

**THE HUMAN RIGHTS ACT 2004 (ACT):  
THE FIRST FIVE YEARS OF OPERATION**

**A REPORT  
TO THE  
ACT DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY**

**PREPARED BY  
THE ACT HUMAN RIGHTS ACT RESEARCH PROJECT  
THE AUSTRALIAN NATIONAL UNIVERSITY  
MAY 2009**



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4 June 2009

Mr Stephen Goggs  
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Dear Stephen

On behalf of the ACT Human Rights Act Research Project team, we are pleased to present you with the Project's final report. The report details our findings on the impact of the ACT Human Rights Act during the first five years of its operation and forms our submission to the government's five year review of the legislation. The recommendations in the report are intended to assist the process of strengthening the operation of the Human Rights Act as a dialogue model.

Please do not hesitate to contact us if you would like to discuss any of these issues further, or if we can be of further assistance to the review.

Yours sincerely



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## Contents

THE ACT HUMAN RIGHTS ACT RESEARCH PROJECT .....	5
EXECUTIVE SUMMARY.....	6
SUMMARY OF RECOMMENDATIONS .....	8
INTRODUCTION .....	13
Overview of the HRA .....	13
12-month review .....	14
DUTY TO COMPLY WITH HUMAN RIGHTS.....	15
BACKGROUND .....	15
DEFINITION OF PUBLIC AUTHORITY .....	15
Exemptions .....	16
Opt-in mechanism .....	18
OBLIGATIONS OF PUBLIC AUTHORITIES .....	19
Reasonable limits .....	20
NEW CAUSE OF ACTION .....	22
REMEDIES .....	22
PREPAREDNESS.....	24
Human Rights Unit.....	24
The Human Rights Commissioner .....	25
Community organisations .....	26
THE LEGISLATIVE PROCESS .....	27
THE LEGISLATIVE ASSEMBLY.....	27
The ALP/Greens Agreement .....	29
THE SCRUTINY OF BILLS COMMITTEE.....	29
Government responses .....	31
Amendments on the floor of the Assembly .....	32
Subordinate legislation.....	33
Other Committees .....	34
Exposure Drafts .....	34
STATEMENTS OF COMPATIBILITY.....	35
Explanatory statements.....	35
Statements of reasons.....	36

Private members' bills .....	38
THE HUMAN RIGHTS COMMISSIONER .....	39
Dealing with community complaints .....	40
Ombudsman .....	41
GOVERNMENT CULTURE .....	41
MEASURING HUMAN RIGHTS PROGRESS.....	44
Public surveys .....	44
Annual reports.....	45
Reviews of the HRA .....	46
COURTS AND TRIBUNALS .....	47
OVERVIEW .....	47
Notification of the Attorney-General and the Human Rights Commissioner .....	49
Referral power to the Supreme Court.....	49
INTERPRETING LEGISLATION .....	50
Original section 30.....	51
Amended section 30.....	52
Specific issues raised by the courts .....	59
The legal profession .....	61
ANNEX I: INTERVIEW REPORT .....	63
ANNEX II: SELECTED PUBLICATIONS.....	90

## THE ACT HUMAN RIGHTS ACT RESEARCH PROJECT

The ACT Human Rights Act Research Project (the Project) is an Australian Research Council Linkage Project (LP0455490) between the Australian National University (ANU) and its Industry Partner, the ACT Department of Justice and Community Safety (JACS). The Project was established to monitor and evaluate the impact of the *Human Rights Act 2004* (ACT) (HRA) over the first five years of its operation.

The Project had both practical and theoretical objectives; it collected and analysed data about the implementation and impact of the HRA on government in the ACT. It examined the role of the HRA in the formation of executive and legislative policy and its interpretation by the judicial system. The Project also used this data to contribute to the debate about the value of bills of rights in protecting human rights. The Project compiled this research in ways that are publicly accessible for researchers and policy makers through the Project web site: <http://acthra.anu.edu.au>. The Project has also produced a number of publications, including a book, articles in international refereed journals, media articles, conferences and presentations (see Annex II).

The Project was led by two Chief Investigators; Professor Hilary Charlesworth from the Regulatory Institutions Network, in the College of Asia and Pacific at the ANU, and Professor Andrew Byrnes, Professor of International Law at the University of New South Wales (UNSW from May 2005, previously at the ANU). Ms Gabrielle McKinnon was appointed in May 2005 as a Research Fellow and Director of the Project.

The Project established a Reference Group to facilitate the conduct of the research. This Reference Group involved members of the research team, representatives of the Industry Partner and experts representing a range of views on the value of bills of rights. The membership of the group at the end of 2008 was:

- Professor Hilary Charlesworth, Chief Investigator of the Project, ANU
- Professor Andrew Byrnes, Chief Investigator of the Project, UNSW
- Ms Gabrielle McKinnon, Project Director, ANU
- Ms Renée Leon, Chief Executive, Dept of Justice and Community Safety
- Dr Helen Watchirs, ACT Human Rights & Discrimination Commissioner
- Mr Martin Hockridge, Legal Aid Commission ACT
- Mr Greg Walker, former President of Law Society ACT

## EXECUTIVE SUMMARY

The ACT *Human Rights Act 2004* (HRA) has had considerable significance as Australia's first legislative bill of rights. By breaking the political deadlock, it has added momentum to efforts in other Australian jurisdictions to consider the desirability of a bill of rights, and provided a model that could be adopted and adapted elsewhere.

It is commendable that the HRA has not remained a static document, and a number of provisions have already been improved in response to the lessons learned in these early years. With the duty on public authorities to comply with the HRA and an independent right of action in the Supreme Court for breaches of the HRA coming into force on 1 January 2009, the HRA's sixth year should be its most significant.

The first five years of the HRA's operation illustrate both the potential and the limits of a dialogue model of human rights protection. Although critics predicted a surge in litigation and an undermining of the elected government by an unaccountable judiciary, the experience of the HRA is that its impact on policy-making and legislative processes has been more extensive and arguably more important than its impact in the courts. Its main effects have been on the legislature and executive, fostering a lively, if sometimes fragile, human rights culture within government. While it has not attracted extensive public attention, and its workings have not always been apparent to the broader community, the HRA has operated in subtle ways to enhance the standing of human rights in the ACT.

One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy. The development of new laws by the executive has 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. These improved laws are likely to have tangible benefits over the longer term, particularly in the form of additional safeguards for vulnerable individuals in the community.

Nevertheless, parts of the bureaucracy are still to become familiar with the HRA and the implications of protecting human rights. The 12-month review of the HRA recognised that the legislation had not equally penetrated all levels of the bureaucracy, and that further support and training was required to clarify the implementation of the HRA to public servants. The review also recognised that there

was still much work to be done to develop fully a culture of human rights in the ACT community. These issues are largely still present and are likely to have been amplified by the changed environment since 1 January 2009 with the commencement of the duty on public authorities. It will be important for the government's five year review to address the lack of systematic education inside the bureaucracy, including ways to support the Human Rights Commissioner in training and education initiatives. It will also be important to consolidate measures that the executive and legislature have adopted to ensure that these processes endure an informed and explicit consideration of the HRA. In this regard, JACS as lead agency for the implementation of the HRA has a critical role to play, but to do so effectively will require sustained and strategic leadership and commitment.

With some exceptions, the courts have, for the most part, remained a spectator to the HRA dialogue thus far. While the HRA has been referred to in some 91 cases in the ACT courts and tribunals, and 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. Until the courts fully grasp their part in the human rights conversation, there will remain some question as to the HRA's ability to generate dialogue between the courts and legislature, and to provide accountability for the government's implementation of human rights.

After almost five years of operation, the HRA has overall succeeded in creating a fledgling human rights culture in the ACT. It is important to recall that the major test of the real success of the HRA is the extent to which it has shaped the policy-making and legislative process, as well as the delivery of services in the ACT. Notwithstanding the fairly limited in-depth examination of the HRA in the courts since its enactment, the progress in these other areas, which is less immediately visible, has been significant. It has brought human rights questions explicitly into the consideration of policy and legislation, thereby improving their quality. Although the findings of the Project show that there is still much to be done, there is little doubt that the implementation of the HRA so far has involved important advances in the endeavour to ensure the full enjoyment of human rights in the ACT. The task for the next five years is to increase and deepen knowledge of the HRA.

## SUMMARY OF RECOMMENDATIONS

### Duty to comply with human rights

1. With respect to the definition of a public authority, consideration should be given to removing the ability to prescribe an entity as a court through regulation as it can potentially be used to expand the list of exempted bodies, contrary to the intention of the amendments.
2. In our view, the policy rationale for partially excluding courts does not apply to tribunals and we recommend that tribunals should be fully included in the definition of public authorities. If there are sound reasons for their exemption, those should be explained.
3. The opt-in provision in s 40D should be publicised to the private sector, including information on how it works and the benefits of opting-in to the HRA. Consideration should be given to including the 'opt-in' provision as a specific requirement in government contracts. However, the preference should be to tailor contracts to specify the human rights obligations of contractors upfront.
4. Consideration should be given to amending s 28 to allow reasonable limits to be set 'under law' instead of only by 'Territory laws'. This would enable proportionality to be factored into public authority conduct where referable to legal sources other than Territory laws.
5. Training programs for public authorities should explicitly spell out the steps required to comply with the obligation to properly consider human rights in decision-making processes. Training programs should also include practical guidance on how to integrate proportionality in decision-making processes. Existing human rights resources on the JACS website – in particular the *Guidelines for ACT Departments: Developing Legislation and Policy* - should be updated to provide guidance on these new obligations. This should be done as a matter of urgent priority.
6. The Supreme Court should be given a limited power to award damages similar to that provided under the UK *Human Rights Act 1998* (UKHRA), and as reflected in the ACT Consultative Committee Model Bill. Additionally, consideration could be given to allowing a person who obtains a declaration of incompatibility from the Supreme Court to apply to the government for an *ex gratia* payment of compensation.

