rights can (and should) be interpreted, and what to do about it if they feel that one of their rights has been interfered with.
42. It is also unrealistic to expect most children to actively advocate on their own behalf in those circumstances where a right has been interfered with. Accordingly, it is critical that 'child friendly' information, advice and advocacy services are appropriately funded and promoted at both a local and national level.
43. In light of the above, the ACT Human Rights Commission strongly supports the establishment of a National Children and Young People Commissioner (see Recommendation 16). This new jurisdiction could be included in the recommended new Equality Act.

## **C.2 ACT's experience: civil and political rights**

44. The ICCPR and ICESCR clearly state that obligations to protect human rights extend to all areas within a country's borders, without exceptions.<sup>32</sup> Being a federal state is no excuse for Australia not implementing legal obligations. In fact, by signing up to the treaties outlined above, Australia has committed the States and Territories to comply as well. However, only two jurisdictions within Australia (the ACT and Victoria) have taken measures to comply with some of Australia's obligations at international law by enacting local legislation protecting rights in the ICCPR.
45. When the ACT Consultative Committee considered which rights should be protected in human rights legislation it recommended that ESC rights should be protected, because of the indivisible and universal nature of rights. The Committee recommended the following rights be included:
  - the right to an adequate standard of living,
  - the right to the highest attainable standard of health,
  - the right to housing, clothing and food,
  - the right to education, and
  - the right to work in just and favourable conditions.
46. In recognising that ESC rights would be more challenging to put into practice than some of the civil and political rights, the Committee recommended that the ESC

---

<sup>32</sup> ICCPR, Article 50; ICESCR, Article 28.

- rights be subject to progressive implementation, and that the courts should be required to consider the financial implications of decisions relating to ESC rights.<sup>33</sup>
47. Whilst ESC rights were not included initially, during debates about the Human Rights Bill, Chief Minister Stanhope stated:
- ‘I remain very much alive to the desirability at a later date of incorporating economic, social and cultural rights into the Human Rights Act. I see that as one of the building blocks that we may in time choose to incorporate.’<sup>34</sup>
48. The Commission strongly supports the inclusion of ESC rights in the HR Act. A common argument cited against protecting ESC rights in legislation is that it would involve the judiciary in questions of resource allocation, and would be too costly. A dialogue model of human rights ensures that it is the parliament, not the court that gets the final say on legislation, and thus questions of resource allocation are ultimately left for parliament to decide. It is erroneous to suggest that the judiciary do not already engage in decision-making that impacts upon resource allocation. The ANU Human Rights Act Project’s supports the inclusion of ESC rights in the ACT HR Act, and commented that inclusion of the right to education in the HR Act ‘*would be unlikely to have a financial impact on the Territory*’.<sup>35</sup>
49. Given the indivisible nature of human rights, civil and political rights have been used in the ACT under the HR Act to present arguments about what are essentially economic, social and cultural rights. This indicates a need for a broader protection of rights in the ACT, and broad protection federally. In a number of cases under the HR Act, advocates have used existing ICCPR rights in the HR Act to support ESC rights. For example, in the case of *Peters v ACT Housing*<sup>36</sup> tenancy advocates relied on the right to equality to indirectly protect the right to housing, arguing that public housing tenants should be compensated to the same extent as private tenants where the property owner had failed to carry out essential maintenance work to ensure that the properties were habitable.
50. In his commentary on the operation of the HR Act, Peter Bailey notes:
- ‘Many of the significant cases have indirectly involved ESC rights through s 11 [the right to protection of the family and children], and these suggest the real need for further declaration of ESC-based rights.’<sup>37</sup>
51. Inclusion of ESC rights will be considered as part of the mandated 5-year review of the operation of the HR Act.<sup>38</sup> The ACT currently has a minority government, with members of the Greens sharing power with the Labour Party through an arrangement set out in a ‘Parliamentary Agreement for the 7<sup>th</sup> Legislative Assembly

<sup>33</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003), Appendix 4, 23.

<sup>34</sup> Australian Capital Territory, *Legislative Assembly Debates*, 2 March 2004, 532 (Jon Stanhope, Chief Minister).

<sup>35</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, ‘Submission to the Review of the *Human Rights Act 2004 (ACT)*’, Australian National University Human Rights Act Research Project, 22 May 2006. Available online at <http://acthra.anu.edu.au/publications/index.html> (accessed 26 May 2009).

<sup>36</sup> [2006] ACTRTT 6.

<sup>37</sup> Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 199.

<sup>38</sup> Section 44 of the ACT HR Act mandates this review be carried out by 1 July 2009, but any review is likely to be tabled in the Legislative Assembly’s subsequent sitting in August 2009.

for the ACT'.<sup>39</sup> The ACT Greens were elected on a platform that included amending the ACT HR Act to 'include internationally recognised economic, social and cultural rights',<sup>40</sup> and so the inclusion of ESC rights in the ACT HR Act is likely to remain on the agenda in the ACT.

**a The question of responsibilities**

52. Just as people are entitled to have their own rights respected, they also have obligations to respect other people's rights. The inherent nature of rights involving responsibilities is recognised in international law by the preamble of the ICCPR, which states:

'the individual, having duties to other individuals and to the community to which he [sic] belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant'

53. Further, this notion is reflected in Article 29 of the UDHR, which states that:

'Everyone has duties to the community in which alone the free and full development of his personality is possible.'

54. The ACT Consultative Committee reflected this international position in their 2003 report by stating that:

'If human rights are the conditions necessary for people to live lives of dignity and value, there is a responsibility to support these conditions.'

55. The preamble of the ACT HR Act explicitly recognises that the Act:

'...encourages individuals to see themselves, and each other, as the holder of rights, and as responsible for upholding the human rights of others.'

56. The UK Ministry of Justice is currently consulting on the issue of responsibilities, but has highlighted that any articulation will not make enjoyment of human rights contingent.<sup>41</sup> In the Commission's view, the preamble of the HR Act adequately reflects the co-existence of rights with responsibilities, and there is no need to include explicit obligations relating to responsibilities in Federal Human Rights legislation. The point was eloquently put in a submission to the ACT Consultative Committee from the National Children's and Youth Law Centre:

'[T]he enjoyment of rights should not be contingent on the performance of responsibilities. If that should happen, and rights should become seen as the reward for 'good citizenship', those most vulnerable to rights abuse and least able to complain about it – the infirm, the mentally ill, prisoners and accused people, for example – would be in danger of falling outside the embrace of a bill of rights.'<sup>42</sup>

<sup>39</sup> Available online at: <http://act.greens.org.au/learn/act-greenslabor-agreement> (accessed 12 June 2009).

<sup>40</sup> ACT Greens Policy on Human Rights. Available online at: <http://act.greens.org.au/archives/19> (accessed 26 May 2009).

<sup>41</sup> UK Ministry of Justice, 'Rights and Responsibilities: Developing Our Constitutional Framework' (2009) 18.

<sup>42</sup> Submission 19 to the ACT Bill of Rights Consultative Committee, in Hilary Charlesworth et al. *Towards an ACT Human Rights Act, Report of the ACT Bill of Rights Consultative Committee*, (2003), Appendix 4, 23, para 5.81.

57. In the ACT, a Private Member's Bill of Rights and Responsibilities was introduced into the Legislative Assembly in 2004 but did not pass. It was based on a draft Universal Declaration on Human Social Responsibilities, which was defeated in a vote at the UN Commission on Human Rights because most countries feared that it would create prerequisites for the promotion and protection of human rights, such as being contingent on fulfilling social responsibilities.<sup>43</sup> This approach is also consistent with the Joint Standing Committee on Foreign Affairs, Defence and Trade, which recommended in 1997 that any possible acceptance of the draft Declaration was conditional on complementing and not derogating from the Universal Declaration.

---

<sup>43</sup> UN Human Rights Commission, 'Compilation of the essential aspects of replies received on the pre-draft declaration on human social responsibilities E/CN.4/2005/99 (7 February 2005).

## D Are these human rights currently sufficiently protected and promoted?

### D.1 Rights are not adequately protected at a Federal level

58. Federal human rights protection in Australia is inadequate. The ACT Consultative Committee's conclusions in 2003 in relation to the ACT apply more broadly in Australia:

'Human rights for people in the ACT are covered in a partial and haphazard manner under federal, territorial, common, constitutional and international law and therefore cannot be said to be adequately protected under our current political and legal system. In the absence of a bill of rights, the ACT lacks a single, accessible statement of the rights that are necessary to lead lives of dignity and value. While a bill of rights has legal significance, its primary purpose should be to encourage the development of a human rights-respecting culture in ACT public life and the community generally.'<sup>44</sup>

59. The Commonwealth Constitution was not drafted as an instrument to protect individual rights: rather, its main purpose was to balance the interests of the Federation and the States, and deal with matters of finance and trade.<sup>45</sup> Only three provisions refer to rights: jury trial; lack of legal power to establish a religion; and prohibiting discrimination on the basis of residence by state.<sup>46</sup> Federal legislation is piecemeal: the Federal race, age, sex and disability discrimination protect the right to non-discrimination in some areas of public life such as work and education but are not comprehensive. Consequently there are gaps where freedom from discrimination is not protected such as religious belief, sexuality and political activity. These Acts also cover only the right to equality, whereas at international law we have committed Australia to protect a whole range of human rights domestically. In light of this situation, the Commission strongly supports the introduction of a Federal Equality Act as has occurred in the UK to provide comprehensive protection against discrimination (see recommendation 16).<sup>47</sup>

60. The 2020 Summit recognised that there was a need for a Federal Human Rights Act.<sup>48</sup> There are many high profile examples in last decade of individuals who have 'fallen through the gaps' in Australia's protection of human rights, and suffered gross violation of rights. A legislative Human Rights Act is needed to prevent this

---

<sup>44</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee (2003) 41.

<sup>45</sup> George Williams, 'The Australian Constitution and Human Rights: A Centenary View' (Symposium: Constitutions and Human Rights in a Global Age: An Asia Pacific Perspective, Research School of Pacific and Asian Studies, 2001). Available online at: [http://rspas.anu.edu.au/pah/human\\_rights/papers/2001/Williams.pdf](http://rspas.anu.edu.au/pah/human_rights/papers/2001/Williams.pdf) (accessed 23 May 2009).

<sup>46</sup> Commonwealth Constitution, sections 80, 30 and 117.

<sup>47</sup> See also, Gabrielle Szabo, *Mainstreaming equality in the ACT* (2008) Report prepared as part of internship with the ACT Human Rights Commission.

<sup>48</sup> Department of Prime Minister and Cabinet, *Australia 2020 Summit Final Report* (2008) pp 172, 191, 308, 376 and 378.

backsliding in human rights protection, as well as safeguarding current provisions (albeit inadequate). People such as Vivian Alvarez Solon, Cornelia Rau and Mohammed Haneef are now household names. However, there are also many less public examples of deficiencies in rights protection in Australia. Many of these come from places like aged care facilities, mental health institutions and detention centres, as it is in closed and semi-closed environments where individuals are not free to come and go, that people are most vulnerable. There have been many reports over decades documenting the problems resulting from lack of human rights protection. It is 20 years since the AHRC National Inquiry into Homeless Children produced the report 'Our Homeless Children' in 1989. In the area of mental health services, the 1993 report of the Australian Human Rights Commission ('AHRC')s 'National Inquiry into the Human Rights of People with Mental Illness' ('Burdekin Report') exposed the personal consequences of inadequacies in Australia's mental health and welfare services, followed in 2005 by the AHRC and National Mental Health Council's 'Not for Service' report, which documented personal stories of people with mental illness, and their families and carers.<sup>49</sup>

61. A respondent in the Commission's Government Survey commented:

It is a travesty that our country has to rely on primitive legislation such as the Magna Carta to define our human rights. The treatment of improper treatment [sic], or potential improper treatment of those such as terrorist suspects, illegal immigrants and others is possible because of the lack of such legislation.

62. However, some survey respondents felt that rights were adequately protected of Australia. Comments on the Government Survey included a belief held by some that '*human rights ... are protected by the Constitution*', and that it was '*unnecessary*'.

**a Non-citizens are particularly vulnerable to human rights violations**

63. Australia as a country should aspire to respect, protect and fulfil human rights in *all human persons* within Australian territory and subject to its jurisdiction. This includes protecting the rights of all non-citizens, who by virtue of their essential humanity should enjoy all human rights with the exception of certain limits on the right to political participation (for example, the right to vote) and freedom of movement (consistent with the duty of non-refoulement).<sup>50</sup> National human rights legislation should therefore apply to citizens and non-citizens.

64. This rationale is enshrined in numerous international instruments including Article 7 of the Universal Declaration of Human Rights ('UDHR') which provides the basic right to equality before the law; the Refugee Convention which states that 'rights for refugees are to be the same as they are for nationals' and in Article 2.1 of the ICCPR which recognises civil and political rights in 'all individuals within its territory and

<sup>49</sup> Mental Health Council of Australia: *Not For Service: Experiences of injustice and despair in mental health care in Australia* (2005). Available online at: [http://www.hreoc.gov.au/disability\\_rights/notforservice/index.html](http://www.hreoc.gov.au/disability_rights/notforservice/index.html) (accessed 2 June 2009).

<sup>50</sup> In accordance with the principle of non-refoulement, which prohibits state-parties from expelling a refugee to a place where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.



- subject to its jurisdiction', including illegal aliens. The United Nations Human Rights Committee further clarified that the ICCPR should 'apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness'.<sup>51</sup>
65. The provision of equal rights for both citizens and non-citizens is of the utmost importance at this time of heightened national security, where many states are increasingly subjecting migrants, refugees and other non-citizens to forms of discriminatory treatment in breach of many international norms. Much of this unfavourable treatment is also justified on the basis of economic welfare and public health. According to the former UN Special Rapporteur on the Rights of Non-citizens:
- ...continued discriminatory treatment of non-citizens demonstrates the need for clear, comprehensive standards governing the rights of non-citizen, their implementation by States, and more effective monitoring of compliance.<sup>52</sup>
66. In Australia unlawful non-citizens who cannot establish refugee status can be in effect condemned to indefinite detention by the Executive unless a place can be found where they can go. Former Chief Justice McHugh of the High Court speaking in respect of the two cases *Al-Kateb v Godwin*<sup>53</sup> and *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji*<sup>54</sup> described the outcome for these asylum seekers as 'tragic' and referred to the inability to change the law regarding stateless asylum seekers in the absence of a national Bill of Rights. Extreme measures have been taken by our government to deny asylum seekers the protections they would be entitled to under international law if they reached Australian shores. Further, in the *Tampa* affair asylum seekers were denied entry and forcibly removed to Christmas Island, Manus Island and Nauru where they were detained. These polices were justified at the time on the basis of 'border control' and 'national security', but were and are contrary to international law. Although the 'Pacific Solution' has been dismantled by the Federal Government, Christmas Island is still used to house asylum seekers offshore, which is concerning due to the remote location and lack of access to some key services.
67. Further afield, the US Government held suspects who were not US citizens at Guantanamo Bay without charge and without trial for up to seven years. Prisoners were denied the most basic democratic rights including the writ of habeas corpus (which grants a prisoner the right to go to court to challenge his or her detention), the right not to be tortured,<sup>55</sup> and the right not to be indefinitely and arbitrarily

---

<sup>51</sup> General Comment 15, 'The position of Aliens under the Covenant' (11 April 1986). See also, in relation to discrimination under the CERD, CERD Committee, General Recommendation 30 'Discrimination against Non Citizens' (1 October 2004).

<sup>52</sup> Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 'Report on the rights of non-citizens' UN Doc No. E/CN.4/Sub.2/2003/L.13 (7 August 2003).

<sup>53</sup> (2004) 219 CLR 562.

<sup>54</sup> [2004] HCA 38.

<sup>55</sup> Pentagon official Susan Crawford made this admission to the media, which was widely reported. See, eg, Demetri Sevastopulo, 'Pentagon official says 9/11 suspect was tortured at Guantánamo Bay', *Financial Times* (Washington), 15 January 2009. Available at online at <http://www.ft.com/cms/s/0/ed37e214-e2a4-11dd-b1dd-0000779fd2ac.html> (accessed 15 May 2009).

detained. The torture of prisoners in detention has also impacted the US Government's ability to prosecute, as much of the evidence is inadmissible.

## D.2 State and Territory level

68. Currently the ACT and Victoria are the only jurisdictions in Australia with legislative protection for human rights. Consultation processes held in Western Australia and by the Tasmanian Law Reform Institute strongly supported the introduction of state-based human rights protection in those jurisdictions; however legislation has not yet been enacted there. The extent of human rights protection afforded to an individual should not be dependent on what jurisdiction they are from. This is particularly relevant to the ACT because of close ties with Queanbeyan, just across the ACT border. Currently people who are physically within ACT's borders have legislative human rights protection whereas those in Queanbeyan do not.
69. The differing approaches to rights between State and Territories with and without human rights legislation was illustrated at a recent Council of Australian Government Meeting, where the topic of legislative responses to Outlaw Motorcycle Gangs was discussed by Attorneys General from all States and Territories. In response to the perceived threat of OMCGs, South Australia and New South Wales enacted coercive legislation that breached a number of basic rights, such as the right to freedom of association, and rights in criminal proceedings. Other states were under pressure to follow suit, with some arguing that unless the remaining States and Territories enacted similar legislation, they would become a 'haven' for gang-related crime and violence.<sup>56</sup> However, Victoria and the ACT maintained the position that such coercive laws were not the most proportionate response to the perceived threat of OMCG's. These two jurisdictions had human rights legislation as a benchmark against which the effect of proposed laws on human rights could be measured. In this example, it meant that such coercive laws were not passed in the ACT and Victoria. Although this is a positive outcome in terms of rights protection in the ACT, it illustrates a significant discrepancy: a member of an OMCG that is 'declared' in NSW can be prevented from working in certain occupations, associating with others, and attending certain areas, all without having being convicted of any specific offence. A person in the same situation in the ACT would not be subject to the same draconian limitations on rights.
70. The introduction of the ACT HR Act has made a significant difference in improving rights protection in the ACT. An example illustrating the capacity for human rights legislation to significantly improve rights protection in practice for a particular group in society is the Commission's 2005 human rights audit of Quamby, the then ACT youth detention centre.

### **Case study: human rights audit of youth detention centre**

Children and young people detained in a closed environment are vulnerable, and respect and protection of their human rights is a priority. They are detained as punishment, not for

<sup>56</sup> See for example, the views of the Australian Federal Police Association as set out in a letter from Jon Hunt-Sharman, to Jeremy Hansen, ACT Liberal Party, reported in Louis Andrews, 'ACT could become a bikie oasis', *Canberra Times*, 1 April 2009.

punishment. In light of these considerations, a human rights audit of youth detention was one of the priorities after the enactment of the ACT HR Act in July 2004. The Human Rights Commissioner conducted a human rights audit of Quamby Youth Detention Centre by reviewing the effect on human rights of the *Children and Young Persons Act 1999* (ACT) (CYP Act), as the legislation that governed the treatment of young people in detention.