7. JACS should review its resourcing and structure of the Human Rights Unit (HRU) to better determine the level of staffing and skills needed to meet the changed environment since 1 January 2009. Greater emphasis should also be given to seeking personnel with qualification and/or practical experience in human rights and also to staff with the capacity to deliver training on human rights to government agencies.
8. JACS should reconvene the Inter-Departmental Committee on Human Rights to oversee the implementation of the amendments imposing obligations on public authorities, and the Human Rights Commissioner should be invited to participate in this forum.
9. Measures should be put into place to support community organisations subject to the 'public authorities' provision. This could be in the form of funding for them to seek training, or the provision of free training from the Human Rights Commission. Organisations that currently provide HRA training (such as the Welfare Rights and Legal Centre) should also be provided with targeted funding. Self-represented litigants should be provided with support materials by the Supreme Court in relation to the direct right of action.

### **The legislative process**

10. The HRU should clarify to instructing agencies that the compatibility statement and Scrutiny Committee reports perform different functions under the HRA; Ministers should be encouraged to take the Committee's concerns back to their departments for reconsideration, rather than relying on the compatibility statement as proof of compatibility.
11. The requirement to explain non-responses to Scrutiny Committee reports should extend to both government and private members' bills.
12. All amendments introduced on the floor of the Assembly should be referred to the Scrutiny Committee unless they are urgent, minor or in response to a Scrutiny Committee report.
13. The terms of reference for the Scrutiny Committee should be amended to require it to report on the HRA issues raised by subordinate legislation.

14. Exposure drafts should include an outline of the human rights implications of the draft bill, so that the community is able to consider and respond to these views.
15. A statement of reasons should continue to be included with each compatibility statement. The statement should adopt a clear s 28 framework as the requisite standard for assessing compatibility. Where a statement of reasons is not provided, its omission should be explained. Where relevant, all reasons behind compatibility statements should be made publicly available, including advice sought from external sources.
16. The five year review should canvass the different options for amending the HRA to include compatibility assessments for private members' bills.

### **Human Rights Commissioner**

17. Given the relative inaccessibility of Supreme Court proceedings for most people, the Human Rights Commissioner should be given a complaints-handling function, provided that the Human Rights Commission is adequately resourced to undertake such a function. Alternatively, consideration could be given to providing a complaints-handling function to the ACT Ombudsman, similar to that provided under the Victorian Charter to the Victorian Ombudsman. In the interim, we recommend a fact sheet should be prepared about how the HRA can be used in complaints before the ACT Ombudsman in relation to maladministration.

### **Government culture**

18. The role of the HRU 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.
19. Intensive and ongoing training on the HRA 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 HRA 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 HRA reports.

20. 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 (for example: <http://www.hrlrc.org.au>).
21. 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.
22. JACS should explore opportunities for the ACT and Victoria to establish a regular bilateral dialogue at officials' level on the operation of HRA and Victorian Charter. Such a dialogue would be useful for identifying areas of common interests which could be achieved more efficiently collaboratively than if each jurisdiction were to pursue them independently. One way to take this forward would be for the Attorneys-General to meet to agree on the terms of reference, as it would be useful to have the dialogue established at the ministerial level; such a meeting could be scheduled into the margins of a SCAG meeting. The agenda should include opportunities for collaboration and information-sharing on training (including training of judges), workshops, and current developments.

### **Measuring human rights progress**

23. The Human Rights Commission's public survey on the impact of the HRA is a useful model to base a longitudinal study of human rights awareness in the ACT. A similar process to the Australian Electoral Study could be established within the ACT electoral cycle, or to generate additional data points, twice within this cycle (that is, one every two years). Because it would take some years for meaningful trend data to be generated, it would be important that such a program should commence sooner rather than later.
24. In addition to reporting against the issues identified in the revised annual report guidelines, agencies should also be required to report on reviews of procedures and policies for compliance; whether and how they have managed their HRA

obligations when outsourcing services, for example, whether contracts and tenders include a requirement for HRA compliance; whether they have developed guidelines and checklists for incorporating the HRA in decision-making; whether they have disseminated information about their human rights obligations to their client groups; and whether they have developed a rights framework for complaints handling.

25. Agencies should be strongly encouraged to use the revised annual report framework to initiate a process for benchmarking their performance and setting progressive goals with the view to continuous improvement. This process could be usefully initiated in conjunction with the five year review.

26. The HRA should be amended to provide for ongoing reviews of its operation by the Attorney-General on a five yearly cycle.

### **Courts and tribunals**

27. The new ACT Civil and Administrative Tribunal (ACAT) should establish a system to monitor and identify cases where HRA issues are mentioned.

28. The HRA should be amended to provide for an express referral power, which would enable questions of law relating to the HRA that are raised in the course of proceedings in the Magistrates Court or the ACAT to be referred to the Supreme Court for resolution. The court or tribunal should be able to make the referral on its own initiative or on application by a party, where it considers that the question is appropriate for determination by the Supreme Court. Consideration could also be given to enabling the court or tribunal to continue to hear severable parts of the proceedings and to hear and determine urgent interlocutory matters to prevent unnecessary delay.

29. The judiciary should be provided with training that focuses on the methodology of applying amended s 30, the direct right of action provision, and sources of international human rights jurisprudence. Training programs need to be ongoing to keep up to date with current developments and include opportunities for regular refresher courses. Targeted funding should also be provided for training programs for the legal profession.

30. Consideration should be given to amending court procedure rules to provide for cost capping orders in HRA proceedings where there is a substantial imbalance between the financial positions of the parties.

## INTRODUCTION

The aim of this report is to contribute the findings of the Project to the five year review of the HRA. It draws on the work of participants in the Project and some bodies of text that appear in this report have been taken from earlier publications of Project researchers.

The report begins with an overview of the HRA and outlines the amendments arising out of the 12-month review. It then examines the new duty on public authorities, before considering the HRA's effect on the legislative process; its influence on government culture; the role of the Human Rights Commissioner; and its application in the courts and tribunals.

### Overview of the HRA

The HRA came into force in July 2004 and is a non-entrenched law that aims to create 'dialogue' about human rights between the legislature, executive and judiciary. The HRA employs various mechanisms to facilitate this dialogue:

- (a) the obligation on 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 (s 30);
- (b) the express invitation to benchmark the interpretation of rights, including any limits on rights (s 28), against international human rights standards (s 31);
- (c) the power for the Supreme Court to issue a declaration of incompatibility in cases where legislation cannot be interpreted to be consistent with human rights (s 32); the declaration does not affect the validity of the legislation in question (s 39), but the Attorney-General is required to report the government's response to the declaration to the Legislative Assembly (s 33);
- (d) 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);
- (e) 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 (s 38);
- (f) the office of Human Rights Commissioner, which has among other functions that of reviewing the effect of laws to ensure compliance with the HRA (s 41); advising the Attorney-General on the operation of the HRA; and providing education about the HRA (*Human Rights Commission Act 2005*, s 27);

- (g) the obligation for government departments and other public authorities to report on their implementation of the HRA in their annual reports (*Annual Reports (Government Agencies) Act 2004*, ss 5, 9(3));
- (h) the requirement for the Attorney-General to review and report to the Legislative Assembly on the operation of the HRA one year (now completed), and five years after the HRA came into force (ss 43, 44); and
- (i) from 1 January 2009, the positive obligation on public authorities to comply with human rights in decision-making, and the direct right of action in the Supreme Court where this obligation is breached (new pt. 5A).

## 12-month review

The 12-month review of the HRA found that the Act was having its most significant impact at the level of policy formation in the executive and the legislature.<sup>1</sup> Nonetheless the review found that the HRA had not equally penetrated all levels of the bureaucracy, and that further support and training was required to clarify the implementation of the HRA to public servants. The review also recognised that the HRA had not been used often in the courts, and there was still much work to be done to develop a culture of human rights in the ACT community. These issues are largely still present and it will be important for the five year review to address them.

The 12-month review recommended a number of amendments to the HRA to ensure that it operated more effectively, including clarifying the interpretive approach that should be taken under 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.<sup>2</sup>

The *Human Rights Amendment Act 2008* (ACT) made these and other changes to the HRA in two phases. The first phase of the amendments, which commenced on 18 March 2008, codified the reasonable limits provision in s 28; clarified the interpretive provision in s 30; and created new notification requirements where human rights issues arise in the Supreme Court in s 34. The second phase of the amendments, which commenced on 1 January 2009, created a new Pt 5A of the HRA, dealing with the obligations of public authorities and the direct right of action.

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<sup>1</sup> See, 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), available at: [http://acthra.anu.edu.au/Primary%20documents/twelve\\_month\\_review.pdf](http://acthra.anu.edu.au/Primary%20documents/twelve_month_review.pdf); and <http://acthra.anu.edu.au/Primary%20documents/12%20Month%20Review%20Discussion%20Paper%20.pdf>

<sup>2</sup> See, JACS, above n 1, Recommendations 5, 6, and 7 respectively.

## DUTY TO COMPLY WITH HUMAN RIGHTS

### BACKGROUND

The original HRA did not include a specific application clause, leading to uncertainty as to whether the HRA regulated the conduct of government agencies. This issue was never fully tested in the courts, and although some cases did appear to apply human rights standards to the conduct of government,<sup>3</sup> this was generally tied to an exercise of the interpretive power.<sup>4</sup> Furthermore, the HRA did not initially create a new cause of action based directly on the violation of human rights. Nevertheless, it was possible to raise alleged violations of the HRA before the courts. For example, the HRA could be invoked in criminal proceedings and, indeed, in civil proceedings where the issue of the interpretation of a Territory law arose. Theoretically, it could also be used as the basis of an action, for example, a violation of the HRA or a failure to take it into account could be relied on in proceedings for judicial review of the actions of public authorities. However, this possibility was not tested during the HRA's first four years.

Based on recommendations made by the 12-month review of the HRA, the *Human Rights Amendment Act 2008* (ACT) introduced, with effect from 1 January 2009, an explicit obligation on public authorities to comply with the HRA, and created a direct right of action in the Supreme Court for breach of this duty.

### DEFINITION OF PUBLIC AUTHORITY

The HRA amendments define public authorities through the identification of specific core public authorities (s 40(1)(a)-(f)), coupled with a more general test for functional public authorities, which captures other entities carrying out government functions (ss 40(1)(g) and 40A).

Core public authorities comprise government authorities and instrumentalities, ministers, public employees and police officers when they are exercising a power under Territory law. Functional public authorities extend to entities whose functions are or include functions of a public nature, when exercising those functions for the

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<sup>3</sup> See, eg the comments of Higgins CJ in Transcript of Proceedings, Application by Eastman (ACT Court of Appeal, No 26 of 2007, 23 and 31 August 2007), summarised at <http://www.acthra.anu.edu.au/cases/case.php?id=73> viewed 26 August 2008.

<sup>4</sup> For example, see *R v Upton* [2005] ACTSC 52, where Connolly J interpreted the general powers of the court under s 20 of the *Supreme Court Act 1933* (ACT) in light of the right to a fair trial in the HRA to grant a conditional stay of proceedings where there had been undue delay by the prosecution.

Territory or a public authority (whether under contract or otherwise) (s 40(1)(g)). This approach draws on the Victorian Charter and is influenced by the UKHRA reflecting the increasing use of private contractors to carry out traditional functions of government. The HRA includes an explicit list of criteria to be considered in applying the test of functionality, in an attempt to avoid the unduly narrow approach that has been taken by the UK courts.<sup>5</sup> Nevertheless, as Simon Evans and Carolyn Evans have noted, the key criterion of a public authority having a function connected to or identified with a function of government is likely to be contentious and its meaning may need to be more precisely determined by the courts.<sup>6</sup>

## Exemptions

Under s 40(2), courts are excluded from the definition of public authority except when they are acting in an administrative capacity.<sup>7</sup> The exemption is intended to avoid conflict with High Court jurisprudence suggesting that Australia has one unified common law which cannot be unilaterally constrained by a State or Territory.<sup>8</sup> This exclusion limits the direct application of human rights of particular relevance to the courts, such as the right to a fair trial and the rights in criminal proceedings, which will instead need to be enforced through statutory interpretation or through the duties of public authorities such as police or prosecutors.

However, it is possible that a robust human rights-consistent interpretation of the legislation from which the Territory courts derive their jurisdiction may overcome some of these limitations.<sup>9</sup> Notably, recent decisions in Victoria, where the Charter similarly exempts courts and tribunals except in their administrative capacity,<sup>10</sup> suggest that even when acting in a judicial capacity courts and tribunals may be directly bound to apply those rights which relate to the powers exercised in a proceeding: specifically the prohibition against cruel, inhuman or degrading punishment; the right to liberty and security; children's rights in the criminal process;

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<sup>5</sup> See, eg Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act: Ninth Report of Session 2006-07(2007)* at [101].

<sup>6</sup> Evans S and Evans C, *Legal Redress under the Victorian Charter of Human Rights and Responsibilities (2006)* 17 PLR 264 at 274.

<sup>7</sup> The Legislative Assembly is also excluded to preserve parliamentary supremacy.

<sup>8</sup> Human Rights Amendment Bill 2007 (ACT), Explanatory Statement, p 4.

<sup>9</sup> See *R v Upton* [2005] ACTSC 52.

<sup>10</sup> But note that the Victorian Charter has an express application clause, which states, among other things, that the Charter applies to courts and tribunals in relation to their 'functions' under Part 2 of the Charter, that is, the list of substantive human rights, as well as their other specific duties (s6(2)(b)). The HRA in contrast is silent on the issue of to whom it applies.

the right to a fair trial; rights in criminal proceedings; the prohibition against double jeopardy; and the prohibition against retrospective punishment.<sup>11</sup>

On the face of it, the HRA definition provides greater transparency than the Victorian model, as it does not allow entities to be excluded through regulation.<sup>12</sup> In Victoria, the use of regulations to exclude Parole boards from the obligations of public authorities has been criticised.<sup>13</sup> However, provision was made in the original HRA to enable an entity to be prescribed as a court through regulation,<sup>14</sup> which potentially can be used to same effect as the Victorian provisions.

**We recommend that consideration should be given to removing the ability to prescribe an entity as a court through regulation as it can potentially be used to expand the list of exempted bodies, contrary to the intention of the amendments.**

## Tribunals

The original Dictionary to the HRA included the main ACT tribunals (the Administrative Appeal Tribunal, the Discrimination Tribunal, the Guardianship Tribunal and the Mental Health Tribunal) in the definition of court,<sup>15</sup> and as a result they are excluded from the definition of public authority, except in their administrative capacities. However, neither s 40(2) nor the Explanatory Statement to the amendments specifically mentions tribunals, suggesting that the exemption was intended to be limited to courts. Indeed, there would appear to be little reason to exclude these tribunals given their limited role *vis-à-vis* the common law. The *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008* has since amalgamated the main ACT tribunals and other jurisdictions into the ACT Civil and Administrative Tribunal (ACAT). As a result of these changes, the HRA Dictionary definition of court has been amended to refer to the ACAT, thereby effectively extending the exemption to some 16 tribunals and quasi-tribunals.<sup>16</sup>

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<sup>11</sup> *De Simone v Bevnol Constructions and Developments Pty Ltd* (unreported) Supreme Court of Victoria, Court of Appeal, Neave JA and William AJA, 3 April 2009; *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009).

<sup>12</sup> s 4(1)(k) of the *Charter of Human rights and Responsibilities Act 2006* (Vic)

<sup>13</sup> See for example, the Victorian Equal Opportunity and Human Rights Commission's second annual report on the operation of the Charter of Human Rights and Responsibilities Act 2006 (Vic), 2009.

<sup>14</sup> Dictionary to the HRA, definition of 'court'. This definition predates the amendments.

<sup>15</sup> It is likely that this definition was intended to facilitate the intervention powers of the Attorney-General and the Human Rights Commissioner under the HRA: see the ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee* (2003) at paras 4.82-83.

<sup>16</sup> The *ACT Civil and Administrative Tribunal Legislation Amendment Act 2008*, Sch 1.

**In our view, the policy rationale for partially excluding courts does not apply to tribunals and we recommend that the latter should be fully included in the definition of public authorities. If there are sound reasons for their exemption, those should be explained.**

### **Opt-in mechanism**

The amendments include a novel opt-in provision which allows an entity that is not a public authority to request the Attorney-General to declare it subject to the obligations of a public authority, a request to which the Attorney-General is obliged to accede (s 40D). The entity can ask to be released from its obligations at any time, and the Attorney-General must comply with that request. The stated intention of this provision is to encourage the private sector to voluntarily subject itself to explicit human rights obligations under the HRA.<sup>17</sup> The Australian Human Rights Commissioner, Graham Innes has suggested that a similar mechanism could be considered in proposals for a national bill of rights.<sup>18</sup>

The provision has been in operation since January 2009 but as yet no private sector organisation has chosen to opt-in to the HRA; the absence of uptake could in part be attributed to the lack of outreach efforts to the business community, which remains wary of the initiative.<sup>19</sup>

**We recommend that more efforts are made to publicise the provision to the private sector, including information about how it works and the benefits of opting-in to the HRA.**

The opt-in provision may also be useful for entities, whose standing might otherwise be unclear under the functional test, to clarify their status as public authorities. Opting-in might even be included as a specific requirement in government contracts to ensure that contractors are bound by human rights obligations. However, it is worth sounding a note of caution about using the provision in these ways. By opting-in, the entity would be obliged to comply with the HRA in all its activities, not just those related to its public functions; potentially, a contractor who is required to

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<sup>17</sup> Human Rights Amendment Bill 2007 (ACT), Explanatory Statement, pp 7-8.

<sup>18</sup> Canberra Times 20 Jan 2009 “Let business opt in to rights charter, urges HREOC chief: <http://acthra.anu.edu.au/media/2009/Jan%202009/Let%20business%20opt%20in%20to%20rights%20charter.pdf>

<sup>19</sup> See for example, Canberra Times articles: “Businesses balk at new human rights law” 23 Feb 2009: <http://acthra.anu.edu.au/media/2009/Feb%202009/Businesses%20balk%20at%20new%20human%20rights%20law.pdf>; and “Business opts out of human rights” 16 Jan 2009: <http://acthra.anu.edu.au/media/2009/Jan%202009/Business%20opts%20out%20of%20human%20rights%20act.pdf>

opt-in will be assuming greater obligations than the functional test strictly requires. Also, an entity that is found to meet the functional test would be a public authority for the purposes of the HRA regardless of whether it seeks to clarify its status by opting-in; importantly, any unilateral decision to opt-out should make no difference to that status.

**We recommend that consideration be given to including the ‘opt in’ provision as a specific requirement in government contracts. However, the preference should be to tailor contracts to specify the human rights obligations of contractors upfront.**

## OBLIGATIONS OF PUBLIC AUTHORITIES

The new obligations on public authorities to comply with and consider human rights in their activities and decision making processes combine aspects from the Victorian Charter (s 38(1)) and the UKHRA (s 6). Section 40B(1) provides that:

- It is unlawful for a public authority –
- (a) to act in a way that is incompatible with a human right; or
  - (b) in making a decision, to fail to give proper consideration to a relevant human right.

However, an act or a decision will not be unlawful if made under a law in force in the Territory (including a Commonwealth law) that expressly requires that action to be taken or decision to be made in a way that is inconsistent with human rights, or the law cannot be interpreted in a way that is consistent with human rights (s 40B(2)).