The audit examined issues of humane treatment (including routine strip searches, surveillance, periods of lockdown, seclusion and conditions of detention), and other issues such as communication with the outside world, complaints systems, discipline resulting in loss of remission and privileges, mixing of young people who are of different ages, gender and status (convicted and remandees). The Terms of Reference for the audit were to assess the legal framework, policies and practices at Quamby against international human rights benchmarks. The purpose of the audit was to guide the review of the *Children and Young People Act 1999*, the policies and legislative instruments made under it, as well assist in developing a new youth detention facility that is human rights compliant. The methodology used included interviewing residents, staff and management, and consulting with central stakeholders.

The most surprising finding was that Quamby had been operating without a proper legislative basis since self-government in 1989, despite several Legislative Assembly Committee Reports and an inquest examining conditions of detention. This situation was clarified by amendments to the CYP Act enacted before the government tabled the Audit. The ACT Government responded very positively to the 52 recommendations in the report; agreeing in full with 25 recommendations and in principle with 27 recommendations. Significant changes have been made to the classification and recruitment of staff, and use of the seclusion room as a last resort for safety of residents, but never for punishment. The strip search procedures were changed so that the young person no longer had to strip completely naked but could strip half at a time, something both the young people and the staff found to be a significant improvement. Quamby staff reported that they felt more confident in their decision making using a human rights legal framework, when they attended Human Rights Commission training. The recommendations were taken into consideration in the design of Bimberi, ACT's new youth detention facility, which was opened in 2008. Further, the Commission conducted a design audit of Bimberi at construction phase to ensure that on paper, all policies, procedures and the physical design were, as far as possible compliant with the HR Act. The aim was to move to a fuller human rights culture, and not just to have technical legal compliance. The desired goal was for a holistic integration of human rights in services for young people.

The ACT HR Act was a vital catalyst for the audit: having the human rights standards clearly set out in ACT legislation provided a clear, unambiguous and relevant framework from which to analyse the operation of youth detention in the ACT. It is unlikely that recommendations would have been taken so seriously by government without the HR Act.

71. Respondents in the Commission's Community and Government Surveys were also questioned on their views of the impact of ACT HR Act on their work the culture of their organisation. Some comments indicated that the impact has not been as significant as they would have hoped:
- 'Would prefer the impact to be more significant'
- 'A work in progress. In some instances it hasn't changed the culture but it is shifting in the right direction.'
72. However, comments were generally positive:

‘Human rights considerations have been a significant driver in the development of policy relating to security issues.’

‘As a social worker, human rights are central to the ethos of my profession and it is great that the ACT approaches this in a serious and pro-active manner.’

‘The Act has added a significant new dimension to my work.’

‘It is an important piece of legislature for the DHCS.<sup>57</sup> It is a standard and guide for how we deal with clients, employees and the wider community.’

73. As outlined later in the submission, introducing legislation is not enough to bring about a human rights culture. However in combination with other measures, including education, the ACT experience is that introducing human rights legislation is a key part of improving human rights protection.

---

<sup>57</sup> The Department of Disability, Housing and Community Services.

## **E How could Australia better protect and promote human rights?**

### **E.1 A Federal Human Rights Act**

74. Based on our experience in the ACT under the HR Act, the Commission is strongly in favour of national human rights legislation, and believes it is the most effective way to achieve comprehensive protection and promotion of human rights in Australia. A national human rights act would become a:

‘...template against which the performance of government and the behaviour of public agencies could be measured by the people – and, importantly against which government and agencies could measure themselves.’<sup>58</sup>

75. Further, the Commission believes that enacting human rights legislation, in concert with other initiatives such as human rights education and training would be the best possible catalyst for improving awareness of and respect for rights in the community.

76. Respondents in the Commission’s surveys of the ACT Community and Government were overwhelmingly in favour of national human rights legislation. Seventy six per cent of respondents in the Government Survey believe that Australia needs federal human rights legislation. One public servant commented that:

‘...there is an opportunity now after 5 years [of operation of the HR Act] for the ACT to promote enshrined human rights on the basis that the sky hasn’t fallen; legislation is made; the rule of law is adhered to and criminals are successfully tried and punished.’

77. Another commented:

‘We should have a national human rights act. I am astounded that we don’t. This would be more appropriate than each State and Territory having individual Acts but in the absence of that the ACT is at least providing some human rights legislation’

78. During the National Human Rights Consultation some strong opposition to national human rights legislation emerged. However, some of the arguments against a national human rights act were not based on available evidence of how human rights legislation has worked in practice.

79. One key concern was that a Federal Human Rights Act would not shift power from parliament to the judiciary, and was therefore ‘undemocratic’. However, a dialogue model similar to the ACT HR Act is strongly democratic, as parliament has the final say on legislation. Courts are not able to strike down legislation, and in the first five years of the ACT HR Act there have not been any examples of activist judges overriding the will of elected representatives. Instead, the judiciary have interpreted

---

<sup>58</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee (2003) 35.

laws in the most human rights consistent way possible, in a way that is still consistent with the purpose of the law that the Legislative Assembly intended.

80. Another concern is that human rights legislation simply creates additional work for lawyers, without any real benefit being felt by the most disadvantaged. It is interesting to note that many critics of Bills of Rights appear to base their cynicism on antipathy to lawyers. This is not supported by evidence. In the first five years of the HR Act there has certainly not been a flood of litigation. There have been around 80 cases where human rights arguments have been used.<sup>59</sup> As stated by Lord Hoffman, the UK HRA was ‘intended to strengthen the rule of law, but not to inaugurate the rule of lawyers’.<sup>60</sup> The UK experience has found that in the first ten years of the UK HRA there has been no increase in the volume, length or costs of litigation.

Recommendation 1: a Federal Human Rights Act

The Federal government should introduce a Federal Human Rights Act in Australia.

81. Human rights legislation should not be viewed in isolation: the Commission’s view is that complementary measures such as community education on human rights, and increased support for systemic work by the AHRC are essential to the success of legislative protection. The necessary non-legislative measures are discussed later in this submission.
82. This part of the submission considers a number of questions about the scope of national human rights legislation, including the content and application of rights protection and the interplay of Federal legislation with State and Territory laws. First, the mechanics of Federal human rights protection are considered, including key questions such as how Federal legislation would deal with limiting rights, human rights consistent statutory interpretation, the role of the bureaucracy and the question of remedies. The submission then goes on to consider evidence and case studies from the ACT that demonstrate how legislative protection of human rights would lead to better human rights protections for all.
83. As Australia’s first jurisdiction to enact human rights legislation, the ACT is in a unique position to provide informed comment on how a legislative bill of rights can protect human rights in practice. Like any new legislation, the process of shaping the ideal form for human rights protection is an ongoing one. The ACT HR Act mandates a five-year review of its operation, due in July 2009. The Commission will be recommending a number of amendments to the ACT HR Act as part of this review, to continue the process of building the best possible human rights culture in the ACT. Where the Commission’s suggested amendments to the ACT HR Act are appropriate to Federal legislation they have been reflected in this submission.

<sup>59</sup> See ANU Bill of Rights Project database of cases under the ACT HR Act at: <http://acthra.anu.edu.au/cases/index.php>.

<sup>60</sup> *Alconbury v Secretary of State for the Environment, Transport and the Regions* [2000] 2 WLR 1389 at 1427C.

## E.2 What rights should a Federal Human Rights Act protect?

84. National human rights legislation should protect a broad range of human rights including civil and political rights and economic, social and cultural rights, for the reasons outlined previously.
- 85.

Recommendation 2: broad coverage of rights protected

A Federal Human Rights Act should protect the rights Australia is obliged to protect at international law, including the rights in the ICCPR and ICESCR.

## E.3 Who would the human rights protection apply to?

86. Human rights protection should apply to all within Australia's borders: citizens and non-citizens alike, for the reasons outlined under earlier in the submission. As reflected in s.6 of the HR Act, only individuals have human rights and hence a Federal Human Rights Act should only protect the rights of natural persons, and not corporations or other legal entities.

Recommendation 3: rights for all, including children and young people

Rights should apply to everyone within Australia's jurisdiction, regardless of citizenship status.

## E.4 How would national legislation sit with State and Territory laws?

87. At present, only two of Australia's eight State and Territories have legislation that protects human rights. The ACT HR Act and the Victorian Charter protect most of the rights in the ICCPR for people that come within their jurisdiction. However, this protection only covers areas for which the ACT and Victoria have legislative competence – for example, in the area of criminal law, health, primary and secondary education and housing. Rights protection in the ACT and Victoria does not extend to acts or omissions by Commonwealth agencies or actions of government carried out pursuant to Commonwealth laws.
88. In light of the uneven nature of human rights protection across and within jurisdictions in Australia, it is therefore important to carefully consider how Federal human rights legislation would operate to ensure that all people in Australia's rights are protected equally. Not only should rights protection apply consistently in the ACT and Victoria (and not depend on which level of government made the relevant law), there is a need to rectify the current position whereby residents of the ACT and Victoria enjoy greater rights protection than other Australians.
89. Given that the terms of reference for the National Human Rights Consultation specifically exclude Constitutional protection of human rights, there are a number of alternate ways the Federal government could approach enacting federal human rights legislation. Federal human rights legislation could cover not only the areas that

are within Commonwealth responsibility via relevant heads of power under the Constitution, but also areas of State responsibility. This would preferably be negotiated with the States, for example through referral of power to the Commonwealth by States, States enacting 'mirror' human rights legislation, or potentially through the Commonwealth's use of existing heads of powers – such as the external affairs power.<sup>61</sup> If Federal human rights legislation only covered areas for which the Commonwealth has Constitutional competence, human rights protection would only be comprehensive in the ACT and Victoria where Federal legislation would supplement existing legislation. However, in other states there would be significant gaps in human rights protection in key areas, including areas such as criminal law and prisons.

90. The Constitutional intricacies of the preferred approach are beyond the scope of this submission. It is important, however, that any Federal human rights legislation is as comprehensive as possible. The Commission therefore supports the Federal Government using whichever means best achieves the most comprehensive human rights protection.

Recommendation 4: A Federal Human Rights Act should have comprehensive coverage, subject to constitutional considerations

## E.5 Constitutional issues

91. Some concerns have been raised that a 'dialogue model' of human rights protection similar to the ACT HR Act may be unconstitutional if enacted at a Federal level if it contains a provision that allows courts to make a 'declaration of incompatibility' where legislation that cannot be interpreted in a rights-consistent manner. The concern is that this could be unconstitutional for two reasons:
- vesting Federal Courts with the power to declare that legislation is not consistent with human rights is a non-judicial power; and
  - the making of a declaration of incompatibility is not a 'matter' (as it does not directly involve a finding on a dispute between two or more parties) and may be outside the court's judicial power as prescribed by Chapter 3 of the Constitution.
92. However, a recent roundtable of constitutional and human rights experts convened by the AHRC on 22 April 2009 concluded unanimously that a Federal Human Rights Act could be drafted in a way that was constitutionally valid.<sup>62</sup> One option, for example, was to take the Courts out of the notification process with respect to declarations of incompatibility, and give an independent body (such as the AHRC) the responsibility for notifying Federal Parliament of cases where Courts were unable to interpret legislation in a rights-consistent way. Once Parliament is notified, parliament would still have the final say as to whether to leave the legislation as is, or

<sup>61</sup> For further elaboration of possible approaches to enacting federal human rights legislation, see Law Council of Australia's submission to national consultation, page 51.

<sup>62</sup> See Australian Human Rights Commission, 'Constitutional validity of a Human Rights Act' (2009). Available online: <http://www.humanrights.gov.au/letstalkaboutrights/roundtable.html> (accessed 4 June 2009).



amend it to make it rights compliant. This would retain the democratic features of the dialogue model.

93. The Law Council of Australia's submission reiterates the findings of the roundtable of Constitutional experts that a Federal Human Rights Act could be carefully drafted so as to significantly reduce any possibility that provisions will be constitutionally invalid.<sup>63</sup>

## E.6 How would the legislation operate?

### a Limiting rights

#### *Distinguishing between rights that can and cannot be limited*

94. Only a very few human rights are considered so fundamental that they cannot be limited in any way. Rights in the ICCPR that are considered non-derogable include the right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Article 7) and the right to be free from slavery and servitude (Articles 8(1) and (2)), and the right to life (Article 6). International human rights law recognises that most other rights can be limited where the rights of others or public interest demands this.<sup>64</sup>
95. The ACT HR Act does not state which rights are absolute and which rights can be limited. The Commission recommends that a Federal Human Rights Act state which rights are absolute rights, and which rights can be subject to reasonable limitations. This would make it clear, particularly in educating the community about rights, which rights are absolute and cannot be limited for any reason. For example, the right to be free from torture, a non-derogable right, has been the subject of much international attention in relation to the previous US Administration's practices of rendition of detainees to countries where torture was allegedly carried out. Clearly spelling out that the international community has agreed that in instruments such as CAT that the right to be free from torture can never be limited regardless of the circumstances would provide important clarity in the public debate on what is acceptable practice in response to terrorism and times of public emergency.

Recommendation 5: differentiating between absolute and non-absolute rights

A Federal Human Rights Act should state which rights are non-derogable and which rights can be subject to reasonable limitations.

#### *Mechanisms for limiting rights*

96. There are different ways human rights instruments can deal with how to limit rights. Some instruments, such as the ICCPR and European Convention on Human Rights ('ECHR') set out each right, followed by the specific circumstances where limitations on that right are permissible. Other human rights legislation (including the ACT HR Act and the Victorian Charter) has an express general 'reasonable limits' clause that

<sup>63</sup> Law Council of Australia, *Submission to National Human Rights Consultation* (2009) 49.

<sup>64</sup> See, for example, UDHR, Article 29(2) which sets out the grounds for limiting rights.

applies to all the rights protected in the instrument. The 'reasonable limits' clause in the ACT HR Act appears in s.28, and it is based on Section 1 of the Canadian Charter of Rights and Freedoms and s. 5 of the New Zealand Bill of Rights Act. Section 28(1) of the ACT HR Act provides:

'Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.'

97. This provision was amended in March 2008 by inserting a new s.28(2) to set out criteria that must be considered when limiting rights. Section 28(2) provides:

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

- (a) the nature of the right affected;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose;
- (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

98. This test provides guidance in ascertaining whether a limitation in rights is reasonable. The Commission's experience has been that training public officials on how to apply s.28(2) to their daily work has been well received. The Commission is pleased to observe that human rights limitation analysis based on the criteria in s.28(2) is apparent in work emanating from various areas of ACT government - for example, in draft Cabinet Submissions that the Commission is afforded the opportunity to comment on.

99. In the Commission's view, a general limitation clause similar to s.28 of the ACT HR Act is preferable to specific limitations in each right. A general limitation clause clearly sets out the process in determining whether limitations are reasonable, and conceptually, is relatively straightforward to explain. This has been even more important since the recent amendments to the ACT HR Act requiring public officials to act and make decisions in accordance with human rights, as public officials must now consider s.28 in determining if any limitations on rights are reasonable. The Commission has conducted extensive training of public officials on their obligations under the ACT HR Act and has received positive feedback about how well attendees understand concept of limitations and how s.28 of the ACT HR Act works, in evaluations of the training.

**Recommendation 6: general limitation clause**

A Federal Human Rights Act should contain a general limitation clause setting out a test for determining whether a limitation on rights is reasonable, similar to s.28 of the HR Act

***Override provision***

100. Unlike the Victorian Charter and the Canadian Charter, the ACT HR Act does not have an ‘override provision’, which enables Parliament to enact laws that are inconsistent with human rights notwithstanding their non-compliance. In the Victorian Charter, it is intended that override declarations are only to be made in exceptional circumstances,<sup>65</sup> for example, in times of public emergency. However, an ‘override provision’ is not strictly necessary in a dialogue model of human rights protection, for two reasons. First, a limitation provision like s.28 is flexible in dealing with all circumstances that arise, including times of crisis or public emergency. When limiting rights in legislation, section 28(2) requires consideration of a range of factors, including the ‘importance of the purpose of the limitation’. Using this approach, it is possible for significant limitations on rights to be consistent with the ACT HR Act if there is a very pressing need (such as a public emergency or crisis), provided the limitation is likely to achieve its goal, and the means employed are the least restrictive available. Second, if parliament wishes to enact laws that are not consistent with human rights (in that the proposed legislation would limit rights in a way that is not a ‘reasonable limit’), it is still free to do so as even if such a law is subject to a declaration of incompatibility this would not invalidate the law. When introducing the bill, the Attorney General must prepare a compatibility statement reflecting that the bill not consistent with human rights and how it is not consistent with human rights.<sup>66</sup> This process is more open and transparent than an override provision.

Recommendation 7: no override clause

A Federal Human Rights Act need not include an ‘override provision’ to introduce legislation that is not consistent with human rights.

#### **b Obligations on public authorities**

101. Federal human rights legislation should include a requirement on all ‘public authorities’ to comply with human rights. ‘Public authority’ should be defined broadly, as it is in the ACT HR Act and Victorian Charter, to include bodies that perform ‘functions of a public nature’. This ensures that organisations that perform functions on behalf of government, for example, on a contractual basis, will still be bound by the obligation, and avoids the ‘outsourcing’ by government of its human rights obligation. Two exceptions to this obligation are appropriate: first, if a law expressly requires actions or decisions that are not consistent with human rights, and second, if a law does not expressly require conduct inconsistent with rights, but it is not possible to interpret the law in a way that is rights consistent in the circumstances.<sup>67</sup>
102. The obligation on public authorities to act and make decisions in accordance with human rights should be accompanied by a direct right of action for ‘victims’ of a breach of rights to a court to enforce the right directly in court.

<sup>65</sup> Victorian Charter, section 31(4).

<sup>66</sup> ACT HR Act, section 37(3)(b).

<sup>67</sup> See, for example, ACT HR Act, section 40B(2).

103. A lead-in period of one (or a maximum of two) years could be included for the introduction of a Federal Human Rights Act. This would provide an opportunity to train public servants on their obligations under the legislation. The material prepared by the UK government for the UK Public Service provides an excellent reference point for the development of publications and training public service.<sup>68</sup>
104. Since the public authority obligations came into force in the ACT on 1 January 2009, the Commission has noted an increase in the level of engagement amongst the public service about human rights. There has been a significant increase in the number of requests for training of public servants, and the Commission has now developed a 'train the trainer' module to cope with the demand, and a fact sheet on the obligations.<sup>69</sup> Training public officials about human rights obligations is an important aspect of successfully developing a human rights culture in government.