Despite the exemption provision, the scope of the duty imposed on public authorities under s 40B is considerable. An act (which includes a failure to act or a proposal to act) that is incompatible with human rights will amount to unlawfulness.<sup>20</sup> Compliance with the obligation in s 40B(1)(a) will depend on the practical outcome of the action (ie, whether it resulted in a breach of human rights).<sup>21</sup>

The obligation in s 40B(1)(b) to give proper consideration to human rights is unique to the HRA and the Victorian Charter. Significantly, proof of unlawfulness is not contingent upon an actual violation of rights. Instead, compliance will turn purely on the quality of the decision-making process: a defective *process* will give rise to

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<sup>20</sup> Under the amended definition of act in the Dictionary to the Human Rights Act 2004 (ACT) introduced by the Human Rights Amendment Act 2008 (ACT), s 9.

<sup>21</sup> However, some human rights have been interpreted to comprise a procedural component, breach of which will amount to a violation of the right concerned, regardless of whether a substantive breach is established.

unlawfulness, regardless of whether the *outcome* is compatible with human rights. By contrast, there is no express obligation under the UKHRA for public authorities to actively consider human rights during the decision-making process and it is only the outcome of the process that the courts will assess for human rights compliance.<sup>22</sup>

The exact manner in which the procedural obligation in s 40B(1)(b), fashioned in traditional judicial review terms, will play out in the context of human rights challenges remains to be seen, but it clearly has the potential to entrench real cultural change in the way government goes about its business. It should be emphasised, this is a considerable obligation requiring significant groundwork to ensure compliance.

**We recommend that training programs for public authorities should explicitly spell out the steps required to comply with this obligation. Existing human rights resources on the JACS website – in particular the *Guidelines for ACT Departments: Developing Legislation and Policy* - should be updated to provide guidance on these new obligations. This should be done as a matter of urgent priority.**

## Reasonable limits

Although in some cases the conduct of public authorities may be tightly constrained by laws, in many instances governing legislation or statutory instruments will leave room for discretion, which will need to be exercised in compliance with human rights. One thorny issue, which may need to be resolved by the courts, is whether and when public authorities may rely upon the reasonable limits provision in s 28 to justify restricting one human right in order to respect another human right or to achieve a competing social objective; under s 28, a limitation will only be reasonable if it is strictly proportionate to a legitimate objective.<sup>23</sup> The question is important because ensuring that proportionality can be properly factored into the decision-making of public authorities is essential to creating an effective compliance regime and building a human rights culture.

It would seem clear that s 28 cannot apply directly to conduct – or put another way, public authorities cannot rely directly on s 28 as a defence for conduct that restricts

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<sup>22</sup> For example, the House of Lords has repeatedly asserted that under the UKHRA “the question is ... whether there has actually been a violation of ... rights and not whether the decision-maker properly considered the question of whether ... rights would be violated or not”: *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19 at [15]. See also *R (on the application of Begum) v Governors of Denbigh High School* [2006] UKHL 15 at [26]-[34].

<sup>23</sup> This issue may also arise under the Charter of Human Rights and Responsibilities Act 2006 (Vic), although the wording of the limitation provision in the Charter is less clear. See, eg the discussion of Jeremy Gans: [www.charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights](http://www.charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights) .

human rights. Section 28 states that reasonable limits may only be set by Territory laws, which would not include actions or decisions of public authorities that are not authorised by an ACT statute or statutory instrument.<sup>24</sup> But there may be recourse to s 28 via the obligation on public authorities to interpret Territory laws compatibly with human rights (s 30). Where a particular conduct is referable to a Territory law, the public authority will be required to interpret and apply the law compatibly with human rights, and it is in that context that the reasonable limits provision in s 28 may be enlivened *vis-à-vis* conduct. Indeed, it is a specific defence in s 40B(2) that conduct will not be unlawful if the law authorising the conduct cannot be interpreted in a human rights-consistent way.

**We recommend that training programs for public authorities include practical guidance on how proportionality should be incorporated into the decision-making process.**

The difficulty with the reasonable limits provision in s 28 and its interaction with the new duty is that s 28 does not permit rights to be limited by legal sources other than Territory laws, whereas s 40B contemplates acts and decisions being referable to other legal sources, for example, public authority conduct authorised by common law will be equally subject to HRA scrutiny. It is unclear how proportionality can be factored into public authority conduct in these circumstances, given that s 28 allows reasonable limits to be set only by Territory laws. The formulation in s 28 is more restrictive than international and comparative approaches to the legality requirement of reasonable limits. These tend to be less concerned with the *source* of the law authorising a limitation (it can be primary or secondary legislation or the common law) than with the *quality* of that law (it must be accessible and precise; and it must not be arbitrary).<sup>25</sup> This approach is reflected in the Victorian Charter, which provides that rights may be subject to reasonable limits *under law*,<sup>26</sup> whereby the phrase ‘under law’ is intended to include statutory and common law.<sup>27</sup>

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<sup>24</sup> See the definition of Territory law in the Dictionary to the Human Rights Act 2004 (ACT); s 13 of the *Legislation Act 2001* (ACT). The situation may not be beyond doubt: in *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48, [92], Refshauge J described the issue as “contentious”.

<sup>25</sup> *Sunday Times v the United Kingdom* (1979-80) 2 EHRR 245; *Golder v United Kingdom* (1975) 1 EHRR 524; *Malone v United Kingdom* (1985) 7 EHRR 14; General Comment No 16[32] CCPR/C/21/Rev.1; HRI/GEN/1/Rev.8; *Huvig v France* (1990) 12 EHRR 528.

<sup>26</sup> s 7(2) of the Victorian Charter.

<sup>27</sup> See Explanatory Memorandum to Clause 7:  
[http://www.legislation.vic.gov.au/domino/Web\\_Notes/LDMS/PubPDocs\\_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257162001D4B2B/\\$FILE/551406exa1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs_Arch.nsf/5da7442d8f61e92bca256de50013d008/CA2570CE0018AC6DCA257162001D4B2B/$FILE/551406exa1.pdf)

**We recommend that consideration should be given to amending s 28 to allow reasonable limits to be set ‘under law’ instead of only by ‘Territory laws’. This would enable proportionality to be factored into public authority conduct where referable to legal sources other than Territory laws.**

## **NEW CAUSE OF ACTION**

The amendments to the HRA also introduce a new right of action for breach of human rights by a public authority (s 40C). This remedy provision is not dependent upon any existing cause of action and is more straightforward than the complex remedy provision in the Victorian Charter.<sup>28</sup> While the Victorian Charter requires a plaintiff to establish a case under an existing cause of action, under the HRA provision, a victim of a breach of human rights obligations by a public authority may directly institute proceedings for that breach in the Supreme Court, as well as relying on these obligations in other legal proceedings. The precise nature of the HRA-based action (judicial review, tort action, or both) and its relationship to existing actions and procedures (such as judicial review under ADJR)<sup>29</sup> is unclear.

There has been one application under s 40C to the Supreme Court so far.<sup>30</sup> It remains to be seen whether a right of action will stimulate renewed interest in the HRA amongst the legal profession and turn the trickle of human rights case law into a stream.<sup>31</sup>

## **REMEDIES**

The Supreme Court is empowered to grant any relief it considers appropriate, except damages. A recent article in the ACT Law Society’s journal, *Ethos*, suggests that for such relief to be effective, the Supreme Court may be required to go beyond traditional judicial review remedies and ‘sometimes make orders for relief that have novel and creative features’ to meet the needs of a given case.<sup>32</sup>

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<sup>28</sup> See, eg S. Evans and C. Evans, "Legal Redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 Public Law Review 264, at 275.

<sup>29</sup> The HRA allows a longer period to lodge a challenge, but it is not clear whether the procedures in the *Administrative Decisions (Judicial Review) Act 1989* (ACT) would be available

<sup>30</sup> *Hakimi v Legal Aid Commission (ACT); The Australian Capital Territory (Intervener)* [2009] ACTSC 48.

<sup>31</sup> As predicted by Attorney-General Simon Corbell: see Australian Capital Territory, Legislative Assembly, *Parliamentary Debates* (6 December 2007) p 4031.

<sup>32</sup> See Emilia Della Torre, "What Price Human Dignity? Recent Changes to Australian Capital Territory Laws", *Ethos*, March 2009 for a discussion of the potential scope of "appropriate relief".

The exclusion of damages follows the Victorian example, perhaps due to concerns about the potential financial liability of the government.<sup>33</sup> The experience in the UK suggests that such caution may be unwarranted. Under the UKHRA, courts have a limited power to award damages.<sup>34</sup> A review of the UKHRA in 2006 noted that the courts used this remedy very sparingly and had awarded modest damages in only three reported cases.<sup>35</sup> The ACT Consultative Committee was sensitive to the concerns of government about the financial implications of such a remedy and recommended that damages should be awarded as a measure of last resort, and only where necessary to do justice in the case:

No award of damages is to be made unless the Court considers that an award of damages is necessary to provide an effective remedy to the aggrieved person, taking account of all the circumstances of the case and any other order made in relation to the unlawful act or conduct.<sup>36</sup>

In relation to a case in which a party obtains a declaration of incompatibility, the HRA (like the Victorian Charter and the UKHRA) makes no provision for any other remedy for the violation of a protected right. An alternative model can be found in Ireland's Human Rights Act, the *European Convention on Human Rights Act 2003*, which gives the government the discretion to make an *ex gratia* payment of

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<sup>33</sup> The New Zealand Bill of Rights Act does not contain an explicit power to award damages but the courts have implied one. In *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. The NZ Court of Appeal determined that such rights created by parliament could not be empty and toothless, and that their breach must give rise to a remedy. There have, however, been relatively few awards since the decision in *Baigent*. See Butler and Butler, *The New Zealand Bill of Rights Act: a commentary (2005)* 1010-1016 (it should be noted that a number of the higher awards they refer to were overturned or reduced on appeal). They conclude 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." (at 1016)

<sup>34</sup> Section 8(3) of the UKHRA provides that 'No award of damages is to be made unless, taking account of all the circumstances of the case, including – (a) any other relief or remedy granted, or order made, in relation to the act in question..., and (b) the consequences of any decision...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.'

<sup>35</sup> Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act (2006)* p 18. See also See Law Commission and Scottish Law Commission, *Damages under the Human Rights Act 1998 – Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965, Cmd 4853*, October 2000 <http://www.scotlawcom.gov.uk/downloads/rep180.pdf> , and *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14 and *Re P* [2007] EWCA Civ 2 <http://www.bailii.org/ew/cases/EWCA/Civ/2007/2.html>.

<sup>36</sup> ACT Consultative Committee Model Bill cl 9(2).

compensation to an aggrieved party where a declaration of incompatibility is made.<sup>37</sup>

**We recommend that the Supreme Court should be given a limited power to award damages similar to that provided under the UKHRA, and as reflected in the ACT Consultative Committee Model Bill. Additionally, consideration could be given to allowing a person who obtains a declaration of incompatibility from the Supreme Court to apply to the government for an *ex gratia* payment of compensation.**

## PREPAREDNESS

Commencement of the duty on public authorities and the direct right of action was delayed in order to allow sufficient time to prepare for these changes. As noted above, the scope of the new obligations made it foreseeable that significant training and a clear plan for implementation was required to ensure that government agencies and other public authorities were properly prepared. Among other things, it would have been important, and remains important for these efforts to be co-ordinated, and that agencies have a clear understanding of where to look for training and assistance.

### Human Rights Unit

The amendments had important implications for the way JACS, as the lead agency for the HRA, needed to prepare for the changed environment from January 2009. It would have been anticipated that these changes needed to be supported by an increased resourcing of the HRU within JACS. Instead, the unit's profile was reduced through a reorganisation and its staff resources diminished, leaving no new capacity to take on the additional work needed to prepare for the amendments.

Although the HRU was re-formed in early 2009, following Territory elections, the concern is that it remains under-resourced and lacks the capacity to properly

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<sup>37</sup> Section 5(4) of the the *European Convention on Human Rights Act 2003* <http://www.irishstatutebook.ie/2003/en/act/pub/0020/sec0005.html> provides that:

Where—

- (a) a declaration of incompatibility is made,
- (b) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and
- (c) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party (“a payment”),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

support the amended Act. It should be anticipated that the amendments are likely to place increasing demands on JACS for advice, training and information. Some of this demand will be met through initiatives by the HRC and through the establishment of a Special Counsel (Human Rights) position within the ACT Government Solicitor's office, but a major shortfall remains with the HRU.

**We recommend that JACS should review its resourcing and structure of the HRU to better determine the level of staffing and skills needed to meet these new challenges. Greater emphasis should also be given to seeking personnel with qualification and/or practical experience in human rights and also to staff with the capacity to deliver training on human rights to government agencies.**

**We recommend that JACS should reconvene the Inter-Departmental Committee on Human Rights to oversee the implementation of the amendments imposing obligations on public authorities, and the Human Rights Commissioner should be invited to participate in this forum.**

### **The Human Rights Commissioner**

The Human Rights Commissioner has noted that the new obligations will have a significant impact on the work of the HRC, particularly in delivering training programs to the management and staff of public authorities on what is required to comply with the new duty.<sup>38</sup> Among other things, public authorities will be required to review existing policies and laws for compliance; to expressly include human rights in new policies; to develop practical measures for implementation e.g. administrative guidelines and checklists; to develop a rights strategy to apply to contractors and tenderers; and to develop a rights framework for internal complaint handling.<sup>39</sup> The Commissioner has stated that these training commitments cannot be met without additional resources.

The Commissioner has published a fact-sheet on the new obligations,<sup>40</sup> and intends to charge government agencies for training programs, but will offer free training for

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<sup>38</sup> ACT Human Rights Commission, Annual Report 2007-2008, p 10:  
<http://www.hrc.act.gov.au/assets/docs/Annual%20Report%20-%20with%20transmittal%20-%20and%20cover.pdf>

<sup>39</sup> Ibid.

<sup>40</sup> Available at <http://www.hrc.act.gov.au/assets/docs/public%20authorities%20factsheet.pdf>

community organisations.<sup>41</sup> Additionally the Commissioner plans to run ‘train-the-trainer’ programs to help extend its training activities.<sup>42</sup>

## Community organisations

The amendments are likely to increase the relevance of the HRA to the community sector because some organisations may now become subject to the Act. As discussed above, the definition of ‘public authority’ includes those entities whose functions are or include functions of a public nature.<sup>43</sup> The uncertainty about the precise scope of this definition has led to some anxiety in the community sector. The Director of the ACT Council of Social Service, Roslyn Dundas, recently said:

I’d prefer to get it right from the outset, leaving the legal process as a necessary back-up. The time taken to get a decision through a Supreme Court process can be timely and not encouraging for someone without access to safe housing or other supports.<sup>44</sup>

Community organisations are also concerned about the direct right of action provision. In particular some organisations have raised concern that the right of action is only justiciable through the Supreme Court.<sup>45</sup> The concern is that this will restrict access to self-litigated claimants and for community organisations, because it is procedurally complex and expensive to access. In Victoria there is evidence of increasing community sector reform to ensure that organisations are compliant with the new human rights standards.<sup>46</sup>

**We recommend that measures are put into place to support community organisations subject to the ‘public authorities’ provision. This could be in the form of funding for them to seek training, or the provision of free training from the HRC. Further we recommend funding organisations that currently provide HRA training, such as the Welfare Rights and Legal Centre. Self-represented litigants should be provided with support materials by the Supreme Court in relation to the direct right of action.**

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<sup>41</sup> Helen Watchirs speech, 10 December 2008 Community Forum, available on the HRC website: <http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=17&MainTypeID=17>

<sup>42</sup> Human Rights Commission Annual Report 2007-2008, p 10.

<sup>43</sup> HRA s 40(1)(g)

<sup>44</sup> Roslyn Dundas, speech made at the Human Rights Commission Community Forum on 10 December 2008, available on the HRC website: <http://www.hrc.act.gov.au/index.cfm?MasterTypeID=2&SectionTypeID=17&MainTypeID=17>

<sup>45</sup> Discussion raised at the 10 December 2008 HRC community forum.

<sup>46</sup> Victorian Council of Social Service (VCOSS), *Using the Charter in Policy and Practice: Ways in which community sector organizations are responding to The Victorian Charter of Human Rights and Responsibilities* (2008).

## THE LEGISLATIVE PROCESS

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 LEGISLATIVE ASSEMBLY

During the 6<sup>th</sup> Assembly (2004-2008), without the usual checks and balances of a cross-bench, the HRA took on increased importance as a tool to encourage government accountability. Although the Liberal Opposition remained sceptical about the HRA, labelling it ‘political self-indulgence’,<sup>47</sup> and threatened to repeal it if elected,<sup>48</sup> its members, as well as the single member of the ACT Greens, increasingly relied on the HRA to hold the government to its own human rights standards. This occurred in the context of breaches of the HRA at Quamby youth detention centre,<sup>49</sup> government intervention in the bushfire coronial inquest,<sup>50</sup> support for compulsory student unionism,<sup>51</sup> treatment of public housing tenants,<sup>52</sup> reducing access to administrative review,<sup>53</sup> imposing penalties for removing trees,<sup>54</sup> criticising opponents of its civic development plan,<sup>55</sup> and prematurely closing parliamentary debates.<sup>56</sup> The government itself regularly used the HRA, both to oppose proposals before the Assembly and to support its own arguments in debates.<sup>57</sup>

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<sup>47</sup> ACT, *Parliamentary Debates*, 5 April 2005, 1364 (Richard Mulcahy).

<sup>48</sup> See, for example, ACT, *Parliamentary Debates*, 15 March 2007, 656 (Bill Stefaniak). Under the leadership of Zed Seselja, however, the Opposition’s policy of repeal may be reconsidered. See, for example, the comments of Zed Seselja regarding the Liberal party taking an ‘open mind’ to the five year review of the HRA: ACT, *Parliamentary Debates*, 4 March 2008, 383.

<sup>49</sup> See, for example, ACT, *Parliamentary Debates*, 29 June 2005, 2479-80 (Jacqui Burke, Richard Mulcahy, Zed Seselja).

<sup>50</sup> ACT, *Parliamentary Debates*, 1 December 2004, 188 (Jacqui Burke).

<sup>51</sup> ACT, *Parliamentary Debates*, 6 April 2005, 1412-16 (Vicki Dunne, Richard Mulcahy).

<sup>52</sup> ACT, *Parliamentary Debates*, 5 April 2005, 1352-53 (Jacqui Burke).

<sup>53</sup> ACT, *Parliamentary Debates*, 18 August 2005, 2867-8 (Vicki Dunne).

<sup>54</sup> ACT, *Parliamentary Debates*, 20 September 2005, 3350-1 (Jacqui Burke).

<sup>55</sup> ACT, *Parliamentary Debates*, 4 May 2005, 1754 (Brendan Smyth).

<sup>56</sup> ACT, *Parliamentary Debates*, 10 March 2005, 887 (Brendan Smyth).

<sup>57</sup> See, for example, ACT, *Parliamentary Debates*, 27 August 2008. During the debate about the *Protection of Public Participation Bill 2008*, the government argued against the inclusion of a right to public participation on the basis that this would create a human right outside the HRA.