### ***Opt in provisions***

105. Since 1 January 2009, the ACT HR Act has provision for entities that are not bound by the ACT HR Act to 'opt in' to the obligations. Private bodies, such as corporations, associations and partnerships that would not otherwise be bound by the HRA can elect to be bound by the duty to comply with human rights contained in s.40B of the HRA.<sup>70</sup> Where entities are not clear whether or not they are bound (where it is unclear if they could be considered as performing 'functions of a public nature') they can opt in to the obligations to provide them with certainty. In some cases, government may make it a condition of contracts that the contracting party be bound by the obligations.
106. A private body that wishes to 'opt in' must write to the Attorney General, who then declares that the body is a public authority for the purposes of the HRA. The declaration can be revoked at any time on request by the private body. While the declaration is in force, the private body will be subject to exactly the same obligations and consequences as any other public authority.
107. The concept that the private sector should be encouraged to respect and promote human rights is not new; international compacts and agreements have set out principles of corporate social responsibility on many occasions.<sup>71</sup> In his introduction speech for the *Human Rights Amendment Bill 2007 (ACT)*, the Attorney General said:
- 'Such a provision will be unique among human rights jurisdictions and will promote a meaningful dialogue within the community about human rights, in line with the overall aims of the Human Rights Act and the growing interest among public and private bodies for triple-bottom-line reporting or

---

<sup>68</sup> See, for example, the UK Department of Constitutional Affairs website: <http://www.dca.gov.uk/hract/dcahumanrights.htm> (accessed 15 June 2009).

<sup>69</sup> The Human Rights Factsheet 'Public Authorities' is available on the Commission's website at [www.hrc.act.gov.au/assets/docs/humanrightsfactsheet.pdf](http://www.hrc.act.gov.au/assets/docs/humanrightsfactsheet.pdf) (accessed 12 June 2009).

<sup>70</sup> ACT HR Act, section 40D.

<sup>71</sup> See, for example, the UN Sub-Commission Norms on the Responsibilities of Transnational Corporations and other Business Enterprises; UN Global Compact; OECD Guidelines for Multinational Enterprises; and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.

reporting against the three major dimensions of sustainability: economic, social and environmental.’<sup>72</sup>

108. The private sector is already required to act lawfully in a range of other areas, for example, in the areas of occupational health and safety, discrimination and privacy. Encouraging broader, voluntary compliance with human rights standards provides an important opportunity for the non-government sector, as a vital part of Australia’s social fabric, to respect, protect and promote human rights. These provisions have only been in force in the ACT for less than six months, and although no organisations have opted in as yet, the Commission is aware of strong interest from a number of organisations who are currently in the process of consulting within their organisation with a view to opting in.

**Recommendation 8: obligation on public authorities**

8.1 A Federal Human Rights Act should contain an obligation on public authorities to act and make decisions in accordance with human rights, similar to s.40B of the ACT HR Act.

8.2 The term ‘public authority’ should be drafted broadly to capture entities performing functions of a ‘public nature’, as reflected in s.40A of the ACT HR Act.

8.3 A Federal Human Rights Act should include a direct right of action to court for someone who alleges that a public authority has breached their human rights.

8.4 An ‘opt in’ provision should be included in a Federal Human Rights Act to enable the non-government sector to be involved in promoting, protecting and respecting human rights in Australia.

**c Cabinet decisions**

109. It is important that Federal human rights legislation include measures to ensure human rights issues are considered as early on in the process of developing law and policy as possible. Human rights considerations should be referred to in the federal Cabinet Handbook and Legislation Handbook. In the ACT, the *Cabinet Paper Drafting Guide*<sup>73</sup> refers to the ACT HR Act and requires all cabinet submission address the issue of compatibility of the proposal with the ACT HR Act. In practice, this has resulted in human rights issues raised early on in policy and law development process, which provides greater opportunity for detailed consideration of the impact of proposals on human rights.

**d Joint committee on human rights**

110. Under s.38 of the ACT HR Act the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee), reports to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. In practice this Committee has provided detailed

<sup>72</sup> Australian Capital Territory, *Legislative Assembly Debates*, 6 December 2007, 4027 (Simon Corbell, Attorney-General).

<sup>73</sup> ACT Government, ‘Cabinet Paper Drafting Guide’ (February 2009).

scrutiny of all Bills, notifiable instruments and disallowable instruments presented to the Assembly.

111. As the detailed examples below illustrate, the Scrutiny Committee has performed an important function in reviewing proposed laws for their effect on human rights. Pre-enactment scrutiny of legislation is a vital part of the dialogue model of human rights protection, and is an essential component of any federal human rights legislation. Another example of the positive impact human rights parliamentary scrutiny can have is the work of the UK Joint Committee on Human Rights. The UK Committee rigorously scrutinises legislation and regularly reports to Parliament on matters that it believes requires the Government's attention as the Bill progresses. A review by the UK Department of Constitutional Affairs on the impact of the UK HRA after ten years in force concluded that:

'Formal procedures for ensuring compatibility, together with outside scrutiny by the Parliamentary Joint Committee on Human Rights, have improved transparency and Parliamentary accountability.'<sup>74</sup>

**Recommendation 9: A Joint Parliamentary Committee on Human Rights**

A Joint Parliamentary Committee on Human Rights should be established to review existing, draft or proposed laws for compliance with human rights. The Committee should have all the powers of existing parliamentary committees, including the ability to conduct inquiries and hearings and accept written and oral submissions.

**e Compatibility of bills with human rights**

112. Under s.37 of the ACT HR Act, the Attorney-General must prepare a written statement, known as a compatibility statement, regarding all government bills presented to the ACT Legislative Assembly ('the Assembly'). This statement must outline whether, in the Attorney-General's opinion, the bill is consistent with human rights. If the Bill is not consistent with human rights, the Attorney-General must detail the reasons for the perceived inconsistency. This requires that government officials closely consider whether the proposed legislation limits rights, and whether the limitations are reasonable. To date, the Attorney-General has not stated any Bills presented before the Assembly are inconsistent with human rights. In the ACT's experience it is preferable to have the Attorney-General, rather than the Minister responsible for preparing the bill, as the person responsible for preparing the compatibility statement, as it provides a more consistent and rigorous approach.
113. In the Commission's view, Federal human rights legislation should extend the ACT requirements by:
- Requiring all bills (not just government bills) are accompanied by statements of compatibility; and
  - Requiring statements of compatibility to include a detailed statement of reasons for compatibility.

<sup>74</sup> UK Department for Constitutional Affairs, 'Review of the Implementation of the Human Rights Act' (2006) 19.

114. There is no legislative requirement in the ACT HR Act for compatibility statements to be accompanied by a detailed statement of reasons. However, as part of the agreement between the Labour Party and the Greens to form government in the 7<sup>th</sup> ACT Legislative Assembly,<sup>75</sup> a detailed statement of reasons, subject to resources, must now accompany each s.37 compatibility statement. Comprehensive compatibility statements have been provided for a number of bills.<sup>76</sup> The Commission's view is that detailed compatibility statements improve the human rights dialogue between the three arms of government and especially the community, and should be required part of Federal human rights legislation.

**Recommendation 10: Statements of compatibility**

The Attorney-General should be required to table a detailed statement of compatibility setting out whether the bill complies with the Federal Human Rights Act, with a detailed statement of reasons.

**f Interpretation of laws**

115. Section 30 of the ACT HR Act includes an obligation on all decision makers to interpret Territory laws (including regulations and other statutory instruments, but not the common law) to be consistent as far as possible with human rights. This interpretative approach is important as it covers all situations of statutory regulation, thereby including private actors as well as public authorities, for example, a breach of privacy by the media as occurred with the high profile case of Naomi Campbell suing a media outlet for publishing photos of her leaving a Narcotics Anonymous meeting.<sup>77</sup> The Act confers jurisdiction on the ACT Supreme Court to issue a declaration of incompatibility in cases where legislation cannot be interpreted to be consistent with human rights;<sup>78</sup> the declaration does not affect the validity of the legislation in question,<sup>79</sup> but the Attorney-General is required to report the government's response to the declaration to the Legislative Assembly within six months.<sup>80</sup>

**Recommendation 11: interpretation of laws**

11.1 A Federal Human Rights Act should contain an interpretative provision that requires anyone interpreting laws to do so in a way that is consistent with human rights, similar to s.30 of the ACT HR Act.

11.2 If a Court makes a finding of inconsistency, the Attorney-General must table the document in parliament promptly and table a written response in parliament

<sup>75</sup> See the ACT Greens-Labour Agreement for the 7th Legislative Assembly. Available online at: <http://act.greens.org.au/learn/act-greenslabor-agreement> (accessed 12 June 2009).

<sup>76</sup> Detailed Compatibility Statements were provided for the *Mental Health (Treatment and Care) Amendment Bill 2008 (ACT)*; *Crimes (Bill Posting) Amendment Bill 2008 (ACT)* and *Crimes (Murder) Amendment Bill 2008 (ACT)*.

<sup>77</sup> See *Naomi Campbell v MGN Ltd* [2004] UKHL 22.

<sup>78</sup> ACT HR Act, section 32.

<sup>79</sup> ACT HR Act, section 39.

<sup>80</sup> ACT HR Act, section 33.

within 6 months of receiving the document, similar to provisions under s.33 of the ACT HR Act.

116. It is important that international jurisprudence is available as a source for interpreting specific rights. In the ACT this happens by virtue of s.31 of the HR Act.

**g Intervention in cases where human rights issues are raised**

117. Section 36 of the ACT HR Act provides the Human Rights Commissioner with the right to intervene in civil or criminal legal proceedings initiated by other parties, with the permission of the court or tribunal. The Attorney-General also has the power to intervene in proceedings involving the application of the HR Act, but does not require the court's permission to do so. In Victoria, the Commission's independent monitoring role places it on the same basis for intervention as the Attorney-General, that is, leave is not required under s.40 of the Victorian Charter.<sup>81</sup>

118. Section 36 of the Human Rights Act provides as follows:

- (1) The human rights commissioner may intervene in a proceeding before a court that involves the application of this Act with the leave of the court.  
 (2) The court may give leave subject to conditions.

119. The Explanatory Statement to the ACT HR Act makes it clear that the purpose of this power is to ensure that there is independent advocacy in relation to the interpretation and application of the Human Rights Act. The Commissioner cannot initiate proceedings herself, nor can she represent an individual or organisation in proceedings.

120. The ACT HR Act broadly defines the word 'court' referred to in section 36. This means that in addition to the ACT Supreme Court, ACT Magistrates Court and ACT Children's Court, the Human Rights Commissioner can seek leave to intervene in proceedings before ACT tribunals including the ACT Civil and Administrative Tribunal.

121. The ACT HR Act does not include a provision for costs orders against the Commission where it seeks leave to intervene under section 36. The Act appears to envisage that the Commission not be exposed to costs when performing its statutory responsibility to assist the Courts in interpreting the rights protected in the Act. Ultimately, of course, this remains a matter for determination by the courts.

**h Remedies for breaches of human rights**

122. There are a number of remedies for breaches of human rights available under a dialogue model of human rights protection. The ACT HR Act includes most of the remedies outlined below, except for the provision of awarding damages as a remedy and a human rights complaint handling mechanism for non-criminal matters. The Commission recommends that a Federal Human Rights Act include the features of the ACT HR Act with the addition of the latter two features.

***Rights consistent interpretation***

---

<sup>81</sup> *Kortel v Mink & Mirik* [2008] VSC 103 at paras 14-16.



123. With an interpretative provision similar to s.30 of the HR Act, a court can adopt a human rights consistent interpretation of legislation as far as it is possible to do so consistently with the purpose of the legislation.<sup>82</sup> That is, if a number of possible interpretations are open to the court, the court is required to adopt the interpretation that limits human rights the least.

***Declaration of incompatibility***

124. If a human rights consistent interpretation is not possible, an individual can seek a declaration of incompatibility. Whilst the granting of a declaration of incompatibility does not provide any personal remedy for the individual concerned given that the inconsistent provision remains valid law, a declaration is likely to focus attention on the issue, and may lead to legislative change. The ACT Supreme Court has not yet made any declarations of incompatibility in the first five years of the ACT HR Act. This compares to the UK, where as at July 2006, there have been seventeen Declarations of Incompatibility made by UK courts and remitted to Parliament.<sup>83</sup> In most cases, the UK Parliament has responded by amending the legislation to make it human rights compliant.<sup>84</sup>

***Appropriate remedies, including damages***

125. In cases where a public authority has been found to have acted unlawfully and breached human rights, effective remedies should be available to the ‘victim’ including damages. At international law, ‘effective remedy’ has been interpreted broadly to include restitution, rehabilitation, public apologies, guarantees of non-repetition, and changes in laws and practice.<sup>85</sup> At present, the ACT HR Act excludes damages for an action against a public authority. Section 40C of the ACT HR Act provides:

‘The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.’

126. Thus the court has the power as part of its inherent jurisdiction to award range of remedies, for example, injunctive relief, a declaration, a writ of habeas corpus or mandamus, an order that an apology be made, or an order that evidence obtained in breach of human rights be excluded from proceedings.

127. The Commission’s view is that damages should be available as a remedy, at the discretion of the Court where no other remedy is appropriate. This should be set out in an express remedies clause as exists in the UK, which provides at s.8(3):

No award of damages is to be made unless, taking account of all the circumstances of the case, including—

<sup>82</sup> See *Kingsley’s Chicken Pty Ltd v Queensland Investment Corporation and Ors* [2006] ACTCA 9 (2 June 2006) citing *Ghaidan v Godin-Mendoza* (2004) 2 AC 557.

<sup>83</sup> There have been 26 declarations of incompatibility made in the UK, however nine of these were overturned on appeal. See M Hunt, *The UK Human Rights Act as a ‘parliamentary model’ of rights protection: lessons for Australia* (Speech delivered at the Australian Human Rights Commission, Sydney 17 February 2009). Available online at [http://www.hreoc.gov.au/letstalkaboutrights/events/Hunt\\_2009.html](http://www.hreoc.gov.au/letstalkaboutrights/events/Hunt_2009.html) (accessed 2 June 2009).

<sup>84</sup> UK Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (2006) 17.

<sup>85</sup> UN Human Rights Committee, General Comment 31, ‘Nature of the General Legal Obligation Imposed on State Parties to the Covenant’, UN Doc CCPR/C.21/Rev.1/Add13 (2004) [6].

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

128. In the Commission's view the UK limited approach is preferable to the situation under the NZ Bill of Rights where, in absence of an express clause, the courts implied a limited right to damages.<sup>86</sup> The primary goal of a remedies clause in a dialogue model of human rights should be to change behaviour and prevent future breaches, and awarding damages as an option of last resort has an important role to play in this. Further, from the plaintiff's perspective, there may be cases where other remedies are not appropriate. When questioned on attitudes to the HR Act, a respondent to the Community Survey commented that *'it could have more teeth though'*.
129. The Commission's view is that excluding the potential for damages to be awarded has the potential to deter would-be claimants, including those with what would appear to be highly meritorious claims, from bringing them to court because of the cost and emotional stress associated with litigation. Although these individuals are often aware of potential benefits of a successful claim, such as a public apology or the court ordering a change in policy, the time and emotional strain of bringing an action to court weights against taking action against the public authority, even in cases where pro bono legal assistance is available. Where pro bono assistance is not provided, or is limited, the balance swings further against taking action against a public authority to seek a remedy.
130. The ACT Consultative Committee recommended an express damages clause for the HR Act, and noted that in both the UK and NZ, there has not been a flood of litigation and the Courts have used their power to award damages sparingly.<sup>87</sup> There is no reason to suggest the result would be any different if Federal human rights legislation in Australia included an express right to damages for breach of a human right by a public authority. The Commission's view is that a limited right to damages, combined with some form of complaint handling function (discussed below) would make federal human rights legislation far more accessible for vulnerable people who need it most: the marginalised who disproportionately suffer human rights abuses.

### **Costs**

131. The Commission believes that it is important not to deter applicants with meritorious claims from bringing them to court if it is the most appropriate avenue in the circumstances, and recognises that the threat of having costs awarded against them is likely to be a significant deterrent. Human rights litigation often involves matters of

---

<sup>86</sup> *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667. In this case, a majority of the Court of Appeal held that a breach of the Bill of Rights Act gave rise to a public law action against the Crown, and could attract damages as a remedy.

<sup>87</sup> ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report on the ACT Bills of Rights Consultative Committee* (2003) 4.73.

public interest, and there are often broader implications than simply resolving a matter between the parties. The Commission therefore believes that Federal human rights legislation should include the presumption that parties bear their own costs.

Recommendation 12: a broad range of remedies including damages where appropriate

12.1 A Federal Human Rights Act should enable courts to award damages for breaches of human rights in cases where no other remedy is, of itself, appropriate.

12.2 A Federal Human Rights Act should include cost provisions based on the presumption that parties bear their own costs.

### ***Complaint handling function***

132. One matter for consideration is whether a Federal Human Rights Act should have a complaints handling mechanism to enable complaints about breaches of human rights to be brought first to an independent body, such as the AHRC, for attempted conciliation. The ACT HR Act does not have a complaints handling mechanism, and this issue was not specifically considered by the ACT Consultative Committee. The Commission is aware that some countries handle human rights (as opposed to discrimination) complaints, as well as performing systemic work, for example, South Africa and some South American jurisdictions.
134. The Commission's view is that Federal human rights legislation should include a conciliation-based complaints handling function for appropriate civil matters. Over the past five years since the commencement of the ACT HR Act, the Commission has encountered many individuals who feel their rights have been breached and would like some sort of remedy for that alleged breach – for example, an apology or a change of policy from the government agency concerned. However, many individuals are deterred at the prospect of litigation in the ACT Supreme Court, particularly if they do not have legal representation. Many potential claimants do not feel empowered to raise the issue of their treatment directly with the public authority, or may have already done so but not achieved the desired outcome. An optional conciliation-based human rights complaint handling model would provide a first point of call for individuals to raise human rights issues in a non-adversarial environment. Should conciliation fail, an individual can opt to pursue legal action.
135. This process must be properly funded and accessible for potential complainants. Breaches of human rights in the course of criminal proceedings could not be dealt with through a conciliation-based complaints model because of the rule that matters that are, or are likely to come before a court cannot be commented on by a non-judicial body (*sub judice*). Instead, the human rights issues associated with criminal proceedings would need to be raised as part of existing criminal proceedings before the court. A conciliation-based complaint handling function could operate along a similar model to that which exists for complaints of unlawful discrimination under the federal anti-discrimination legislation and the *Human Rights and Equal Opportunity Act 1986* (Cth). If a complainant alleged a breach of human rights in a non-criminal proceeding, a complaint could be made to the AHRC, which would then investigate

the matter and attempt to conciliate the complaint. If conciliation was unsuccessful, the claimant could elect to make a claim in the Federal Court. There should be no restriction on complainants initiating court proceedings without using this more informal mechanism. Experiences from South Africa and their Complaint Handling Manual and Guidelines may assist in identifying appropriate options for Australia.<sup>88</sup>

136. The major benefit of this approach would be to make seeking a resolution of a human rights complaint more accessible and cost effective for complainants. As one respondent to the Commission's Government Survey commented:
- 'I am disappointed that the HR Act is not more enforceable and that people who feel that their human rights have been violated in the ACT have little practical redress. Most cannot afford to take the matter to court and are intimidated by this process.'
137. As outlined above, the Commission has found that potential claimants find the option of making a claim directly to court about a breach of human rights a very daunting and potentially expensive prospect, and to some it seems a disproportionate means to achieve resolution (particularly if they are seeking an apology or a change of policy from the government department).
138. The Commission does not recommend that the Victorian model<sup>89</sup> of Ombudsman human rights complaints be duplicated in either the ACT or Federal spheres. As a public authority itself, and also having its jurisdiction limited to government departments and statutory bodies the Ombudsman should already monitor its own and other's decision-making processes and actions to ensure they are human rights compliant. A complaints jurisdiction is more appropriately placed in human rights agencies, which are already experienced with discrimination cases.