Some issues that produced serious human rights debate included the framing of offences against pregnant women, and whether the right to life under the HRA prevents appropriate protection of the unborn foetus;<sup>58</sup> the use of privative clauses and call-in powers which are intended to prevent litigation;<sup>59</sup> the use of strict liability offences, and the appropriate level of justification to be provided by the government;<sup>60</sup> lowering the compulsory voting age in the ACT to 16, in accordance with the right to equality, and the rights of children;<sup>61</sup> retrospective provisions in planning legislation;<sup>62</sup> amendments to the *Freedom of Information Act 1989* (ACT), and the perception that the government lacks transparency;<sup>63</sup> a proposed needle-exchange program in the new prison;<sup>64</sup> and detention powers proposed for the Health Professions Tribunal.<sup>65</sup>

#### **Terrorism (Extraordinary Temporary Powers) Act 2006**

A good example of the effect of the HRA on ACT legislation is the co-operative counter-terrorism regime proposed by the Commonwealth government in the wake of the London bombings in 2005. Although the ACT government had committed to introduce parallel anti-terrorism laws, it was highly critical of the Commonwealth's *Anti-Terrorism Act (No 2) 2005* (Cth), maintaining that many provisions of this Act were in breach of the right to liberty under the ICCPR. JACS prepared legislation that it considered human rights-compliant, referring an exposure draft bill to the Standing Committee on Legal Affairs. The ACT's Terrorism (Extraordinary Temporary Powers) Bill 2006 differed in many aspects from the Commonwealth regime, including its provisions for judicial oversight of preventative detention orders, the exclusion of children from the preventative detention regime, and the omission of draconian penalties for disclosing the fact of detention. The Bill was tabled with an advice on human rights compliance by Sydney barrister Kate Eastman. The 2005 counter-terrorism regime was one area in which the ACT was able to have some influence over the debate at national level, with the Chief Minister releasing both the draft Commonwealth laws and his advice about the human rights compatibility on his website, galvanising opposition to the national laws.

<sup>58</sup> ACT, *Parliamentary Debates*, 16 February 2006, 264ff (debate on the Crimes (Offences against Pregnant Women) Amendment Bill 2005 (ACT)).

<sup>59</sup> See, for example, ACT, *Parliamentary Debates*, 16 February 2006, 248ff (debate on the use of the *Land (Planning and Environment) Act 1991* (ACT) in relation to the Alexander Maconochie prison).

<sup>60</sup> See, for example, ACT, *Parliamentary Debates*, 20 October 2005, 3928ff (debate on the Criminal Code Harmonisation Bill 2005 (ACT)); ACT, *Parliamentary Debates*, 31 May 2007, 1335ff (Zed Seselja) (debate on the Corrections Management Bill 2006 (ACT)).

<sup>61</sup> ACT, *Parliamentary Debates*, 29 March 2006, 798-805.

<sup>62</sup> ACT, *Parliamentary Debates*, 28 February 2007, 109 (Zed Seselja).

<sup>63</sup> ACT, *Parliamentary Debates*, 8 March 2007, 346 (Bill Stefaniak). See also the comments of Vicki Dunne on open and accountable government: ACT, *Parliamentary Debates*, 8 March 2007, 1752.

<sup>64</sup> ACT, *Parliamentary Debates*, 31 May 2007, 1333ff.

<sup>65</sup> ACT, *Parliamentary Debates*, 14 November 2006, 3413ff (debate on the Health Legislation Amendment Bill 2006 (No 2))

See generally Andrew Byrnes and Gabrielle 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 Miriam Gani and Pene Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E-press, 2008) 361-377, available at: [http://epress.anu.edu.au/war\\_terror/pdf/ch16.pdf](http://epress.anu.edu.au/war_terror/pdf/ch16.pdf)

#### **Children and Young People Act 2008**

Another example of how the HRA has influenced the legislative process is the development of the *Children and Young People Act 2008* (ACT). This is a comprehensive updating and codifying statute that is intended to be the primary law in the ACT providing for the protection, care and wellbeing of children and young people. The government released an exposure draft of the legislation and the Human Rights Commissioner and the Children and Young People's Commissioner made submissions. Human rights issues were raised by practices such as therapeutic protection orders, pre-natal reporting of children at risk, strip-searching of detained children, and behaviour management schemes proposed for a youth detention centre. These human rights issues were considered extensively by policy officers involved in the preparation of the legislation, with assistance from the Human Rights Unit. This is reflected in the lengthy Explanatory Statement presented with the Bill, which refers not only to the provisions of the ACT HRA, but also to an array of relevant international standards, including the Convention on the Rights of the Child and United Nations principles relating to juvenile justice. It also draws on the audit reports of the ACT Human Rights Commissioner.

### **The ALP/Greens Agreement**

On 31 October 2008, the ACT Greens and the ACT Labor Party signed a Parliamentary Agreement relating to the conduct of the 7th ACT Legislative Assembly. Two of the commitments set out in the Appendix to the agreement are specifically relevant to the operation of the HRA:

3.7 Amendments to the Human Rights Act 2004 requiring all Private Members' Bills to be assessed for compliance with the Act.

3.8 Statements of compliance with the Human Rights Act 2004 to include a detailed Statement of Reasons, recognising more detailed consideration of the resource implications.

The agreement also resulted in the adoption of various temporary orders which will operate for the duration of the 7<sup>th</sup> Assembly. These changes are discussed below.

### **THE SCRUTINY OF BILLS COMMITTEE**

The HRA has significantly enhanced the role of the Standing Committee on Legal Affairs, performing the duties of a Scrutiny of Bills and Subordinate Legislation

Committee (the Scrutiny Committee).<sup>66</sup> Whereas previously the bi-partisan Committee had looked for undefined intrusions into personal liberties, it is now required under s 38 of the HRA to adopt a broad and explicit human rights framework when examining all bills, both government and private, introduced into the Assembly.

As a non-partisan body, the Committee does not comment on the policy aspects of the legislation it scrutinises,<sup>67</sup> and has generally not considered it appropriate to take a conclusive view on whether particular limitations on rights can be justified under the limitation provision in s 28 of the HRA, leaving instead these questions to be considered by the Assembly.<sup>68</sup> This approach differs from that taken by the Victorian Scrutiny of Acts and Regulations Committee, which similar to the UK Joint Parliamentary Committee on Human Rights, has taken a more hands-on approach when assessing the proportionality of limitations.<sup>69</sup> However, the Committee has increasingly provided guidance on the methodology for applying s 28,<sup>70</sup> and it has occasionally expressed strong opinions about whether particular limitations might be considered disproportionate.<sup>71</sup>

The inclusion of, and justification for, strict liability offences have been an ongoing theme in the Scrutiny Committee reports. The Committee has commented at length on these matters, and has frequently noted the inadequacy of some Explanatory Statements in addressing the issues. In 2005, the Chief Minister acknowledged that an impasse had been reached between the views of the government and the Committee, and agreed to refer the issue to ACT Standing Committee on Legal Affairs for inquiry.<sup>72</sup> The Committee released its report in February 2008,

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<sup>66</sup> From 2008 the Standing Committee on Justice and Community Safety (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee)

<sup>67</sup> 'Role of the Committee' as set out in the preface to each Scrutiny Report. See eg *Scrutiny Report No 56* (2008).

<sup>68</sup> For an overview of the issues raised by the Scrutiny Committee in its reports from the beginning of 2007 and government responses to these comments, see ACT Human Rights Act Research Project, *The Scrutiny Committee and the HRA 2007*, Australia's First Bill of Rights: Assessing the Impact of the ACT Human Rights Act 2004 <http://acthra.anu.edu.au/resources/Scrutiny%20Committee%20reports%20table.pdf>.

<sup>69</sup> See for example Vic SARC Report No 3 of 2009 at: [http://www.parliament.vic.gov.au/sarc/Alert\\_Digests\\_09/Alert%20Digest%20No%203%20of%202009.pdf](http://www.parliament.vic.gov.au/sarc/Alert_Digests_09/Alert%20Digest%20No%203%20of%202009.pdf)

<sup>70</sup> See Peter Bayne (legal advisor to the Scrutiny Committee), 'The Human Rights Act 2004 (ACT) : developments in 2004', *Canberra Law Review*; (8) 2005: 137-166, 149

<sup>71</sup> See, for example, Scrutiny Committee, Parliament of ACT, *Scrutiny Report No 16* (2005) 4, discussing the Court Procedures (Protection of Public Participation) Amendment Bill 2005 (2007).

<sup>72</sup> *Parliamentary Debates*, 20 October 2005, 3933-4 (Jon Stanhope, Chief Minister).

recommending a comprehensive audit of ACT legislation to determine the prevalence of strict liability offences and their appropriateness in each case.<sup>73</sup>

## Government responses

The responses of the government to the Scrutiny Reports suggest that serious consideration is being given to the views of the Committee. The government has amended some legislative proposals in light of criticisms in the Committee's reports, for example by limiting overly broad powers given to the Environmental Protection Authority under the Water Resources Bill 2007 (ACT) and restricting the powers given to the Health Professions Tribunal to issue warrants of detention under the Health Legislation Amendment Bill (No 2) 2006 (ACT).<sup>74</sup>

The Committee has also been willing to enter into dialogue with the government over its comments. For example, the Committee commented that proposed restrictions on the display of smoking advertisements in the Tobacco Amendment Bill 2008 were likely to breach the right to freedom of speech.<sup>75</sup> The government responded that the Committee's concerns were unnecessary, as the HRA applied only to individuals and not to corporations.<sup>76</sup> The Committee responded by explaining that commercial free speech might still be made by individuals, particularly in small business.<sup>77</sup>

More often, however, the government has provided additional justification in response to the Committee's concerns, but has defended its views on compatibility. There may also be a tendency for some government agencies to view the statement of compatibility as a sufficient answer to issues raised by the Scrutiny Committee, which limits the potential for fruitful dialogue. For example, in his response to the Committee's concerns over provisions of the Domestic Animals Amendment Bill 2007 (ACT), Minister John Hargreaves noted that:

The provisions of the Bill were drafted after discussion with Parliamentary Counsel's Office and in consultation with the Human Rights Unit ... A Human Rights Compatibility Statement has been provided for the Bill in its entirety. Consequently, I

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<sup>73</sup> Standing Committee on Legal Affairs, Parliament of ACT, *Strict and Absolute Liability Offences* (2008).