#### Recommendation 13: human rights complaint handling function

A conciliation-based human rights complaint handling mechanism should be established for civil human rights complaints. This function would best be performed by the Australian Human Rights Commission with additional resources. Complainants will also still have the option to take claims to court, if resolution fails or simply initiate court proceedings directly.

#### i Auditing laws for human rights compliance

139. Under s.41 of the HR Act, the ACT Human Rights Commission has the power to audits the effect of laws (including the common law) on human rights, and report in writing to parliament. These audits enable identification of systemic human rights issues and have been a vital tool in identifying subsequently rectifying human rights breaches in the ACT. The Commissioner has conducted two major audits to date, as detailed below.

<sup>88</sup> See for example, the South African Human Rights Commission's Complaint Handling Manual and Complaint Handling Procedures, available online at [http://www.sahrc.org.za/sahrc\\_cms/publish/cat\\_index\\_29.shtml](http://www.sahrc.org.za/sahrc_cms/publish/cat_index_29.shtml) (accessed 12 June 2009).

<sup>89</sup> Via *Ombudsman Act 1973* (Vic), section 13.

140. The Commission strongly supports the inclusion of an ‘audit power’ in federal human rights legislation, which could be similar to AHRC’s power under provisions of the HREOC Act.<sup>90</sup> Audits should be performed against rights protected in a Federal Human Rights Act, in a similar fashion to the Commission’s audit against the HR Act. In this way, human rights protection in practice can be analysed against internationally recognised and universally accepted standards to identify areas where further attention is needed.

Recommendation 14: power to conduct human rights audits

A Federal Human Rights Act should include provision for an independent body to review the effect of laws (including the common law) on human rights and report in writing to parliament.

**j Periodic reviews of the Federal Human Rights Act**

141. The ACT HR Act was enacted in 2004 with two mandated reviews included in the legislation: a one-year review and a five-year review. The one-year review of the ACT HR Act provided an opportunity to reflect on how the HR Act operated in practice and enabled the legislation to be developed further – for example, the obligations on public authorities was introduced by amendments in 2008 that resulted from the one-year review of the Act. A Federal Human Rights Act should include provision for reviews, not only on the operation of the Act but the rights that should be protected, to ensure that the document is not ‘frozen in time’, but evolves to reflect social needs.

**k Examples of how human rights legislation develops a human rights culture**

***l Better protection and promotion of human rights in parliament***

142. One of the primary impacts the HRA has had in the ACT since in its inception has been to the parliamentary process. The HRA has influenced the development of legislation in three primary ways:
- in influencing the development and consultation around legislation prior to introduction of bills;
  - through the Standing Committee on Justice and Community Safety, performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee (‘the Scrutiny of Bills Committee’); and
  - during substantive debate.
143. Each of these influences will be considered in turn, with case studies that demonstrate the efficacy of each mechanism in improving human rights protection.

***In influencing the development and consultation around legislation prior to introduction of bills***

<sup>90</sup> For example, ss.11 (1)(e), (j) and (k) of the HREOC Act. The AHRC ‘Bringing them Home’ inquiry and report was conducted pursuant to these powers of the HREOC Act.

144. The Government has been particularly mindful of human rights principles in developing and consulting on draft legislation, particularly because of the obligation for the Attorney-General to state at the introduction of new legislation whether it is human rights compatible.
145. One particularly high profile example that demonstrates the impact of human rights legislation on drafting of bills is in relation to anti-terrorism legislation. In the wake of the 2005 London Terrorist bombings, the Commonwealth sought agreement from State and Territories to pass mirror legislation to ensure a uniform legislative response to the perceived threat of terrorism. However, any laws enacted in the ACT had to be compliant with the HR Act and so in some part differed from legislation enacted in at a Commonwealth level and in other States and the Northern Territory, and the Commission provided advice to the ACT Attorney-General on compatibility of proposed terrorism laws with human rights.<sup>91</sup> The Preamble of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT) ('ACT Terrorism Act') states that measures taken are necessary and effective, they contain safeguards against abuse, are evidence-based, intelligence-led and proportionate – that is, they have the legitimate objective to deter, prevent, detect and prosecute terrorism.
146. The impact of the HR Act on terrorism laws is well documented by Andrew Byrne and Gabrielle McKinnon.<sup>92</sup> Some of the safeguards in the ACT terrorism legislation include:
- requiring a fair court hearing for Preventive Detention Orders on limited grounds, including the threshold test of when it is reasonable and necessary, as well as the least restrictive means of preventing a terrorist act;
  - not applying to children under the age of 18 years, as it conforms with the requirement to have detention only as a last resort for young people under the Convention on the Rights of the Child;
  - enabling full legal representation of detainees. The Act allows detainees to have more communication with others (enabling them to tell where, why and how long they expect to be detained) – it does not contain offences for people, including family members, who disclose that someone is subject to an order (following the UK model);
  - presuming the confidentiality of communication between lawyer and client, with monitoring only in exceptional circumstance rather than routine;
  - providing that ACT Policing is required to undertake human rights training of its officers; and

---

<sup>91</sup> The advices are available on the Commission website:

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=18&MainTypeID=18> (accessed 12 June 2009).

<sup>92</sup> A. Byrnes & G. McKinnon, 'The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: A Triumph for Federalism or a Federal Triumph?' in *Fresh Perspectives on the 'War on Terror'*, Miriam Gani and Pene Matthew (eds) (2008), 361 -377. Available online at <http://acthra.anu.edu.au/articles/Triumph%20of%20federalism.pdf> (accessed 12 June 2009).

- having a sunset clause of 5 rather than 10 years, as recommended by the Federal Senate Committee.

With the HR Act as an objective lens through which to determine whether the proposed anti-terrorism laws were consistent with human rights, the ACT Terrorism laws are far less coercive than in other jurisdictions. In the Commission's view the ACT Terrorism laws represent a more proportionate response to the threat of terrorism.

147. The case studies below further illustrate the impact the HR had on the legislative process in relation to the following bills:
- *Corrections Management Bill 2006*;
  - *Children and Young People Bill 2008*; and
  - *Mental Health (Treatment and Care) Amendment Bill 2008*.
148. The case studies below illustrate how the ACT HR Act resulted in detailed pre-enactment consideration of the impact each bill would have on the human rights of the ACT community. In most of those examples below and above, the Government issued Exposure Drafts of these Bills to encourage community consideration of issues. In some cases this occurred as a result of the Commission's highlighting of controversial human rights issues in its comments on draft Cabinet Submissions which are required to be confidential, so Exposure Drafts are an important mechanism to bring about open community debate.
149. These examples demonstrate how scrutiny under human rights legislation leads to more considered legislation from a human rights perspective, which is appropriate and proportionate to the goal the legislation seeks to achieve. The Commission's view is that a Federal Human Rights Act that required similar pre-enactment scrutiny would significantly improve human rights protection and promotion in Australia, by assisting in identifying areas where laws could breach human rights, before the laws are enacted. This would enable problems with draft legislation to be rectified before they are enacted and adversely impact anyone – in this way, the dialogue model of human rights legislation operates in many cases to 'prevent' rights breaches from occurring.

#### **Legislation case study 1: Corrections Management Bill 2006**

Prior to the Commission's audit of the Operation of ACT Correction Facilities under Corrections Legislation, the Government took steps to modernise the ACT Corrections Facilities in light of the construction of a new prison (the Alexander Maconochie Centre) through a new Corrections Management Bill.

The ACT HR Act was a key consideration both in the development of the new prison, and the Corrections Management Bill 2006. As the Explanatory Statement to the Bill stated:

The ACT's Human Rights Act 2004 protects fundamental rights. Any limits on these rights are only permissible if they are authorised by a Territory law and are reasonable and demonstrably justifiable in a democratic society. The Bill contemplates the minimum conditions and management of people, whose right to liberty is lawfully limited.

Consistent with section 28 of the Human Rights Act 2004, the Bill sets out reasonable limitations upon a sentenced offender's human rights, or a detainee's rights, consistent with the object of the Bill.

The Bill drew on the Commission's recommendations from the Human Rights Audit of the Quamby Youth Detention Centre, and the ACT Human Rights and Discrimination Commissioner was consulted extensively in the development of the Bill. The Explanatory Statement states explicitly that the following Parts were drafted with human rights principles in mind:

The objects and principles (including management of correctional services, treatment of detainees and remandees, minimum living conditions, administration (including policies and operating procedures, access to health services, emergency powers, living conditions (including treatment of convicted and non-convicted detainees, communication with family and others, telephone calls, mail, contact with accredited people, news and educational services, health care, religious, spiritual and cultural needs); inspection of correctional centres; management and security (including segregation, strip search requirements, body searches, discipline (including overlapping disciplinary breaches and criminal offences)

These changes had a direct impact on how detainees are treated, how they are searched, their living conditions, their ability to communicate and keep in contact with the outside world and their health treatment. These are fundamental issues regarding the management and treatment of those deprived of their liberty.

This Bill demonstrates the direct and practical impact a human rights act has on the treatment and well-being of prisoners in corrections facilities. The strength of this framework is that prisoners continue to be secured in a corrections environment, consistent with the goals of rehabilitation, security, justice and good order, in a system designed to respect human rights. These are not only the rights of the prisoners and detainees, but also the corrections staff, whose rights, particularly the right to security of the person, must also be recognised. The ACT experience shows that human rights strengthens, rather than weakens, the overall corrections system. The AMC is now fully operational, and one respondent to the Commission's Government Survey commented that '*I work at the AMC and the Human Rights Act is referred to on a daily basis*'.

### **Legislation case study 2: *Children and Young People Bill 2008***

The ACT's new *Children and Young People Act 2008* was underpinned by human rights principles, both in a general sense, and because of the Commission's 2005 audit of the Quamby Youth Detention Centre.

As the Explanatory Memorandum to the Bill stated:

The development of the Bill was influenced by a number of factors, including the Human Rights Act 2004, extensive community consultation and government responses to reviews and inquiries during this time, including...the Human Rights Audit of Quamby Youth Detention Centre, by the Human Rights and Discrimination Commissioner, reported in June 2005.

In doing so, the Bill also sought to embody and express relevant international human rights standards for children and young people deprived of their liberty, including:

The Convention on the Rights of the Child;

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty;

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice; and



The United Nations Standard Minimum Rules for the Treatment of Prisoners.

In particular, the Bill took into account human rights principles in relation to the treatment and detention of children and young people in the youth justice system, and the care protection system for children and young people at risk in the ACT.

In relation to the youth justice system created by the Bill, the ACT HR Act impacted on matters such as:

The separation of juvenile detainees and adult detainees;<sup>93</sup> avoiding a blanket policy of transfer of young people to adult facilities when they turn 18;<sup>94</sup> the treatment and living conditions of young detainees; medical treatment of young detainees;<sup>95</sup> use of force;<sup>96</sup> maintenance of family relationships;<sup>97</sup> alcohol and drug testing;<sup>98</sup> reform to searching and strip searching procedures;<sup>99</sup> and an overhaul and new legislative basis to the behaviour management system to ensure clarity and consistency, as recommended by the Commission.<sup>100</sup>

The Bill also took into account the HR Act's protection of security of the family (s.11(1)) in formulating a care and protection system that may lead to children being removed from their family unit for their own protection. As the Explanatory Statement stated:

The care and protection principles outlined at clause 349 emphasise that the primary responsibility for providing care and protection for children and young people rests with their parents and family members (clause 349(1)(a)) and support should be given to parents and family members to provide for the care, protection and wellbeing of children and young people (clause 349(1)(b)). However, the care and protection chapters place reasonable limits on this right in circumstances where a child or young person has been abused or neglected or is at risk of abuse or neglect and is in need of some form of protective intervention from the State through reporting, appraising and care and protection orders tailored to meet the child or young person's protective needs. This gives effect to section 11(2) of the Human Rights Act 2004 which provides that every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

### **Legislation case study 3: *Mental Health (Treatment and Care) Amendment Bill 2008***

In 2005, the ACT Government decided to amend the existing ACT Mental Health (Treatment and Care) Act 1994 to allow for the ACT Mental Health Tribunal (now ACT Civil and Administrative Tribunal) to make an involuntary emergency electroconvulsive therapy (ECT) order.

Following detailed consultation with the community and the Human Rights and Discrimination Commissioner substantial amendments were made to the original Bill due to human rights arguments:

<sup>93</sup> Sections 99 and 100.

<sup>94</sup> Division 5.1.4; UN Committee on the Rights of the Child, General Comment 10, 'Children's rights in juvenile justice', CRC/C/GC/10 (2007).

<sup>95</sup> Section 180.

<sup>96</sup> Division 6.6.4.

<sup>97</sup> Division 6.6.6.

<sup>98</sup> Part 6.7.

<sup>99</sup> Chapter 7.

<sup>100</sup> Chapters 8 and 9.

the membership of the Mental Health Tribunal was expanded from just the presidential member to a full, three-member tribunal;

the lower threshold criterion of irreparable harm was removed, so that emergency treatments could only be made when necessary to save the life of a person;

the requirement of a second doctor's opinion was added, prior to seeking an application;

a requirement was added that the administration of ECT must be recorded as either voluntary or involuntary;

the public advocate must be informed prior to an emergency ECT decision being made;

the number of emergency ECT treatments is capped at three in accordance with international standards; and

A blanket prohibition introduced on emergency ECT treatment for people less than 16 years of age because of lack of data supporting the safety and need of this form of treatment in minors.

Despite the controversial aspects of ECT, this Bill is an example of how a human rights act does not prevent therapeutic treatment being administered on an involuntary basis, but rather ensures that such treatment is subjected to extensive and rigorous review and safeguards. As Chief Minister Jon Stanhope MLA said during the debate of the Bill:

Today, we see yet again the Human Rights Act at work, providing a standard to hold our behaviour up against and to measure our decisions against. This bill is an excellent example of how the Human Rights Act can help legislators work out human rights issues in a spirit of cooperation between stakeholders. It demonstrates the value of the human rights dialogue that is taking place in the ACT. Bills such as this one give me confidence that the dialogue about human rights is developing in a way that improves our capacity to respect, protect and promote human rights. Human rights are now at the heart of our policy-making processes and compatibility is the new litmus test.

### ***Through the Scrutiny of Bills Committee***

150. Under s.38 of the HRA, the Scrutiny of Bills Committee, reports to the Legislative Assembly about human rights issues raised by bills presented to the Assembly. The Scrutiny of Bills Committee applies a human rights framework, independent from Government, to all instruments presented to the Assembly, and routinely devotes many pages of their Reports to human rights issues. As a result of this enhanced scrutiny of legislation, changes are frequently made to Bills and other parliamentary instruments after their introduction, in response to the Committee's comments.
151. In 2008 for example, the ACT Government introduced legislation to create a new Civil and Administrative Tribunal, encompassing a number of previously existing tribunals. In considering the *ACT Civil and Administrative Tribunal 2008 Bill*, the Scrutiny of Bills Committee recommended the Bill be amended to include notes explicit preserving the privilege against self-incrimination in the Bill. In response, the Government agreed and amended the Bill, with the Attorney-General made the following comments during debate:
- 'I would like to thank the Standing Committee on Legal Affairs for their scrutiny of the bills. I have prepared and forwarded to the committee a detailed response to their comments .... I also thank the committee for its

suggestion that notes to subclause 41 (1) and clause 33 should refer to sections 170 and 171 of the Legislation Act 2001 so that privilege against self-incrimination is explicitly preserved in the bill. This suggestion has been incorporated into the foreshadowed government amendments.'

#### **During substantive debate**

152. Even after the above two processes, amendments have also been made on the floor of the Assembly during final debate on Bills, based on human rights principles. Coupled with recommendations from the Scrutiny of Bills Committee, debate on the floor of the Assembly which draws on human rights arguments has also resulted in Bills being amended.

#### **Case study: Health Legislation Amendment Bill 2006 (No 2)**

The ACT Government introduced this bill in 2006 to make changes to the way health professionals are regulated in the ACT. The Bill included a proposed new section 59A, which empowered the President of the Health Professions Tribunal to issue a warrant to bring a person before the Tribunal and detain a person until the person is released by order of the Tribunal.

The Government initially argued that the clause should remain, because a human rights review of mental health legislation by the Castan Centre at Monash University, which included assessing a clause similar to the proposed s.59A, found the provision was human rights compliant. However, after hearing debate on the floor of the Assembly and reconsidering the report of the Scrutiny of Bills Committee, the Government dropped the proposal. As the Health Minister, Katy Gallagher MLA, said at the time:

"...I was happy for 59A to proceed. It had been given the tick through the human rights audit. It had been given the tick through our own human rights process, through JACS, with an amendment, which we agreed to. However, the scrutiny report raised the argument with me. I had another look at it yesterday and thought, "All right. I will accept the scrutiny of bills committee's argument on this. I will listen to what the Assembly is saying to me." That is a minister's job. It is to take pieces of advice. We have taken advice from Monash University; we have taken advice from JACS. I have taken advice from health. Now I have taken advice from the scrutiny of bills committee...

...As I have said, the advice through that review was that no further action was required to address this clause. JACS, in issuing advice on human rights compatibility, asked that an addition be included in this clause to bring the person before the Tribunal as soon as possible. We took that advice and put it in there. The presidential members are magistrates. The Supreme Court has general oversight of all of these tribunals, so there are additional protections there. I accept, as I have said, the view of the scrutiny committee and of members who had raised their concerns with me. After listening to that advice and responding to it and taking more advice on whether or not we need a clause like this, I thought it was better to accept the views of the opposition and the Greens not to proceed with this clause. It is simply the government listening to the Assembly, not majority government being arrogant or ignoring what people are saying."

153. Even where changes are not made, Government Ministers are expected to respond to the adverse comments of the Committee, either in the debate stage of the Bill, or in formal correspondence to the Chair. In doing so, matters of confusion regarding human rights also have an opportunity to be addressed.

## ***II Better protection and promotion of human rights in government***

154. A dialogue model of human rights protection similar to the ACT HR Act would significantly improve human rights protection and promotion in government at a federal level. Evidence from the ACT and other jurisdictions with dialogue models indicates an increasing awareness of human rights in bureaucracy, and a shift away from inflexible applications of policies and procedures to an approach that considered individual circumstances and human rights implications of decision-making.
155. There are a number of features of the dialogue model that are important in creating a change within government. Each of these provisions is reviewed in turn, with examples of how these provisions work in practice. The overall impact of the dialogue model on ACT government is then considered.

### ***Audit power***

156. Under s.41 of the HR Act, the Commission has the power to conduct human rights audits of the effect of laws (including the common law) on human rights. The Commission has conducted two audits to date, of the former ACT youth detention centre, Quamby in 2005, and ACT remand facilities in 2007 (see case studies of these audits elsewhere in this submission). In addition, the Commission has conducted a service review of the Psychiatric Services Unit at the Canberra Hospital in partnership with ACT Health, pursuant to s.48 of the HRC Act. The focus on using this power has been to 'shine a light' on the practices, policies and procedures of closed environments such as youth and adult detention centres and secure mental health facilities, as it is these places that people can be at their most vulnerable to human rights abuses and violations. The audit function has been the most powerful in achieving systemic change at legislative as well as practical levels. The ACT Chief Minister, Jon Stanhope, commented on the impact of the Commission's audit of Quamby Juvenile Detention Centre at the (then) Human Rights Office (precursor to the ACT Human Rights Commission)'s fourth Human Rights Community Forum on 1 May 2006:

'The human-rights audit of the Quamby Juvenile Detention Centre by the Commissioner last year was a perfect, practical example of a dialogue system at work. The process was conducted in such a collaborative way that by the time the final report was written, most of its recommendations had already been acted upon. This, surely, is a result worth any number of front-page Supreme Court judgments exposing rights abuses against juvenile offenders. In fact, I believe that those who criticise the Human Rights Act according to the somewhat tortuous argument that it has not resulted in dozens of stern judgments or screaming headlines misunderstand the intent of the law, which is to promote a human-rights culture that would regard such a headline as a failure of process, more than a signal of success. I do not regard it as noteworthy or remarkable that in its first year of operation, the Human Rights Act was cited in only 14 Supreme Court cases. Perhaps it is a sign that process further away from the courthouse are working well.'

157. The ACT HR Act was proved a vital catalyst for both audits conducted to date: having the human rights standards clearly set out in ACT legislation provided a clear, unambiguous and relevant framework from which to analyse the operation of youth detention in the ACT. It is unlikely that such comprehensive reviews would have been possible without some form of human rights legislation, and it is unlikely that recommendations would have been taken so seriously by government had the ACT not had the HR Act.

**Case study: Human Rights Audit of Corrections**

The Commission exercised its power under s 41(1) of the *Human Rights Act 2004* to produce the *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation*, which was tabled by the Attorney-General on 21 August 2007. It was conducted prior to the opening of the ACT's new prison, the Alexander Maconochie Centre ('AMC') and presented a snapshot of the treatment of detainees at ACT's remand centres, the Belconnen Remand Centre ('BRC') and the Symonston Temporary Remand Centre ('STRC'), identifying issues that were relevant to the operation of AMC.

The Audit assessed the legal framework, policies and procedures using international human rights benchmarks. It was an ideal opportunity to document human rights compliance in physically inadequate remand facilities, with a view to the establishment of the new AMC by recommending improvements and avoiding any systemic human rights problems. The focus of the Audit was on remandees as a closed population – they have the right to be presumed innocent, but are often detained for long periods. The AMC also houses sentenced prisoners and it has the primary goal of rehabilitation rather than simple punishment, with humane treatment being a core function of staff.

Some of the problems identified in the Audit requiring urgent attention included:

- addressing overcrowding at the Periodic Detention impacting primarily on women, who were bussed to and from the BRC on weekends, resulting in less humane conditions of detention, including additional strip searches and fewer privileges;
- avoiding the excessive lock-downs; and
- offering a program of organised activities for detainees currently on remand.

The Audit recommended detailed general improvements in many areas including:

- equivalence to health care in the community – pilot of a needle and syringe program to prevent disease transmission, improved privacy and other protection for medical appointments and limits on restraints used in hospitals;
- humane treatment – changes to cell searches, drug testing, visits, privacy and hygiene in cells, access to legal advice, media, and information about rights;
- systemic discrimination – increased sensitivity to women's special needs and cultural, language and other issues for minority groups; and
- corrections culture – de-escalation and anti-bullying training, better maintenance and coverage of recording devices (e.g. videos & digital footage of incidents subject to investigations, such as use of force).

The ACT Government response was released on 12 February 2008. Of the 98 recommendations the Government agreed in full with 70, 'in principle' with 10, 'in part' with four, and 'noted' a further 10. It did not agree with the following four recommendations:

4.3.4.1 – ceasing to chaining seriously ill prisoners to hospital furniture and requiring that the use of restraints be recorded and notified to the Health Services Commissioner;

3.1.1. – ensuring that women prisoners are only guarded by women at night, reflecting the UN Standard Minimum Rules for the Treatment of Prisoners;

2.7.1 – enabling remand prisoners to wear their own clothing as set out in the UN Standard Minimum Rules for the Treatment of Prisoners and in compliance with the then current *Remand Centres Act 1976* (the law has since been repealed by the *Corrections Management Act 2007* which came into force in December 2007); and

2.12.2 – providing more verbal information on rights to detainees at induction.

Overall, the Commission was encouraged by the response to the Audit. The preparedness to make changes where needs have been identified is indicative of the genuine concern for prisoner welfare. For example, after the audit, activities officers were quickly appointed and offer detainees meaningful activities, which assist them to cope better with custody. The Attorney-General has requested that the Commission repeat the Audit when the AMC has been in operation for 12 months. The Commission is keen to perform this work but will need more resources in order to assess whether human rights compliance has been improved in practice, and the extent to which its recommendations have been implemented.

158. The Optional Protocol to the Convention Against Torture which Australia has signed and is in the process of ratifying requires regular domestic, as well as occasional UN Committee, inspections. The Western Australia Inspector of Custodial Services has already incorporated human rights in his Code of Inspection Standards (2007). It states:

‘The observance of human rights is integral to good prison management and the most effective and safest way of managing prisons’.

***Annual reporting requirements***

159. Under the ACT dialogue model there is a requirement that government departments report on implementation strategies and progress in incorporating human rights standards into their operations in their annual reports.<sup>101</sup> Although ACT departments have complied with this obligation, the Commission is concerned that this compliance is minimal, and with the letter rather than the spirit of this requirement. Reports from ACT Government Departments have generally only reported in a cursory way about measures they have taken to promote and protect human rights, or have reported on measures such as mandatory discrimination training (as the outcome of a discrimination complaint against the agency). In the forthcoming five year review of the ACT HR Act, the Commission will be arguing that the ACT HR Act should be amended to mirror the situation in Victoria, where the Victorian Equal Opportunity and Human Rights Commission is funded to report on government agency compliance with human rights. We recommend that the AHRC perform a similar function.

***The dialogue model: developing a human rights culture in government***

160. One of the key objectives of the ACT HR Act was to encourage a human rights-respecting culture in the ACT public service and in the ACT community. The ANU

<sup>101</sup> This requirement is set out in C.177 (p 33) of the *Annual Reports (Government Agencies) Notice 2008 (No 1)* (ACT), a legislative instrument made pursuant to the *Annual Reports (Government Agencies) Act 2004* (ACT).

Human Rights Act Research Project conducted interviews with ACT government officers from 2006-2008, and identified that there had been some success in developing pockets of knowledge about human rights, although there was 'more limited awareness among frontline decision-makers'.<sup>102</sup> The Commission's view is that this level of knowledge across ACT Government about human rights is increasing as a result of the new public authority obligations, as more public servants receive training in how to consider human rights in decision making. This highlights the important point that comprehensive training of public servants is a vital consideration in enacting Federal human rights legislation.

161. Almost all respondents to the Commission's Government Survey were aware that the ACT had human rights legislation (95.1%), and were overwhelmingly positive about the fact that the ACT had the HR Act, with 81% stating they were 'positive', 14.1% stating they were 'neutral', and only 4.8 stating they were 'negative'. Comments on perceptions of the ACT HR Act include:

'Great to have an agreed set of values to work from.'

'The ACT is in a unique position of having a controlled environment and therefore act as the watershed to possible national initiatives. The Human Rights Act 2004 is an important first step in showing our commitment to Human Rights.'

'I think it is important that we have a framework for protecting the rights of the ACT Community.'

162. However, only 27.8% of respondent's had attended training or seminars on the ACT HR Act, and in comments, some referred to training held almost five years previously. Respondents commented:

'The problem is I've attended as an interested person. Training for public servants needs to be mandatory, particularly given the application of the recent amendments to the HRA'.

'Although some departments had adopted training, human rights training should be mandatory.'

163. The Victorian Charter has been well integrated in agency strategies and processes, for example in 2008 the Victorian Competition and Efficiency Commission performed an inquiry on Liveability that identified human rights as one of three primary drivers.<sup>103</sup>

***Use of HR Act in ACT Public servant's work***

164. The UK Audit Commission found in 2003 that cultural change was strongest in agencies that were exposed to human rights litigation, such as the police.<sup>104</sup>
165. Survey results indicated that the ACT HR Act is being used in a range of different ways in the work of ACT Public Servants. This is a positive indication that a 'human rights

<sup>102</sup> Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Bills of Rights in Australia: history, politics and law' (2008) 91.

<sup>103</sup> Victorian Human Rights and Equal Opportunity Commission, 'Submission to the National Human Rights Consultation' (2009) 13.

<sup>104</sup> UK Audit Commission, 'Human Rights: improving public service delivery' (2003) 19.

culture' is developing well in ACT government. For example, survey respondents commented that they had used the HR Act in varied areas including:

'When conducting an incident investigation into an area that has mental health consumers'

'In teaching migrants'

'in design of building'

'...when making [a] decision on security and emergency management issues in the ACT'

'In undertaking my role as a prosecutor. I always ensure that I interpret relevant provisions in legislation, like the Bail Act, in a way which is consistent with the Human Rights Act'

166. As the following comment illustrates, the HR Act has been used to guide not just government interaction with the community, but how they deal with matters internal to the organisation:

'An Aboriginal/Torres Strait Islander staff member attended a funeral for her brother's partner, and was absent for longer than permitted by the Certified Agreement. We needed to consider indigenous cultural issues in this context'

167. Survey responses, as well as feedback from the Commission's community engagement work provide an indication of the development of a human rights culture in the ACT.

### ***III Better protection and promotion of human rights in the courts***

168. Prior to the enactment of the HR Act, critics predicted that it would be a litigious feast for lawyers, a rogue's charter favouring the rights of criminals over victims, or would have no impact on court decisions at all. None of these criticisms have been realised in practice — there has been no avalanche of cases pursued by lawyers, or of criminals escaping justice through human rights loopholes. The then Director of Public Prosecutions stated at the Legislative Assembly Legal Affairs Committee hearing on Annual Reports that the Act's influence had been 'pervasive' in his work, including bail applications but considered the overall effect of the Act to be a positive one. Importantly, there is increasing evidence that the ACT HR Act is being used as an advocacy tool for individuals in their dealings with government, similar to the documented use of the UK HRA and Victorian Charter.
169. The features of the dialogue model that enable better human rights protection through the courts is discussed, with examples of how these features have played out in practice in the ACT. The important role of the ACT HR Act as an advocacy tool is then considered. The ACT experience with human rights in Courts demonstrates a dialogue model of human rights legislation at a federal level would give judges too much power, but instead provides a benchmark that sets minimum standards by which to measure the conduct of government.
170. There have been over 85 reported cases citing the HR Act since the Act came into force. The great majority of these cases have been in the ACT Supreme Court and



Court of Appeal, with a small number in the Magistrates Court, Children's Court and Tribunals. Approximately 60% of the matters involved issues of criminal procedure, where the HR Act has given renewed focus to the requirements of a fair trial, and the need to avoid undue delay in prosecution.<sup>105</sup> The HR Act has also been applied in a wide variety of civil proceedings, including public housing and private tenancy matters, discrimination, adoption, care and protection, personal injury and planning matters. In many cases the HR Act has been used to support a conclusion which would likely have been reached on other grounds, but it has been a decisive consideration in some significant cases.<sup>106</sup> The matters which have come before the courts and tribunals have, until recently, related only to the interpretive power in s.30 of the Act. However, the direct duty on public authorities which came into effect on 1 January 2009 has already been considered in relation to the obligations of the Legal Aid Commission,<sup>107</sup> and is likely to be the subject of further test cases in the Territory.<sup>108</sup>

171.

***Human Rights in Court: case studies***

**Single mother allowed to stay on public housing list**

*Commissioner for Housing in the ACT v Y* [2007] ACTSC 84

Relevant right(s): Right to a fair trial (s.21, HR Act)

A single mother of two young children had her special circumstances taken into account in determining her income and was allowed to remain on the priority list for public housing as a result of the *Human Rights Act*. The applicant and her children were living in emergency accommodation as she could not afford to rent privately. The Commissioner for Housing had initially refused the applicant's request for special consideration, finding that her commitment to an expensive car lease (the only one she could get as a single mother) could not be considered in assessing her income. The Commissioner suggested that the applicant could send the children, aged 4 and 9, to childcare and school by public bus. The Commissioner also argued that this decision was not reviewable by the Court. The Supreme Court rejected this narrow reading of the Housing Program, finding that the right to a fair trial under the *Human Rights Act* meant that such important decisions should be reviewable, and that the discretion should be exercised in favour of the applicant in this case.

172.

**Suspended sentence inadequate for disproportionate use of force**

*Lukatela v Birch* [2008] ACTSC 99

Relevant right(s): Protection from torture and degrading treatment (s.10, HR Act); Right to humane treatment when deprived of liberty (s.19, HR Act)

<sup>105</sup> See eg *R v Fearnside* [2009] ACTCA 3, *R v Griffin* [2007] ACTCA 6, *R v Upton* [2005] ACTSC 52.

<sup>106</sup> For example: *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84, *Perovic v CW No CH 05/1046*, *R v YL* [2004] ACTSC 115.

<sup>107</sup> *Imran Hakimi v Legal Aid Commission (ACT); The ACT (Intervener)* [2009] ACTSC 48 (12 May 2009).

<sup>108</sup> As it has in Victoria, with the landmark decision of *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009).

A police station watchhouse sergeant had intentionally and unlawfully used capsicum foam on numerous people in custody who were drunk or un-cooperative, but posed no threat to anyone present. In several cases the detainees were already handcuffed. The officer had been given a total of a three month suspended sentence of imprisonment and a good behaviour bond for nine offences. The Supreme Court reviewed this sentence and found that it was manifestly inadequate, citing the detainees' rights under the Human Rights Act to protection from torture and degrading treatment, and to humane treatment when deprived of liberty.

173.

**Injured student allowed to make an insurance claim out of time**

*Hanan Al – Rawahi v Mohammad Ali Niazi* [2006] ACTSC 84

Relevant right(s): Right to a fair trial (s.21, HR Act)

An overseas student had suffered serious injuries when struck by a car on a pedestrian crossing. She retained a solicitor, but there were various delays in serving the driver's insurer, and the insurance company rejected the claim as being out of time. The Supreme Court found that the delay had been unreasonable in an objective sense, but nevertheless decided to exercise its discretion to allow the claim to proceed, having regard to the interests of justice and the right to a fair trial in the Human Rights Act. The Court considered that where a claimant's right to bring an action for damages for personal injury is at stake, if there is any doubt, the right to a fair trial suggests that the Court should err in favour of the claimant being allowed to pursue the claim.

174.

**Criminal proceedings against a child permanently stayed because of delay in prosecution**

*Perovic v CW No CH 05/1046*, Unreported decision of Magistrate (1 June 2006)

Relevant right(s): Children in the criminal process (s.20, HR Act)

The Children's Court found that an unjustifiable delay by police in charging a child with a criminal offence, and in pursuing the prosecution, amounted to a breach of the child's right under the Human Rights Act to be brought to trial as quickly as possible. The Court found that this delay had led to such injustice both to the child and the complainant that the matter should not continue, and granted a permanent stay of proceedings.

175.

**Decision respects wishes of children to stay together with their father**

*A v Chief Executive of Department of Disability, Housing & Community Services* [2006] ACTSC 43

Relevant right(s): Protection of family and children (s.11, HR Act)

A family of seven children was allowed to stay together with their father in the family home, after the Supreme Court found that previous care orders had not given due regard to the importance of the family unit and its entitlement to protection under the Human Rights Act. The Court found that orders excluding the father from the family home were not justified by the evidence and did not respect the express wishes of the children to have an ongoing relationship with their father. Such orders were inimical to the right to protection of the family unit as they were likely to result in the children being separated and sent to different foster homes. The Supreme Court varied the orders to provide that parental responsibility for the children would be shared by the Chief Executive and both parents.

176.

**Court approves request of a child to be adopted by her stepfather***Re Adoption of TL [2005] ACTSC 49*

Relevant right(s): Protection of family and children (s.11, HR Act)

The Supreme Court rejected a narrow reading of Adoption Act taken by the Department of Disability, Housing and Community Services, and approved the adoption of a 15 year old girl by her stepfather. The child's natural father had died, and she was concerned to ensure that she would remain in her stepfather's care should anything happen to her mother. The Court found that given the wishes of the child, adoption was preferable to an order for custody or guardianship and that this would be consistent with the right of the family unit to protection under the Human Rights Act.

**Rent reductions should not discriminate against low income earners***Peters v ACT Housing [2006] ACTRRTT 6*

Relevant right(s): Recognition and equality before the law (s.8(c), HR Act)

A public housing tenant of ACT Housing received a rental rebate, which was only a percentage of the market rental of the premises due to low income. The Tribunal found that essential repairs and maintenance to the properties had not been carried out by the ACT Housing over a long period of time, and that the tenants had suffered significant inconvenience and loss of enjoyment of the properties. A rent reduction was ordered, and Housing ACT argued that rent reduction ordered on a rebated rent should only be applied in so far as the reduction exceeded the difference between the market value and the rebated rent. Section 8 of the HR Act (equality before the law and non-discrimination) was used to argue that this was an unacceptable interpretation of the relevant legislation as it would result in tenants receiving different levels of compensation for identical breaches depending on whether they were paying market or rebated rent. The member accepted this as one of the reasons for rejecting Housing ACT's submission.

**IV Human rights in advocacy**

177. Human rights legislation sets out an objective standard by which to measure how individuals are treated. The dialogue model of human rights protection is not litigation focussed: litigation is generally a last resort. The dialogue model aims to reduce the likelihood of human rights being breached in the first place, through scrutiny of draft bills, and government policies and practices for identifying and addressing human rights concerns. Where an individual feels that public authority has breached their human rights, individuals and their advocates can use the standards set out in the human rights act as an advocacy tool in their interactions with government. The Commission is aware of a number of examples of the ACT HR Act being used as an advocacy tool, including in the de-identified case studies set out below. As these case studies demonstrate, having human rights standards set out in legislation can prove a highly effective non-adversarial way to encourage organisations to develop more effective public policy and practice.