<sup>74</sup> Scrutiny Committee, Parliament of ACT, *Scrutiny Report No 34* (2006). The proposed new s 59A was removed pursuant to an amendment proposed by the Minister for Health: ACT, *Parliamentary Debates*, 14 November 2006, 3424, 3426-7 (Katy Gallagher).

<sup>75</sup> Scrutiny Report 52.

<sup>76</sup> Scrutiny Report 54.

<sup>77</sup> Scrutiny Report 54.

am confident that the strict liability offences created and the additional defences provided adequately accommodate the requirements of the HRA.<sup>78</sup>

**We recommend that the HRU clarify to instructing agencies that the compatibility statement and Scrutiny Committee reports perform different functions under the HRA; Ministers should be encouraged to take the Committee's concerns back to their departments for reconsideration, rather than relying on the compatibility statement as proof of compatibility.**

The government responds to most if not all reports by the Committee. During the 6<sup>th</sup> Assembly (2004-2008), Committee reports on 13 government bills did not receive a formal response; nine of these bills went on to be passed. Reports on 21 private members' bills received no response in that same period. Overall, 270 bills were introduced during the 6<sup>th</sup> Assembly, comprising 217 government bills (five lapsed) and 53 PMBs (nine were passed; one was withdrawn; 22 were negatived; 21 lapsed).

Pursuant to a new temporary order adopted for the 7<sup>th</sup> Assembly (resulting from the Greens/ALP Agreement), the relevant Minister can be asked to account for the failure to respond to a Committee report within three months of the report being tabled.<sup>79</sup>

**We recommend that non-responses to Committee reports on private members' bills should be subjected to the same rule as these bills have an increased significance in the context of minority government.<sup>80</sup>**

### **Amendments on the floor of the Assembly**

A limitation of the HRA pre-enactment scrutiny process is that there is no requirement to report on the compatibility of amendments introduced on the floor of the Assembly. It is not uncommon for amendments to be moved during the passage of a bill, sometimes these can be substantial and involve what are essentially new policies.<sup>81</sup> In an effort to close this gap, the Assembly has recently adopted a new temporary order which will require amendments proposed by the Government on its own bills to be referred to the Scrutiny Committee before it can

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<sup>78</sup> Scrutiny Committee, Parliament of ACT, *Scrutiny Report No 46* (2007) appendix (response by Minister John Hargreaves to comments by the Committee in Scrutiny Report 43).

<sup>79</sup> Temporary order 254A, 9 December 2008, ACT Legislative Assembly Standing and Temporary Orders (Feb 2009).

<sup>80</sup> As was recently evidenced by the Government's FOI reforms being defeated in favour of Ms Dunne's Freedom of Information Amendment Bill 2008.

<sup>81</sup> See, for example, the ACT Civil and Administrative Tribunal Legislation Bill 2008, where extensive amendments were passed without the opportunity to assess their compatibility with the HRA.

be passed.<sup>82</sup> The Assembly can waive this requirement if the amendments are urgent, minor or in response to a Scrutiny Committee report.

**We recommend that all amendments introduced on the floor of the Assembly should be referred to the Scrutiny Committee unless they are urgent, minor or in response to a Scrutiny Committee report.**

### Subordinate legislation

Under the HRA (s 38), the Scrutiny Committee has no express mandate to report on the human rights issues raised by subordinate legislation. The Scrutiny Committee's legal advisor for subordinate legislation, Stephen Argument, has commented that it is 'curious' that the Committee was given no role in this respect.<sup>83</sup> By contrast, the equivalent Victorian Scrutiny of Bills and Regulation Committee is specifically required to report on the compatibility of subordinate legislation with the Victorian Charter.<sup>84</sup>

In practice, the Committee does undertake a rights assessment of subordinate legislation, and particular issues like strict liability offences are given equal attention, but it does so within the framework of its traditional terms of reference:

The Committee notes that the Explanatory Statement accompanying this subordinate law contains no discussion of even the fact that the subordinate law contains a strict liability offence. As a result, the Committee draws the Legislative Assembly's attention to this subordinate law, on the basis that it may be considered to trespass unduly on rights previously established by law, contrary to principle (a)(ii) of the Committee's terms of reference. (*Scrutiny Report No. 2—2 February 2009*)

However, the Committee essentially undertakes two separate strands of reporting and potentially risks adopting inconsistent positions on similar issues.

**We recommend, in line with the Victorian example, that the terms of reference for the Scrutiny Committee be amended to require it to report against the HRA on the rights issues raised by subordinate legislation.**

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<sup>82</sup> Temporary order 182A, 26 February 2009, ACT Legislative Assembly Standing and Temporary Orders (Feb 2009).

<sup>83</sup> Stephen Argument, *The Legislative Instruments Act 2004: Is it the cherry on the top of the legislative scrutiny cake?*, pg 13 at <http://www.parliament.act.gov.au/conferences/scrutiny/argument.pdf>

<sup>84</sup> *Subordinate Legislation Act 1994* (VIC), s 21(ha).

## Other Committees

While there is no express requirement for other Assembly Committees to consider HRA, it has nevertheless been considered on an *ad hoc* basis in various inquiries and reports. One striking example is in the report of the Standing Committee on Planning and Environment into a proposed commercial development in the Canberra suburb of Kingston, which referred extensively to the HRA and comparative human jurisprudence.<sup>85</sup> The Committee ultimately concluded that the development would not infringe rights, but recommended that the ACT Planning and Land Authority expressly address the relevance of the HRA to the discharge of its statutory and non-statutory responsibilities. The Committee has also examined major planning legislation reforms against the HRA even though the terms of reference for the inquiry did not specifically mention the HRA.<sup>86</sup>

The HRA was also the primary benchmark for the Standing Committee on Legal Affairs' Inquiry into the Exposure Draft Terrorism (ETP) Bill 2006.<sup>87</sup> The terms of reference for current inquiries into the *Freedom of Information Act 1989* and the Crimes (Bill Posting) Amendment Bill 2008 expressly refer to the HRA.

## Exposure Drafts

Releasing exposure drafts of bills is an important way of enabling community input and dialogue about the human rights implications of bills. During the 6<sup>th</sup> Assembly (2004-2008), 18 exposure drafts of bills (two private members' bills) and five exposure drafts of statutory instruments were released for public consultation. The 12-month review recommended that for key bills, agencies should be encouraged to make the case for compatibility to the wider community in connection with exposure drafts or public consultation.<sup>88</sup> But this recommendation has not been fully implemented. Since the review, some eight bills were released for public consultation but only one detailed the human rights issues to which it gave rise.<sup>89</sup>

Under the Greens/ALP agreement, the government has reiterated its commitment to make exposure drafts of all major pieces of reform legislation available in a timely manner for community comment and consideration.<sup>90</sup>

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<sup>85</sup> Standing Committee on Planning and Environment, Parliament of ACT, Draft Variation to the Territory Plan No 256 Kingston Group Centre Part Section 22 (2006).

<sup>86</sup> <http://www.parliament.act.gov.au/downloads/reports/22pePlanningRe.pdf>

<sup>87</sup> <http://www.parliament.act.gov.au/downloads/reports/03AntiTerrorismReport.pdf>

<sup>88</sup> Recommendation 4, Review Report

<sup>89</sup> Children and Young People Bill 2007

<sup>90</sup> Item 3.3, Appendix 1 of the ALP/Greens Agreement.

A new temporary order has also been adopted to ensure that a bill is not introduced and debated in the same sitting period unless there are exigent circumstances, which will increase the opportunity for HRA issues to be raised and considered more fully.<sup>91</sup>

**We recommend that exposure drafts should include an outline of the human rights implications of the draft bill, so that the community is able to consider and respond to these views.**

## STATEMENTS OF COMPATIBILITY

It is a requirement, under s 37 of the HRA, that bills presented to the Legislative Assembly by a minister are accompanied by a statement of compatibility by the Attorney-General. Although there is no specific requirement for a statement of reasons to be included for the Attorney-General's opinion, there have been ongoing calls for the compatibility statements to contain reasons so as to serve an educative role for the Assembly.<sup>92</sup> The government did provide a statement of reasons for the Mental Health (Treatment and Care) Amendment Bill 2005 (ACT), which annexed a detailed statement of reasons to the compatibility statement, and the Terrorism (Extraordinary Temporary Powers) Bill 2006 (ACT), discussed above, for which barrister Kate Eastman's advice on compatibility was tabled separately in the Assembly.<sup>93</sup>

### Explanatory statements

The general policy of the government has been to require that human rights issues be addressed in the Explanatory Statements, which are prepared by the department responsible for the Bill. This is partly an issue of resources, but the HRU also considers that there are benefits to the quality of the human rights dialogue from sharing the responsibility for human rights compliance across government, and requiring each department to analyse and justify its legislation in human rights terms.

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<sup>91</sup> Temporary order 172, 9 December 2008, ACT Legislative Assembly Standing and Temporary Orders (Feb 2009).

<sup>92</sup> See, for example, ACT, *Parliamentary Debates*, 30 August 2007, 2538 (Deb Foskey).

<sup>93</sup> Kate Eastman, *Terrorism (Extraordinary Temporary Powers) Bill 2006 (ACT): Memorandum of Advice* (2006), available at <http://acthra.anu.edu.au>. ACT, *Parliamentary Debates*, 3 May 2006, 1126 (Simon Corbell).