**Modifications to public housing allowed in order to protect privacy**

Relevant right(s): Protection of privacy and reputation (s.12, HR Act)

A vulnerable female who lived in public housing expressed concerns to her advocacy service that she was being intimidated by a neighbour. With the assistance of the advocacy group she sought Housing ACT's permission to modify her rented property to improve her privacy. The submission to Housing ACT relied on, amongst other things, the client's right to privacy under s.12 of the HR Act, and permission to make the modifications was granted.

#### **Housing lease changed to daughter's name after mother passed away**

Relevant right(s): Protection of the family and children (s.11, HR Act)

Following the death of her mother, a woman found that she and her children were not entitled to remain in her mother's public housing property, as the lease had been in her mother's name. The children had always lived in the house and had close contacts with the local community, especially their school and nearby friends. The mother was in contact with care and protection and there was a risk the children would be taken from her care if she did not have a home for them. In submissions to Housing ACT the woman's advocacy service raised the right to protection of family life to successfully negotiate for the lease to be transferred from her mother's name to her own name thus avoiding potential homelessness.

#### **Family able to stay together through more flexible application of rules**

Relevant right(s): Protection of the family and children (s.11, HR Act)

A woman was homeless and temporarily living with one of her children in a caravan without electricity in NSW. The other child was living with her grandmother in the ACT in order to attend school. The woman was not eligible for priority housing as she had outstanding debts to Housing ACT from a previous tenancy. The woman's advocacy service used the right to protection of family life to advocate for flexibility in applying the allocation rules. The client was housed as a priority candidate prior to arranging repayments on the debts.

Use of the ACT HR Act as an advocacy tool is not just limited to cases involving an individual taking action against government. One responded to the Government Survey commented:

'I have worked with young people so using the Human Rights Act to advocate for their rights has been a very rewarding exercise for me'.

#### ***Human Rights Commission's intervention in proceedings***

178. As noted above, s.36 of the ACT HR Act provides the Human Rights Commissioner with the power to seek leave to intervene in a case before a court or tribunal.
179. Most recently, in June 2009 the Commission has provided submissions on human rights interpretative obligations of the ACT Civil and Administrative Tribunal, the right to a fair trial and right to privacy in relation to a decision by the ACT Planning and Land Authority to approve a development application. In September 2008, the ACT Supreme Court granted leave to intervene in the cases of *Morro v ACT*,<sup>109</sup> *N v ACT*<sup>110</sup>

<sup>109</sup> SC 916 of 2007.

and *Ahadizad v ACT*,<sup>111</sup> which were unlawful detention matters heard concurrently in the ACT Supreme Court. The unlawfulness of the detention in each matter arose when the Sentence Administration Board revoked each plaintiff's order for periodic detention and committed him to full-time imprisonment. The revocation was unlawful in the matters of Ahadizad and N because the plaintiffs were not given notice of, or time to respond to, the allegation that they had breached their periodic detention order, nor were they notified of the hearing into the breach allegation. There was little dispute between the parties on the issue of whether or not the detention was unlawful, the arguments centred on whether s.18(7) gave rise to damages. The Respondent argued that this provision of the ACT HR Act did not create a right to damages, whereas the Commission argued that s.18(7) carried with it an entitlement to seek compensation for unlawful imprisonment. The judgement in the matters was reserved and the parties are still awaiting an outcome at the time of writing.

180. The Commission also intervened in proceedings involving the interpretation of s.51A of the *Domestic Violence and Protection Orders Act 2001* ('DVPO Act'), which enabled an interim protection order against a child to be finalised without a hearing. The Commission's submission argued that the DVPO Act should either be interpreted in light of the fair trial rights (s.21), or that a declaration of incompatibility should be made (s.32). Chief Justice Higgins held in *SI bhnf CC v KS bhnf IS*<sup>112</sup> that the DVPO Act could not be read in a way that denied the right to a fair hearing. He set the protection order aside on the basis that the right to a fair trial was breached by not giving the person subject to the order a fair opportunity to be heard. He found that the fair trial right would be breached if the court had no power to reconsider an order made in the absence of that person. The court did not find it necessary to issue a declaration of incompatibility, as it found that s.51A of the DVPO Act (inserted in 2005) could be reinterpreted to be consistent with the ACT HR Act by 'reading in' or implying hearing rights.

## E.7 Complementary measures to accompany human rights legislation

181. Enacting human rights legislation will not of itself improve the protection and promotion of human rights in Australia. Legislative change must be accompanied by essential non-legislative measures. The Commission's strong view is that these measures should not be seen as an alternative or substitute for a federal human rights act.

### a Community human rights education

182. One person responded to the a question in the Government Survey about how the ACT HR Act has impacted on their work, that they had discussed the HR Act '*during units of work about Australia and what it means to be an Australian citizen*' in upper primary and secondary school. Education in schools about human rights is important, but it is only part of the picture.

---

<sup>110</sup> SC 220 of 2008.

<sup>111</sup> SC 535 of 2008.

<sup>112</sup> [2005] ACTSC 125.

183. Adequate and appropriate community human rights education across a range of occupations, professions and areas is one of the most important factors in ensuring human rights legislation is effective. For a tool like a human rights act to work effectively, people must know about it, how it works, when it can be used and the likely outcomes it can achieve. One Community Survey respondent identified the role that human rights legislation itself plays in educating the community about human rights.

‘...[the HR Act] is an important step towards better human rights protection in the ACT. I mean this not only in a legal sense but also to raise the awareness of human rights in the community.’

184. This supports the Commission’s experience that the ACT HR Act has provided a great impetus to engage with the community about human rights in a range of for a – from the Commission’s annual community forum, with over 100 in attendance, to providing human rights training for public officials such as staff of Corrections ACT and ACT Health. However, as a respondent in the Commission’s Community Survey commented:

‘...legislation alone is not enough.’

185. Education must cover a range of sectors, but particularly the public service, the legal profession, the judiciary, and community advocacy groups. Government officials must be trained in their obligation under human rights legislation, and relevant areas must be skilled up in preparing compatibility statements.
186. The British Institute of Human Rights in 2004 commented on the real need for public education and advocacy in relation to human rights.<sup>113</sup> This will assist service delivery to move from a charity to a human rights framework.

#### **b Increased support for community advocacy organisations**

187. The Commission’s view is that human rights legislation can be a vital tool to protect and promote the rights of the most disadvantaged in society. However, it is these groups that often need the most assistance in enforcing their rights or seeking redress if their rights have been violated. Community advocacy organisations such as Community Legal Centres, and the Legal Aid Commissions in each State and Territory play a vital role in assisting the most disadvantaged to have a voice and stand up for their rights. Even with the introduction of a conciliation-based model for non-criminal human rights complaints, assistance is often still required. A Federal Human Rights Act will not be able to fulfil its promise without additional funding to Legal Aid and community advocacy organisations such as the Human Rights Law Resource Centre in Victoria. ACTCOSS has made similar recommendations to the ACT Government.

#### **c Enhanced support for the Australian Human Rights Commission**

188. Federal human rights legislation in the form recommended in this submission would involve a substantial range of new functions to be performed by the AHRC. Investigating and conciliating human rights complaints, auditing and reporting on

<sup>113</sup> British Institute for Human Rights, *Something for Everyone: The Impact of the Human Rights Act and Need for a Human Rights Commission* (2004).

government departments for compliance with human rights legislation, and increased community education responsibilities are important additional functions that are best performed by a body like the AHRC. It is important that the AHRC, or any other body tasked with these functions, be funded to enable the functions to be carried out appropriately.

**Recommendation 15: essential measures to compliment human rights legislation**

15.1 Human rights education specifically targeting public officials, the legal profession, the judiciary, and community organisations to ensure that there is widespread understanding of human rights and the operation of the legislation.

15.2 Additional funding for community advocacy organisations and State and Territory Legal Aid Commissions specifically for assisting with dealing with human rights complaints.

15.3 It is important that the AHRC is appropriately funded to enable it to carry out tasks necessary to develop a human rights culture – including human rights education, human rights auditing, and handling human rights complaints.

**d Other legislative measures**

- 189. As outlined at paragraph 43, the Commission supports the introduction of a National Children and Young People Commissioner.
- 190. Further, as outlined at paragraph 59 of the submission, the Commission supports the introduction of a Federal Equality Act.

**Recommendation 16: other legislative measures**

The position of National Children and Young People Commissioner should be created.  
A Federal Equality Act should be introduced.

## Appendix 1: ACT Human Rights Commission's human rights functions

Function	Description	Authority	Examples
Advising	The Commission can provide advice on the compatibility of existing or proposed ACT laws, or laws from other jurisdictions with the HR Act.	<p>'advising the Minister about any matter in relation to [the HRC Act ] or a related Act'<sup>114</sup></p> <p>'advise the Attorney General on anything relevant to the operation of the HRA'<sup>115</sup></p> <p>'review the effect of territory laws, including the common law, on human rights ... [and] ... report in writing to the Attorney General on the results of the review'<sup>116</sup></p>	<p>Advices to Jon Stanhope MLA (as Attorney General) on Commonwealth anti-terrorism laws (30 August 2004, 19 September 2005, 19 October 2005).<sup>117</sup></p> <p>Advice to Simon Corbell MLA (as Attorney General) on human rights compliance of Outlaw Motorcycle Gang (OMCG) laws if enacted in the ACT.</p> <p>Review of the ACT Psychiatric Services Unit, February 2009 (with ACT Health).<sup>118</sup></p>
Auditing	Human rights auditing is a major educative and systemic tool, which measures the compatibility of government agency operations with the ACT HR Act and specifically demonstrates how a legislative function can be performed within a human rights framework.	'review the effect of territory laws (including the common law) on human rights and report to AG' <sup>119</sup>	<p>Human rights audit of Quamby Juvenile Detention Centre, June 2005<sup>120</sup></p> <p>Human rights audit of ACT Correctional facilities, July 2007<sup>121</sup></p>

<sup>114</sup> HRC Act, section 14(1)(h).

<sup>115</sup> HRC Act, section 27(2)(b)

<sup>116</sup> ACT HR Act, section s41(1).

<sup>117</sup> These advices are available online at

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=18&MainTypeID=18>.

<sup>118</sup> This review was conducted pursuant to s.14(1)(h) and s.48 of the HRC Act. A copy of the review is available on the Commission website at

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=3&SectionTypeID=29&MainTypeID=29>.

<sup>119</sup> ACT HR Act, section 41.

<sup>120</sup> A copy of the audit report is available on the Commission website at

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=16&MainTypeID=16>

<sup>121</sup> A copy of the audit report is available on the Commission website at

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=16&MainTypeID=16>



Function	Description	Authority	Examples
Intervening in court proceedings	With leave of the court, the Human Rights Commissioner can intervene in court proceedings to provide submissions on the application and interpretation of human rights.	'The human rights commissioner may intervene in a proceeding before a court that involves the application of [the HR Act] with the leave of the court' <sup>122</sup>	<p>Right to compensation for unlawful arrest or detention - s18(7) of HRA. Issue – does HRA create a separate right to compensation</p> <p>In the 2004-5, the Human Rights Office appeared in a case before the Mental Health Tribunal at the invitation of its President.</p> <p><i>Emlyn Jones v Federal Capital Press Pty Ltd</i> (ACT Discrimination Tribunal)</p> <p>ACT Human Rights Commission intervention guidelines: <i>A Guide to the Human Rights Commissioner's power to Intervene in Court Proceedings</i> set out the considerations in the Commissioner's decision whether to intervene in court proceedings.<sup>123</sup></p>
Providing public education		<p>'to provide education about human rights and the HRA'<sup>124</sup></p> <p>'promoting community discussion, and providing community education and information about [the ACT HR Act]'<sup>125</sup></p>	<p>Community education and engagement program, including carrying out regular training workshops for government and non-government organisations.</p> <p>Human rights training for ACT Corrective Services staff</p>

<sup>122</sup> ACT HR Act, section 36. Section 34 of the ACT HR Act requires parties to give notice to the Human Rights Commissioner for matters relating to human rights.

<sup>123</sup> A copy of the intervention guidelines is available on the Commission website at:

<http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=16&MainTypeID=16>

<sup>124</sup> HRC Act, section 27(2)(a).

<sup>125</sup> HRC Act, section 14(1)(d).

## Appendix 2: ACT Human Rights Act Consultative Process

The ACT Consultative Committee was chaired by the Australian National University Professor Hilary Charlesworth, and included Larissa Behrendt, Elizabeth Kelly and Penelope Layland. The Committee devised a program of community consultation to ensure broad discussion of the issues set out in its terms of reference. These included whether it was ‘appropriate and desirable’ to enact an ACT bill of rights, what form such a bill might take, what effect it might have on executive and judicial power, and what rights should be included.<sup>126</sup> The process took nine months and involved the publication of an issues paper and a pamphlet, the consideration of 145 submissions received from groups and members of the public, meetings (with both the general public and specific community groups), public lectures, seminars and conferences.<sup>127</sup>

The consultation process also featured a ‘deliberative poll’ whereby 200 randomly selected Canberrans participated in a two day forum that was designed to facilitate ‘the voice of representative Australians from the ACT’ on whether or not there should be a Bill of Rights in the ACT, and if so, what form the Bill should take.<sup>128</sup> Run by not-for-profit group Issues Deliberation Australia, participants were polled on their views about a Bill of Rights for the ACT prior to the deliberations and at the conclusion. The theory of deliberative polling is that any resulting changes in opinion represent the conclusions the public would reach if it had the opportunity to become more informed and engaged by the issues and opinions. The participants spent the two days learning about human rights, discussing options and deliberating in small groups run by trained moderators, considering various policy options. They also held question and answer sessions with experts holding differing views on the merits of a bill of rights based on questions developed in small group discussions.

Polling prior to the deliberative poll indicated that a small majority were in favour of a bill of rights (47.3%), whilst a minority (28.6%) were against a bill of rights and 24% were undecided. Following the deliberations, the undecided group split fairly evenly resulting in 58.6% in favour of a bill of rights and 38.4% against. Of those against an ACT bill of rights at the conclusion of the poll, some cited grounds such as ‘a bill of rights should be implemented nationally first’ and ‘an ACT Bill would be superfluous in light of possible Commonwealth override’.<sup>129</sup> Thus although a clear majority of those polled in the deliberative poll were in support of a bill of rights in the ACT, some of those opposed were so on the basis that legislative human rights protection should be a matter for the Commonwealth. This view was also reflected in a number of the submissions to the ACT Consultative Committee that expressed concerns that because of ACT’s limited legislative power, a bill of rights was better addressed nationally.<sup>130</sup>

---

<sup>126</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003).

<sup>127</sup> Hilary Charlesworth, Gabrielle McKinnon and Andrew Byrnes, ‘Bills of Rights in Australia – History, Politics and Law’ (2008).

<sup>128</sup> The poll was conducted by the non-profit organisation ‘Issues Deliberation Australia’. The full final report of the poll is available at [www.jcs.act.gov.au/prd/rights/index.html](http://www.jcs.act.gov.au/prd/rights/index.html).

<sup>129</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003) 132.

<sup>130</sup> Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003) 37.

# Appendix 3: ACT Human Rights Commission Government Survey






## Human rights and ACT government

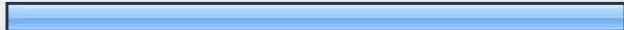

1. What is your email address? (Email address required for competition entry. Unless you consent to receiving our email updates your email address will not be held by the ACT Human Rights Commission after completion of the survey.)

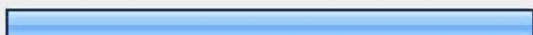
		Response Count
		238
<i>answered question</i>		238
<i>skipped question</i>		11

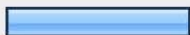

2. Would you like to sign up for the ACT Human Rights Commission's quarterly e-newsletter 'Humanity' and be notified of the Commission's training calendar? (If you do consent to us providing you with updates, we will only use your email address for that purpose.)

		Response Percent	Response Count
yes (please ensure you have entered your email address above)		55.1%	136
already on email subscription list		6.9%	17
no		38.1%	94
<i>answered question</i>			247
<i>skipped question</i>			2

3. Which of the following best describes your work for the ACT Government?			
		Response Percent	Response Count
policy		13.1%	29
service provision		35.3%	78
<b>administrative</b>		<b>38.0%</b>	<b>84</b>
executive		5.0%	11
legal		8.6%	19
Other (please specify)			34
		<i>answered question</i>	<b>221</b>
		<i>skipped question</i>	<b>28</b>

4. Prior to filling out this survey, were you aware that the ACT had human rights legislation?			
		Response Percent	Response Count
yes		95.1%	234
no		4.9%	12
		<i>answered question</i>	<b>246</b>
		<i>skipped question</i>	<b>3</b>


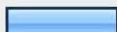
5. What is your attitude to the ACT having the Human Rights Act 2004 (ACT)?				
			Response Percent	Response Count
positive		81.0%	201	
neutral		14.1%	35	
negative		4.8%	12	
Please feel free to add a comment			33	
<i>answered question</i>			<b>248</b>	
<i>skipped question</i>			<b>1</b>	


6. Have you attended training or seminars on the Human Rights Act 2004 (ACT)?				
			Response Percent	Response Count
yes		27.8%	69	
no		72.2%	179	
Please feel free to add a comment			17	
<i>answered question</i>			<b>248</b>	
<i>skipped question</i>			<b>1</b>	

7. Was the training or seminar run by the ACT Human Rights Commission?				
			Response Percent	Response Count
yes		48.1%	51	
no		51.9%	55	
If no, which organisation ran the training?			29	
<i>answered question</i>			<b>106</b>	
<i>skipped question</i>			<b>143</b>	

8. Have you ever used, referred to, or considered the Human Rights Act 2004 (ACT) in your work for the ACT Government?			Response Percent	Response Count
yes			53.2%	132
no			46.8%	116
			<i>answered question</i>	248
			<i>skipped question</i>	1

9. If you answered 'yes' to the previous question, how best describes your use or consideration of the Human Rights Act 2004 (ACT)? (please select all that are relevant)			Response Percent	Response Count
in developing legislation			17.8%	24
in developing policy			33.3%	45
in obtaining compatability statements for Bills			7.4%	10
in decision making (for example, in applying existing policies and procedures to your work)			45.2%	61
in staff development and induction			23.7%	32
in responding to enquiries			37.8%	51
Other (please specify)			22.2%	30
			<i>answered question</i>	135
			<i>skipped question</i>	114

10. To what extent has the Human Rights Act 2004 (ACT) had an impact on the outcome of your work?			
		Response Percent	Response Count
no impact		36.2%	88
a small impact		47.3%	115
a significant impact		16.5%	40
Please feel free to add a comment			37
<i>answered question</i>			<b>243</b>
<i>skipped question</i>			<b>6</b>

11. Do you believe the Human Rights Act 2004 (ACT) has changed the culture of your organisation?			
		Response Percent	Response Count
yes		25.8%	63
not sure		47.1%	115
no		27.0%	66
Please feel free to add a comment			34
<i>answered question</i>			<b>244</b>
<i>skipped question</i>			<b>5</b>

12. Do you believe that you and/or your organisation need more resources for dealing with the Human Rights Act 2004 (ACT)?			
		Response Percent	Response Count
yes		31.3%	77
neutral		49.2%	121
no		19.5%	48
Please feel free to add a comment			22
<b>answered question</b>			<b>246</b>
<b>skipped question</b>			<b>3</b>

13. Which educational resources would you find most useful? (please select all that are relevant)			
		Response Percent	Response Count
face-to-face training		58.3%	133
face-to-face contact events		23.2%	53
printed materials		47.8%	109
regular updates, eg. electronic newsletters		49.6%	113
web-based training		35.1%	80
Other (please specify)			19
<b>answered question</b>			<b>228</b>
<b>skipped question</b>			<b>21</b>



14. Do you think Australia needs federal human rights legislation?			Response Percent	Response Count
yes			76.2%	189
neutral			16.9%	42
no			6.9%	17
Please feel free to add a comment				41
<i>answered question</i>				248
<i>skipped question</i>				1

15. Do you have any other comments or thoughts on the Human Rights Act 2004 (ACT) or human rights more generally?			Response Count
			51
<i>answered question</i>			51
<i>skipped question</i>			198

# Appendix 4: ACT Human Rights Commission Community Survey

## Human rights and the ACT community

1. What is your email address? (Email address required for competition entry. Without your email address your comments will still be submitted.)

	Response Count
	90
<i>answered question</i>	90
<i>skipped question</i>	10

2. Would you like to sign up for the ACT Human Rights Commission's quarterly e-newsletter 'Humanity' and be notified of the Commission's training calendar? (If you consent to us providing you with updates, we will only use your email address for that purpose.)

	Response Percent	Response Count
yes (please ensure you have entered your email address above)	58.0%	58
already on email subscription list	16.0%	16
no	26.0%	26
<i>answered question</i>		100
<i>skipped question</i>		0

3. What is your attitude to the ACT having the Human Rights Act 2004?

	Response Percent	Response Count
positive	84.0%	84
neutral	12.0%	12
negative	4.0%	4
Please feel free to add a comment		18
<i>answered question</i>		100
<i>skipped question</i>		0

**4. Prior to filling out this survey, were you aware that the ACT had a human rights act?**


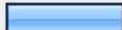

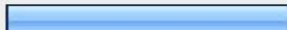

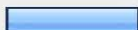
		Response Percent	Response Count
yes		81.0%	81
no		19.0%	19
<i>answered question</i>			100
<i>skipped question</i>			0

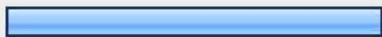


**5. Have you noticed any media about the ACT Human Rights Act 2004? (eg. conditions of detention, law reform, children's rights)**

		Response Percent	Response Count
yes		70.0%	56
not sure		11.3%	9
no		18.8%	15
please feel free to comment on your experience of human rights and the media			10
<i>answered question</i>			80
<i>skipped question</i>			20






**6. Have you ever found the ACT Human Rights Act 2004 relevant to you personally or valuable in your work?**

		Response Percent	Response Count
yes		57.5%	46
neutral		26.3%	21
no		16.3%	13
<i>answered question</i>			80
<i>skipped question</i>			20




7. Has the ACT Human Rights Act 2004 had any significant impact on your life or work? (please select all that are relevant)			
		Response Percent	Response Count
in learning about or understanding my own rights		41.3%	33
in standing up for my own rights		18.8%	15
in standing up for the rights of others		41.3%	33
<b>in my work</b>		<b>46.3%</b>	<b>37</b>
in dealing with government agencies		21.3%	17
other		21.3%	17
We welcome any stories or further details about how you or your advocate have used the ACT Human Rights Act 2004 (eg. tenancy, bail, children's rights). Please feel free to provide details below.			18
<i>answered question</i>			<b>80</b>
<i>skipped question</i>			<b>20</b>

8. Would you like to know more about human rights in the ACT?			
		Response Percent	Response Count
yes		61.6%	61
neutral		29.3%	29
no		11.1%	11
<i>answered question</i>			<b>99</b>
<i>skipped question</i>			<b>1</b>

**9. What sort of educational resources would you find most useful (please select all that are relevant)?**

		Response Percent	Response Count
face-to-face training		35.6%	31
face-to-face events (eg seminars, forums)		50.6%	44
printed material		54.0%	47
regular updates (eg. electronic newsletter)		69.0%	60
Other (please specify)		9.2%	8
<i>answered question</i>			<b>87</b>
<i>skipped question</i>			<b>13</b>

**10. The ACT Human Rights Act 2004 currently covers civil and political rights. It does not include economic, social and cultural rights such as the right to health, housing and education. Do you think these rights should be included in the ACT Human Rights Act 2004?**

		Response Percent	Response Count
yes		82.6%	76
neutral		12.0%	11
no		5.4%	5
Please feel free to add a comment			24
<i>answered question</i>			<b>92</b>
<i>skipped question</i>			<b>8</b>

11. Do you think Australia needs a national human rights act?				
			Response Percent	Response Count
yes			89.1%	82
neutral			8.7%	8
no			2.2%	2
Please feel free to add a comment				19
<i>answered question</i>				92
<i>skipped question</i>				8

12. Do you have any other comments or thoughts on the ACT Human Rights Act 2004 or human rights more generally?			Response Count
			29
<i>answered question</i>			29
<i>skipped question</i>			71

Appendix 5: How rights protection can benefit children and young people

Common real-life situations	Rights that may have been infringed/interfered with	How the situation might be different if rights were better protected or promoted
<p>A child has been placed in foster care without an adequate explanation of what is happening to him. He has not been consulted about the design or implementation of their care plan.</p>	<p>Right to express his opinion on issues which affect him, and to have his views seriously considered</p> <p>Right to protection of the family</p> <p>Right to special protection and assistance for children who cannot live with their family</p>	<p>The child protection authority could communicate with the child in an age appropriate way about what is happening, where his family is, and whether/when he will be able to see them again. They could consult with the child about their care plan in a meaningful way. They could ensure the care plan includes adequate provision of support services to meet the child’s needs while he is in care.</p>
<p>A local government failed to consult with children and young people before making decisions about the design of facilities in public space in their neighbourhood (bike paths, parks, playspaces, etc). The facilities that were provided for young people are now not being used. Young people choose to meet in other areas, and are frequently ‘moved on’ by police, and evicted from shopping centres.</p>	<p>Right to express their opinion on issues which affect them, and to have their views seriously considered</p> <p>Right to freedom of peaceful assembly</p> <p>Rights to freedom of association</p>	<p>Well in advance of making any planning changes, the local government could consult with children and young people about the proposed redesign of local public space. They could design consultation processes that are accessible to children and young people. If the young people continued to congregate in places that the government or community objected to, the police, local government and private landholders could communicate with the young people in a respectful way. They could try to find out the reasons for the young people choosing to meet at those locations, and try to reach an agreement about other places that they might meet.</p>
<p>A family of one adult and three children has been on the urgent public housing waiting list for over a year.</p>	<p>Right to protection of the family</p> <p>Right to adequate standard of living (housing)</p> <p>Right to state assistance to parents in the performance of their child rearing responsibilities</p>	<p>The public housing authority could structure their assessment criteria in a way that specifically acknowledges their human rights obligations. If there is insufficient housing stock to enable all families in crisis to receive housing, the housing authority could use the human rights obligations to negotiate increased funding for public housing provision.</p>
<p>A child with a disability in a mainstream school does not receive any extra assistance to meet their educational and</p>	<p>Right to education</p> <p>Right to assistance for children with disability, so they can live a</p>	<p>The school could provide a teachers aide to assist the student for part of the week. If there are insufficient resources to provide a</p>

Common real-life situations	Rights that may have been infringed/interfered with	How the situation might be different if rights were better protected or promoted
support needs in the classroom.	full life and participate actively in the community	teachers aide for every student with a disability, the education authority could use the human rights obligations to negotiate increased funding for special needs programs.
A group of young people who have recently arrived in Australia are not receiving adequate care for their physical or mental health because of they are unaware of the health services available to them, or how to access them. They cannot learn to drive because they cannot afford lessons, and do not know anyone with a vehicle who can teach them.	Right to participation in public life  Right to physical and mental health	Young people or their advocates could use the human rights obligations to request funding for an information/support/referral service for young people from culturally diverse communities. The health authority could provide translation and interpreter services, and develop outreach strategies for different cultural communities. The road transport authority could provide a subsidised learn-to-drive program for young people on low incomes.
A young person has a casual job at a take away shop on weekends. She is often burned by the oil in the fryer, but is scared to ask her boss for safety equipment in case she loses their job. She thinks she isn't being paid fairly, but doesn't know how to find out how much she should be paid.	Right to protection from harmful or exploitative work  Right to just and favourable conditions of work  Right to physical and mental health	The workplace safety authority could promote their services through schools and shopping centres to ensure young people are aware of their options when working in an unsafe workplace. The employment authority could provide information about fair wages to young people using accessible media (such as television, internet sites, etc).



18/04/16



Human Rights Inquiry

Submission No. 434

ACT HUMAN RIGHTS  
COMMISSIONER

Australian Capital Territory

The Research Director  
Legal Affairs and Community Safety Committee  
Parliament House  
Brisbane QLD 4000

Via email: [lacsc@parliament.qld.gov.au](mailto:lacsc@parliament.qld.gov.au)

Dear Research Director

### **Human Rights Inquiry**

Thank you for the opportunity to make a submission to the above Inquiry.

From 1 April 2016, the ACT Human Rights Commission functions were changed to include the ACT Victims of Crime Commissioner and the ACT Public Advocate. I have been appointed as President and Human Rights Commissioner of the new agency.

I make this submission in my capacity as ACT Human Rights Commissioner, and not as President of the ACT Human Rights Commission.

Yours sincerely

A handwritten signature in cursive script that reads 'Helen Watchirs'.

Dr Helen Watchirs  
Human Rights Commissioner

18 April 2016



## **Submission to the Human Rights Inquiry**

---

### **Legal Affairs and Community Safety Committee**

**18 April 2016**

## Contents

<b>Introduction.....</b>	<b>4</b>
<b>Key elements of the ACT HR Act .....</b>	<b>5</b>
<b>The Legislature’s role.....</b>	<b>5</b>
<b>The Executive Government’s role .....</b>	<b>5</b>
<b>The Judiciary’s role.....</b>	<b>5</b>
<b>The Human Rights Commissioner’s role.....</b>	<b>5</b>
<b>Improving human scrutiny processes .....</b>	<b>6</b>
<b>Compatibility Statements .....</b>	<b>6</b>
<b>Provision of reasons in compatibility statements .....</b>	<b>6</b>
<b>Compatibility statements for secondary legislation .....</b>	<b>7</b>
<b>Compatibility statements for private members bills .....</b>	<b>7</b>
<b>Decentralisation of the compatibility statement requirement .....</b>	<b>7</b>
<b>Human Rights Scrutiny Committee.....</b>	<b>7</b>
<b>Specialist human rights committee.....</b>	<b>7</b>
<b>Appropriate mandate and powers .....</b>	<b>8</b>
<b>Submissions by the public and other stakeholders .....</b>	<b>8</b>
<b>Oversight of declarations of incompatibility .....</b>	<b>8</b>
<b>Improving access to remedies.....</b>	<b>9</b>
<b>Human rights complaints and lower courts .....</b>	<b>9</b>
<b>Damages.....</b>	<b>10</b>
<b>Alternative dispute resolution .....</b>	<b>11</b>
<b>Improving human rights culture .....</b>	<b>11</b>
<b>Human Rights Commissioner .....</b>	<b>11</b>
<b>Human rights audits .....</b>	<b>12</b>
<b>Economic, social and cultural rights .....</b>	<b>12</b>

## Introduction

1. This submission expresses my support and encouragement for the enactment of a Human Rights Act in Queensland, which I believe would, depending on its form and content, significantly improve human rights protection in Queensland.
2. The case for legislating human rights is strong. While human rights in Australia generally receive some protection from the common law, constitutional rights and anti-discrimination legislation, we are all increasingly aware that there are significant gaps in the existing patchwork of protections, which are unlikely to be resolved without a comprehensive statement of human rights that is guaranteed by law.
3. There are multiple examples to draw on, both from Australia (ACT and Victoria) and overseas (United Kingdom and New Zealand, among others), to support the enactment of human rights legislation. The evidence from these jurisdictions confirms the benefits that flow from explicit human rights protection. In the Australian context, the ACT *Human Rights Act 2004* (HR Act) and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter), which establish a dialogue between the three arms of government, and include positive obligations on public authorities to act consistently with human rights, demonstrate the success of a dialogic model in achieving human rights protection. Various reviews of these laws over the last ten years have shown that by bringing human rights questions explicitly to the forefront, law making and public service delivery can be improved, and disadvantage can be tackled from a principled standpoint.
4. In my view, Queensland should enact a Human Rights Act that is informed but not confined by the legislative models operating in the ACT and Victoria. Importantly, this inquiry should be seen as an opportunity to learn and improve on the existing dialogue models operating in Australia. Therefore, drawing on the ACT's experience, this submission considers some of the key technical details involved in developing and implementing an effective Human Rights Act, with a particular focus on those aspects of the HR Act which can be strengthened or improved. It is hoped that by highlighting these areas, the committee will be better informed as to how to devise a model for human rights protection in Queensland that avoids these shortcomings.
5. The ACT Human Rights Commission provided a substantial submission to the 2009 National Human Rights Consultation (NHRC), which detailed the ACT's experience as a human rights jurisdiction and the lessons that could be drawn from its example.<sup>1</sup> Many of the issues canvassed in that submission are relevant to the terms of reference of the present inquiry. More recently, my office released a 10-year review of the HR Act, which looked at areas across the three arms of government where implementation of the Act could be improved.<sup>2</sup> A copy of both documents is attached for your reference, and I request that they be read in conjunction with this submission.

---

<sup>1</sup> ACT Human Rights Commission, Submission to the National Human Rights Consultation (2009).

<sup>2</sup> ACT Human Rights Commissioner, *Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004* (2014).

## Key elements of the ACT HR Act

6. **The Legislature's role:** The ACT Legislative Assembly is at the centre of the HR Act dialogue model, which is designed to preserve parliamentary supremacy over human rights matters. The HR Act utilises various mechanisms to facilitate dialogue on human rights both within and with the Legislative Assembly, including:
  - the pre-enactment scrutiny role of the Scrutiny of Bills Committee which reports to the Legislative Assembly on the human rights issues raised by all bills prior to their passage (s 38);
  - the requirement for the Attorney-General to report the Government's response to any declaration of incompatibility issued by the Supreme Court to the Legislative Assembly within six months for consideration if any remedial action is necessary (s 33); and
  - the requirement for the Attorney-General to table human rights audit reports by the Human Rights Commissioner in the Legislative Assembly (s 41).
7. **The Executive Government's role:** The HR Act invests the executive Government with several duties and functions, including:
  - the requirement for the Attorney-General to present a written statement on the human rights compatibility of each Government bill presented to the Legislative Assembly (s 37);
  - the requirement for the Attorney-General to review and report to the Legislative Assembly on the operation of the HR Act (ss 43 and 44);
  - the obligation on public authorities to comply with human rights (Part 5A).
8. **The Judiciary's role:** Consistent with a dialogue-based model of rights protection, the courts are not the final arbiter of whether laws are consistent with human rights, but rather one participant in a discussion that also involves the executive and the legislature. Accordingly, the HR Act invests the following duties and functions on courts and tribunals:
  - the obligation for courts and tribunals (and other decision-makers) to adopt, where possible, a human rights consistent interpretation of ACT laws (s 30).
  - the power for the Supreme Court to issue a declaration of incompatibility, declaring a law incompatible where such an interpretation cannot be adopted (s 32).
  - the right to apply to the Supreme Court for relief if a person's human rights have been breached by a public authority, and the Supreme Court's ability to grant the person 'the relief it considers appropriate' except for damages (s 40C). A person may also rely on the unlawfulness of the conduct of the public authority in other legal proceedings in ACT courts and tribunals.
9. **The Human Rights Commissioner's role:** The Human Rights Commissioner has various functions in relation to the HR Act, including:
  - the right to intervene, with the leave of the court, in any legal proceedings, which relates to the application of the HR Act (s 36);

- reviewing the effect of ACT laws on human rights (s 41); and
- providing community education and information about human rights, and advising the Attorney-General on the operation of the HR Act (*Human Rights Commission Act 2005*, s 27).

## Improving human scrutiny processes

10. Reviews over the last ten years of the ACT HR Act have shown that its pre-enactment scrutiny processes – namely the requirement for compatibility statements and parliamentary human rights scrutiny – are having a clear effect on the informing and improving the development of legislation and policy, thereby improving their overall quality.<sup>3</sup> In addition, the ACT's cabinet processes expressly require cabinet submissions to include the human rights implications of legislative proposals.<sup>4</sup> This is an important means for improving transparency within government with regard to human rights issues. There are also signs that HR Act has made a genuine cultural difference to the way the ACT Legislative Assembly goes about its work, and members across the political divide frequently invoke the Act and the standards that it upholds in parliamentary debates.
11. Nonetheless, there are limitations in the existing ACT processes, regarding coverage and content of statements of compatibility, and the mandate and practices of the human rights scrutiny committee, which should be avoided in a Queensland human rights model.

## Compatibility Statements

12. **Provision of reasons in compatibility statements:** In contrast to Victorian Charter, the HR Act does not require compatibility statements to provide a reasoned analysis of the human rights issues raised by proposed legislation. In most cases, a 'one-line' statement is issued as evidence of the Attorney-General's opinion regarding a bill's human rights compatibility. While detailed human rights analysis is often provided in the Explanatory Statement to a bill, it would be better if that discussion were contained in the compatibility statement itself. The Commonwealth Parliamentary Joint Committee on Human Rights, for example, has emphasised the importance of 'stand-alone' compatibility statements, and noted that they assist the committee to perform its scrutiny tasks more efficiently.<sup>5</sup> A Queensland Human Rights Act should similarly require the provision of reasoned compatibility statements, as the Victorian and Commonwealth models are to be preferred in this regard.

<sup>3</sup> See, ACT Department of Justice and Community Safety (JACS), *Human Rights Act 2004 Twelve Month Review Report* (2006); ANU Human Rights Research Project Report, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009), available at: [http://www.justice.act.gov.au/protection\\_of\\_rights/human\\_rights\\_act](http://www.justice.act.gov.au/protection_of_rights/human_rights_act); and ACT Human Rights Commissioner, *Look Who's Talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004* (2014).

<sup>4</sup> ACT Legislation Handbook (September 2009), p 18 [4.8], available at: [http://www.cmd.act.gov.au/data/assets/pdf\\_file/0017/113624/actgov-legislation-handbook.pdf](http://www.cmd.act.gov.au/data/assets/pdf_file/0017/113624/actgov-legislation-handbook.pdf). See also ACT Cabinet Paper Drafting Guide (November 2009), available at: [http://www.cmd.act.gov.au/data/assets/pdf\\_file/0004/113584/cabinet-drafting-guide.pdf](http://www.cmd.act.gov.au/data/assets/pdf_file/0004/113584/cabinet-drafting-guide.pdf).

<sup>5</sup> Parliamentary Joint Committee on Human Rights, *GUIDANCE NOTE 1: Drafting statements of compatibility* (December 2014), available at: [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)

13. **Compatibility statements for secondary legislation:** The HR Act does not subject secondary legislation to the statement of compatibility requirement, although explanatory material for these has occasionally included some human rights analysis. This is a significant omission, which should not be followed. A Queensland Human Rights Act should require statements of compatibility for legislative instruments as well as bills. The Commonwealth parliamentary scrutiny model established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) has demonstrated that such a requirement is feasible and also critical, given the range of amendments that have an impact on human rights that can be promulgated through secondary legislation.
14. **Compatibility statements for private members bills:** Another omission of the HR Act (which is mirrored in the UK model)<sup>6</sup> is to exempt private member's bills from the statement of compatibility requirement. This is undesirable as it creates a two-tier system for the human rights scrutiny of proposed legislation. In principle, there is no reason why private member's bills should be subjected to lower or different standards of scrutiny. Both Victoria and the Commonwealth have extended the requirement for statements of compatibility to all bills, regardless of whether the proponent is the Government or a private member. In my view, a Queensland model should do the same.
15. **Decentralisation of the compatibility statement requirement:** Under the ACT HR Act, the responsibility for preparing compatibility statements for Government bills rests exclusively with the Attorney-General. With the exception of New Zealand, all other comparable jurisdictions with compatibility statement requirements, including Victoria, the Commonwealth, and the United Kingdom, utilise models that are decentralised. In my view, it would be preferable for the individual Ministers to be tasked with the responsibility of preparing their own compatibility statements, as opposed to having that function centralised within the Attorney-General's portfolio. While the existing HR Act framework has been useful in promoting consistency and refining expertise in the early years of the HR Act's implementation, a centralised function could be counterproductive in the longer term as it could shield other agencies from fully engaging with their human rights obligations. It may also not be feasible from a resource perspective for larger jurisdictions.

## Human Rights Scrutiny Committee

16. **Specialist human rights committee:** The HR Act requires a relevant standing committee to report to the ACT Legislative Assembly on human rights matters raised in all bills. The Assembly's Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills Committee) already performs a legislative scrutiny function and in practice the obligation under the HR Act to report to the Assembly about human rights matters falls to that Committee. In Victoria, this task falls to the Scrutiny of Acts and Regulations Committee. Given that there is a degree of overlap between the work performed by legislative scrutiny committees and human rights scrutiny, it may appear prudent to simply to expand the role of these committees to also cover human rights grounds. However, I believe that the establishment of a dedicated human rights committee, along the lines of the Commonwealth Parliamentary Joint Committee on Human Rights or the UK Joint Committee on Human Rights, would produce better results. Importantly, it would enable the

---

<sup>6</sup> See, UK *Human Rights Act 1998*, s 19.

committee to develop the necessary human rights expertise, without being restricted by traditional scrutiny conventions, which may be counter-productive to human rights assessments. The ACT Scrutiny of Bills Committee, for example, rarely provides its own conclusions on compatibility, preferring instead to leave that task to the ACT Legislative Assembly. In contrast, both the Commonwealth and UK Committees regularly express their own conclusions as to whether legislation risks breaching human rights, after a process of seeking and evaluating all the available evidence. Clear findings are likely to be more useful for informing parliamentary debate as well as the wider community as to the nature of the human rights issues raised by legislative proposals.

17. **Appropriate mandate and powers:** Given the increasing proliferation of secondary legislation, it is critical that a human rights scrutiny committee is provided with the mandate to examine both bills and legislative instruments for human rights compatibility. Unlike the Victorian and Commonwealth models, the ACT Scrutiny of Bills Committee has no express mandate to assess subordinate legislation against the HR Act, which is a significant shortcoming. In my view, consideration should also be given to enabling the committee to undertake own-motion human rights reviews of existing legislation, and potentially broader thematic reviews, similar to the Commonwealth Parliamentary Joint Committee on Human Rights. It will also be important to provide the committee with adequate resources and sufficient time to fulfil its scrutiny tasks. Ideally, it should be made a requirement that the committee's findings must be expressly addressed when legislation is debated.
18. **Submissions by the public and other stakeholders:** Victoria's Scrutiny Committee often receives formal submissions on bills from stakeholders and broader community. This is generally not the case in the ACT, although the Commission has on a number of occasions provided submissions to the Scrutiny Committee where we have been particularly concerned about a piece of legislation. In my view, it would be desirable if provision were made in the Queensland model, for Parliament to refer a bill for a full inquiry (which would likely include public submissions, oral hearings, and a further detailed report into the policy rationale for the proposal) if the human rights scrutiny committee raises significant concerns with a bill. A full inquiry may not always be necessary, however, if the human rights scrutiny committee is able to receive and consider more stakeholder submissions prior to issuing its reports, as is the case in Victoria. Either process – greater and earlier submissions to the human rights scrutiny committee, and potentially broader inquiries – will enable the justification for proposed laws to be thoroughly fleshed out, and hear from community and expert stakeholders whether the stated objectives of the legislation are likely to be achieved.
19. **Oversight of declarations of incompatibility:** The ACT Government has yet to adequately respond to the only declaration of incompatibility issued by the ACT Supreme Court *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147. This suggests further refinements are necessary on the specific level of detail provided in Government responses to such declarations. It also suggests that the requirement in the HR Act for the Attorney-General to report the Government's response to any declaration of incompatibility issued by the Supreme Court to the Legislative Assembly within six months is not operating optimally. In my view, greater accountability to the Parliament would be achieved, if the legislation included a requirement to refer the Government's response to the human rights scrutiny committee or another relevant committee for inquiry and report within a fixed period, for example, three months. The relevant committee should also be provided with a relevant follow-up power to review the Government's



implementation of any remedial action arising from a declaration of incompatibility.

## Improving access to remedies

20. Overall, in its first ten years of operation, the HR Act has been mentioned in approximately 50 cases in the ACT tribunals (6.6% of published decisions), 164 cases in the ACT Supreme Court (9.2% of 1846 published decisions) and in 29 cases in the ACT Court of Appeal (7.6% of 371 published decisions).<sup>7</sup>
21. The right to an effective remedy is a fundamental principle in international human rights law. Provision of a direct right of action under the HR Act, and the ability for individuals to seek redress for human rights breaches through the courts and tribunals is undoubtedly an important remedy under the HR Act. However, successive reviews have highlighted that HR Act's impact on the courts and tribunals has been less successful, when compared to its influence on the formulation of new legislation and policy. My office's assessment of the HR Act at the 10-year stage concluded that the Act had rarely made a difference to the actual outcome of cases, and the direct right of action remained under-utilised, which suggests that it may be a remedy that is out of reach for the vast majority of people in the community.<sup>8</sup>
22. I believe there are several factors that may be contributing to the limited success of the HR Act before the ACT courts and tribunals. Care should be taken to address these concerns when developing a Queensland Human Rights Act.
23. **Human rights complaints and lower courts:** In a range of cases,<sup>9</sup> in both the ACT and Victoria, there has been a degree of uncertainty about the ability of courts and tribunals below the Supreme Court to consider human rights arguments, particularly around whether a public authority has discharged its duties to act and make decisions in accordance with human rights and when they do, what remedy might flow from such a consideration. These are matters that fall into the 'other legal proceedings' description of the ACT HR Act, which suggests human rights can be raised in other proceedings.
24. In *LM v Children's Court* [2014] ACTSC 26, the ACT Supreme Court considered the ability of the ACT Children's Court to assess whether a public authority had breached its human rights obligations. The Court also considered the nature of any remedy such bodies could provide for a breach. The Court considered that an express power to grant relief under the HR Act is given only to the Supreme Court under s 40C(4). However, the Court also suggested that inferior courts and tribunals (and the Supreme Court) retain their inherent, statutory or common law jurisdictions to grant remedies otherwise available to them other than under the HR Act.
25. Therefore it appears that a person may rely on their rights under the HR Act in lower courts and

---

<sup>7</sup> See, ACT Human Rights Commissioner, 'Look Who's Talking: 10 years of the ACT Human Rights Act', December 2014.

<sup>8</sup> Ibid.

<sup>9</sup> *Director of Housing v Sudi* [2011] VSCA 266; *LM v Children's Court* [2014] ACTSC 26; *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014); and *Social Housing v Crockford* (Residential Tenancies) [2015] ACAT 3.

tribunals, but lower courts and tribunals cannot grant a remedy under the HR Act for that breach, unless it falls within the existing rules of that remedy. This creates a risk that HR Act arguments before a lower court or tribunal may be of limited use, if any remedy for a breach is subject to the requirement of the non-HR Act matters before the court anyway. While the consideration of a remedy by a lower court and tribunal for a HR Act breach may include factors beyond the traditional scope of that remedy, this remains unclear.

26. I believe legislative reform is needed to clarify these questions. If the HR Act precludes inferior courts and tribunals from issuing a direct remedy (as the ACT Supreme Court found in *LM*), then applicants are likely to be disadvantaged. Inferior courts and tribunals offer applicants a more cost-effective path to remedying wrongs. Tribunals and lower courts offer significant benefits with specific jurisdictional expertise. They are familiar with the subject matter and particular legal framework, thus able to weigh up the impact of a public authority's breach of the individual's rights in light of all relevant factors in the proceeding, and are therefore well-placed to issue an effective remedy under the HR Act.
27. **Damages:** The ACT and Victoria are unique among human rights jurisdictions for excluding an award of damages for human rights breaches. The requirement for alleged breaches of human rights to be commenced as legal actions in the Supreme Court, coupled with the inability of the courts to provide damages as a remedy, create a barrier for the community to ensure that the Government's human rights obligations are met.
28. It has been my longstanding position that the availability of damages under the HR Act would assist genuine claimants who may otherwise be deterred by the cost and time involved in pursuing test case litigation. It is also consistent with international human rights law which requires breaches of human rights to be subject to appropriate remedies.
29. In other comparable jurisdictions (eg UK and NZ), damages have been used responsibly and are only awarded in limited circumstances. The New Zealand Bill of Rights Act does not contain an explicit power to award damages but the courts have implied one since the *Baigent* decision in 1994.<sup>10</sup> The NZ Court of Appeal determined that rights created by parliament could not be empty and toothless, and that their breach must give rise to a remedy.
30. There have been relatively few awards since the decision in *Baigent*. Commentators have noted that a number of the higher awards were overturned or reduced on appeal, and concluded that awards under the NZ legislation 'track the approach of the New Zealand courts in the field of torts: fact-specific, often impressionistic, and moderate.'<sup>11</sup> More recently, NZ Chief Justice Elias CJ observed that the number of cases where damages have been sought against the State since 1994 is small, 'suggesting that early predictions of a flood of claims to vex the administration of justice are well astray, as such predictions usually are.'<sup>12</sup>
31. The ACT courts are unlikely likely to follow the NZ example by finding damages to be a just and

---

<sup>10</sup> See *Baigent's case, Simpson v Attorney-General* [1994] 3 NZLR 667 (CA), the plaintiff was awarded damages for an unlawful entry and search of her property by the police, in contravention of the NZBORA.

<sup>11</sup> Butler and Butler, *The New Zealand Bill of Rights Act: a commentary* (2005) 1010-1016).

<sup>12</sup> *Attorney-General v Chapman* [2011] NZSC 110 (16 September 2011), [5].

appropriate remedy for human rights breaches, in the absence of legislative provision to that end. Useful lessons can be drawn from the UK model in this regard, where the experience of moderate awards has also been a feature. Under the UK *Human Rights Act 1998*, damages are only available if the following thresholds are met:<sup>13</sup>

- Firstly, existing public and private law remedies must be inadequate.
- Secondly, a causal connection between the loss and the loss in respect of which compensation is claimed.
- Thirdly, (and in particular in claims for non-pecuniary damages) a sufficient degree of gravity in terms of the loss itself.

In other words, the finding of a human rights breach will be sufficient unless it is necessary further to compensate the claimant for losses they have actually sustained.<sup>14</sup>

32. In my view, the human rights dialogue in the courts and tribunals could be improved with minimal changes, and with little risk to the government. These aspects should be taken into account when developing the Queensland legislation. The benefits would be an overall improvement in the quality of justice for everyone in the community.
33. **Alternative dispute resolution:** Under the HR Act, I have the power to intervene, with the leave of the court, in any legal proceedings, which relates to the application of the HR Act. As Human Rights Commissioner, however, I do not have any jurisdiction to handle individual cases of human rights violations. The five-year review of the HR Act noted that conferring a complaints handling function on the Human Rights Commissioner would complement the direct right of action to the Supreme Court under the HR Act, particularly in light of the underutilization of the direct right of action in the HR Act. The recent eight-year review of the Victorian Charter has also recommended that the Victorian Equal Opportunity and Human Rights Commission be given the power to resolve human rights disputes through mediation, as that would 'help people resolve their issues at an early point and in an accessible and resource-effective way'.<sup>15</sup> I would strongly encourage that similar provision be made under a Queensland Human Rights Act.

## Improving human rights culture

34. **Human Rights Commissioner:** In my view, a Queensland Human Rights Act should establish the position of an independent Human Rights Commissioner to monitor human rights protection under the Act, advise government on compliance with human rights and promote public understanding and awareness of human rights. The Human Rights Commissioner should also be

---

<sup>13</sup> See Ben Collins, 'Just satisfaction – but only just? The award of damages under the Human Rights Act', May 2009, available at <http://www.1cor.com/1155/records/1213/BC%20public%20law%20talk.pdf>

<sup>14</sup> Ibid.

<sup>15</sup> Michael Brett Young, 'From commitment to culture The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006' (2015), p 99.

able to apply for leave to appear as intervener or amicus curiae in court proceedings about the application of the Act. For example, my role as intervener under s 36 of the HR Act is to assist the court or tribunal, and is directed toward the protection of human rights in the public interest in proceedings that may otherwise involve only the potentially partisan perspectives of an individual applicant and the relevant public authority. My intervention is not directed at advancing the claims of either party, siding with any particular party, or intervening in any factual contest between the parties.

35. **Human rights audits:** Under s 41 of the HR Act, I have an own-motion power to audit the effect of laws (including the common law) on human rights, and report in writing to the ACT Legislative Assembly. In contrast, under s 41(c) of the Victorian Charter, the Victorian Equal Opportunity and Human Rights Commission can only conduct a review for compliance with the Charter, when requested by the public authority.<sup>16</sup> I have conducted four audits to date in the ACT.<sup>17</sup> The audits under the HR Act help to identify systemic human rights issues and have been a vital tool in subsequently rectifying human rights breaches in the ACT. I believe the inclusion of an independent audit power in a Queensland Human Rights Act would be an important way of ensuring that public authorities comply with their human rights obligations.

## Economic, social and cultural rights

36. The rights in the HR Act – similar to the Victorian Charter – are primarily drawn from the International Covenant on Civil and Political Rights. The HR Act, however, was amended in 2012 to include a right to education, the first direct recognition of a socio-economic right in the HR Act, albeit in limited form.<sup>18</sup> Further amendments in 2016, extended the duty on public authorities to the right to education, to make it a fully-fledged right under the HR Act.<sup>19</sup> The HR Act was also amended this year to provide for the express recognition of the cultural rights of Aboriginal and Torres Strait Islander peoples.<sup>20</sup> At minimum, a similar set of rights should be considered for inclusion in a Queensland Human Rights Act.
37. As human rights are interdependent and indivisible, I believe that the ACT HR Act should be extended to include all the rights guaranteed in the International Covenant on Economic, Social and Cultural Rights. A similar position was adopted by the ACT Economic, Social and Cultural Rights Research Project, which was a joint project undertaken by the Australian National University and the ACT Government in 2009-2010, to consider whether the HR Act should be

---

<sup>16</sup> Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015), p 92.

<sup>17</sup> Human Rights Audit of Quamby Youth Detention Centre (2005); Human Rights Audit into Adult Correctional Centres, (2007); Human Rights Audit of the Bimberi Youth Justice Centre as part of corresponding Review of the Youth Justice System by Children and Young People Commissioner (2011); and Human Rights Audit on the Conditions of Detention of Women at the Alexander Maconochie Centre (2014).

<sup>18</sup> See, *Human Rights Amendment Act 2012*, available at: <http://www.legislation.act.gov.au/a/2012-41/20130101-53529/pdf/2012-41.pdf>.

<sup>19</sup> See, *Human Rights Amendment Act 2016*, available at: <http://www.legislation.act.gov.au/a/2016-5/20160226-62903/pdf/2016-5.pdf>.

<sup>20</sup> Ibid.

amended to include explicit protection of economic, social and cultural rights.<sup>21</sup> The Project's Report demonstrated that concerns about judicial overreach were misplaced. Appropriate drafting could ensure that the judiciary's role in implementing economic, social and cultural rights was suitable in a parliamentary democracy, and that the executive and the legislature remained the primary decision-makers for setting economic and social policy priorities. The Project found that:

The first six years of operation of the HRA have shown that it has not led to a flood of litigation, vexatious or otherwise, and that the major impact of the HRA has been in ensuring that executive government, the legislature and the courts give regular and more focused attention to the human rights issues raised by specific laws, policies and proposals. There is every reason to expect that inclusion of ESCR in the HRA would have a similar impact, and would represent a further stage of evolution of human rights protection in the ACT. There are multiple benefits that would flow from the inclusion of ESCR in the HRA. It would improve accountability and process in the executive, legislative and judicial spheres. In terms of substance, legislative protection of ESCR has the potential to assist the most marginalised and vulnerable in our community.<sup>22</sup>

38. I would encourage Queensland to improve on the ACT's record by adopting a Human Rights Act, which expressly protects both sets of rights. However, if the inclusion of fully justiciable economic, social and cultural rights is considered to be too ambitious at this stage, these rights could be included in the relevant scrutiny processes established by a Human Rights Act, including the requirement for compatibility statements and in the mandate of a parliamentary human rights scrutiny committee. In my view, it is important to at least consider the viability of introducing a staged process for the recognition of economic, social and cultural rights, which, for example, focused initially on pre-legislative scrutiny requirements, without imposing any related obligations on public authorities or creating any new role for the courts, as occurred in relation to the new right to education in the ACT. Useful lessons in this regard can be drawn from the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which requires statements of compatibility and systematic scrutiny by Parliament with regard to the full suite of economic, social and cultural rights.

---

<sup>21</sup> ANU, 'ACT Economic, Social and Cultural Rights Research Project', *Australian Research Council* (2010), and Government response to the review (2012), available at: [http://www.justice.act.gov.au/protection\\_of\\_rights/human\\_rights\\_act](http://www.justice.act.gov.au/protection_of_rights/human_rights_act).

<sup>22</sup> *Ibid*, pp 15-16.