The Scrutiny Committee has been particularly critical of the government failing to provide adequate detail in its Explanatory Statements, particularly where strict liability offences are involved.<sup>94</sup> It has also offered praise for detailed Explanatory Statements,<sup>95</sup> and confirmed their importance:

The point of this exercise is not simply to inform the Committee, the Assembly, the legal profession and the courts. An Explanatory Statement has the potential to be the vehicle for discourse between the promoter of the Bill and the general public, and thus enhance the growth of a human rights culture in the ACT. The work involved in writing an Explanatory Statement is tedious and difficult, but the outcome is of great value.<sup>96</sup>

The 12-month review of the HRA recommended in 2006 that:

Within the Executive, the Government should continue to encourage Agencies to make greater use of the Explanatory Statements to make the case for compatibility. But, where a bill raises significant human rights issues, the compatibility statement should provide a 'summary of reasons', focusing on the human rights principles and drawing on the case established by the sponsoring agency.<sup>97</sup>

This recommendation has not been fully implemented. Reasons have not been included in any statement of compatibility in the two years following the release of the review, although some Bills, such as the Corrections Management Bill 2006 (ACT) and the Children and Young People Bill 2008 (ACT), raised significant human rights issues, and detailed reasons were included in the Explanatory Statements.

### Statements of reasons

The ability of the legislature to participate in a dialogue with the executive on human rights issues depends in part upon the information available to the Assembly and former Greens MLA Dr Deb Foskey long campaigned for reasons to be provided for all compatibility statements.<sup>98</sup> For the 7<sup>th</sup> Assembly, the government has committed to include a detailed statement of reasons with each s37 Compatibility Statement, where resources permit, under the Greens/ALP Agreement.

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<sup>94</sup> See, for example, Scrutiny Report 51 (discussion of Planning and Legislation Amendment Bill).

<sup>95</sup> For example, for the Children and Young People's Bill.

<sup>96</sup> Standing Committee on Legal Affairs (performing the duties of a Scrutiny of Bills and Subordinate Legislation Committee) (Scrutiny Committee), Parliament of ACT, *Scrutiny Report No 54* (2008) 24.

<sup>97</sup> Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) recommendation 3.

<sup>98</sup> ACT, *Parliamentary Debates*, 14 November 2006, 3417-19 (Deb Foskey).

'Memoranda' have been prepared for two bills so far<sup>99</sup> and were subjected to detailed examination by the Scrutiny Committee, which took a different view of the issues raised by the bills.<sup>100</sup> The Committee also questioned whether it was appropriate for the statements to have focused on a s 30 analysis (i.e. what the courts might do) instead of a reasonable limits assessment under s 28, which is the required standard for a compatibility assessment by the Government:

2. The Human Rights Unit provides advice to the Government concerning the possible fate of its law in a Supreme Court challenge, and it is thus relevant to speculate on the possible use by the court of HRA section 30 to interpret a law in a way that is compatible with the HRA. The Committee, however, considers that this consideration is irrelevant to the question of whether the Assembly should pass a bill that on its face, as the Memorandum of Compatibility seems to acknowledge, may not be a justifiable derogation of the right to freedom of expression in HRA section 16. Rather, the question for the Assembly is whether the Bill should be amended to remove any doubt about its compatibility, so that it is not left to the courts to engage in an interpretative exercise that comes close to legislating.<sup>101</sup>

Both bills have been referred to relevant Standing Committees for further inquiry and report to the Assembly. Greens MLA Shane Rattenbury commended the government for preparing the memoranda, and noted the important educative function they performed by generating 'interplay and feedback' with the Scrutiny Committee.<sup>102</sup>

**In line with the ALP/Greens agreement, we recommend that a statement of reasons should be included with each compatibility statement. The statement should adopt a clear s 28 framework as the requisite standard for assessing compatibility. Where a statement of reasons is not provided, its omission should be explained. Where relevant, all reasons behind compatibility statements should be made publicly available, including advice sought from external sources.**

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<sup>99</sup> The Crimes (Bill Posting) Amendment Bill 2008 and the Crimes (Murder) Amendment Bill 2008; the statement of reasons for the latter has been published on the ACT Legislation Register.

<sup>100</sup>

<http://acthra.anu.edu.au/resources/Memorandum%20of%20Compatibility/Scrutiny%20Report%20%207th.pdf>

<sup>101</sup> See ACT Legislative Assembly, Standing Committee on Legal Affairs, *Comments on the Responses Scrutiny Report No 3*, 23 February 2009, 16; also at:

<http://acthra.anu.edu.au/resources/Memorandum%20of%20Compatibility/Scrutiny%20Report%20%207th.pdf>

<sup>102</sup> ACT *Parliamentary Debates*, 10 February 2009, 561 (Shane Rattenbury):

<http://www.hansard.act.gov.au/hansard/2009/week02/561.htm>

## Private members' bills

Under the HRA, the Attorney-General is required to issue compatibility statements only for government bills. Compatibility statements are not prepared for private members' bills but Cabinet may be advised of the HRA implications of such proposals through the cabinet submissions process.

The government has committed under Greens/ALP agreement to amend the HRA to require all private members' bills to be assessed for HRA compliance. This commitment has not yet been implemented and it is not clear if it will involve the Attorney-General issuing compatibility statements for private members' bills or if the responsibility for certifying compliance will fall to the promoter of the bill. The HRA currently centralises the s 37 function in the Attorney General's portfolio. In practice, inconsistent provisions are the subject of negotiation and will often be redrafted in the course of developing a final bill, and so far there has been no instance of a government bill being introduced without a statement of compatibility.

New Zealand, which has a similar centralised approach to compatibility assessments, requires the NZ Attorney-General to report on the inconsistencies of private members' bills as soon as practicable after the introduction of the bill (s 7).<sup>103</sup> The limitation of the NZ model is that it reduces the opportunity for addressing potential inconsistencies prior to the bill's introduction.

**We recommend that the five year review should canvass the different options for amending the HRA to include compatibility assessments for private members' bills.**

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<sup>103</sup> *Bill of Rights Act 1990* (NZ) (NZBORA). Note that under the NZBORA, the Attorney-General is only required report on inconsistencies.

## THE HUMAN RIGHTS COMMISSIONER

The ACT Human Rights Commissioner has played an important role in implementing the HRA. The Commissioner has the power to review the effect of Territory laws on human rights, and to report on the reviews to the Attorney-General (s 41). This review power extends to laws that were in existence prior to the introduction of the Act, and includes the common law. The Commissioner has used this power to conduct two major human rights audits, one of the Quamby Youth Detention Centre<sup>104</sup> and the second of other ACT corrections facilities, including the Belconnen Remand Centre and the Symonston Temporary Remand Centre.<sup>105</sup> The Quamby audit made 52 recommendations for reform. The government agreed to implement 25 of the recommendations and agreed in principle with the remainder.<sup>106</sup> The corrections facilities audit made 98 recommendations, of which the government accepted all but four, noting that many had already been planned for implementation in the new prison.<sup>107</sup> These audits have led to immediate reform as well as longer term plans for improvements.

The functions of the Commissioner also include providing education about human rights and the HRA and advising the Attorney-General on anything relevant to the operation of the legislation.<sup>108</sup> The Commissioner has conducted regular community forums, and a range of training and education sessions on the HRA for schools, the community, practitioners, and government officers.

Chief Minister and former Attorney-General Jon Stanhope has sought the advice of the Human Rights Commissioner on a range of issues, including the Commonwealth and ACT terrorism laws and the Commonwealth government's 2007 intervention in Aboriginal communities in the Northern Territory.<sup>109</sup> The Commissioner has also made submissions to government on the human rights implications of proposed

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<sup>104</sup> ACT Human Rights Office, *Human Rights Audit of Quamby Youth Detention Centre* (2005), available at <http://www.hrc.act.gov.au>.

<sup>105</sup> ACT Human Rights Commission, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (2007), available at <http://www.hrc.act.gov.au>.

<sup>106</sup> See ACT, *Parliamentary Debates*, 18 August 2007, 2909-11 (Katy Gallagher).

<sup>107</sup> ACT, *Parliamentary Debates*, 12 February 2008, 73 (Simon Corbell)

<sup>108</sup> *Human Rights Commission Act 2005* (ACT) s 27(2).

<sup>109</sup> See, eg, *Request for Advice on Discrimination and Human Rights Implications of Commonwealth Emergency Measures in NT Indigenous Communities Announced on 21 June 2007* (2007) Human Rights Commission, available at <http://www.hrc.act.gov.au>.

legislation.<sup>110</sup> In particular, the Commissioner's advice that a proposed law permitting the use of electro-convulsive therapy in emergency situations breached human rights led to some significant amendments to the Bill.

Under s 36 of the HRA, the Commissioner is given standing to intervene in proceedings involving the application of the Act, with the leave of the court. The Commissioner exercised this power in the case of *SI bhnf CC v KS bhnf IS (SI v KS)*<sup>111</sup> filing comprehensive legal arguments that were adopted by the applicant in that case. The Commissioner has also intervened in some Mental Health Tribunal cases, in a discrimination claim brought against the *Canberra Times*,<sup>112</sup> and more recently in a case in the Supreme Court concerning the right to compensation for unlawful imprisonment (currently awaiting judgement).

### Dealing with community complaints

The Human Rights Commissioner receives a large number of complaints from the public,<sup>113</sup> however, the HRA does not confer jurisdiction on the Commissioner to receive and investigate complaints alleging violations of the Act. The 12-month review of the HRA canvassed extending such a function to the Commissioner but ultimately concluded that, subject to the successful incorporation of a direct right of action, the HRA should not be amended to include a complaints handling role for the Commissioner.<sup>114</sup> In her submission to the 12-month review, the Commissioner stated that she did not consider it would be appropriate to deal with individual human rights complaints,<sup>115</sup> but such a function may now be more viable under the new governing structure of the Human Rights Commission.

**Given the relative inaccessibility of Supreme Court proceedings for most people, we recommend that consideration should be given to providing a complaints-handling function to the Human Rights Commissioner, provided that the Human Rights Commission is adequately resourced to undertake such a function.**

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<sup>110</sup> See the list of submissions at *Human Rights and Discrimination Commissioner/Submissions*, available at <http://www.hrc.act.gov.au>.

<sup>111</sup> [2005] ACTSC 125 ('*SI v KS*').

<sup>112</sup> *Emlyn-Jones v Federal Capital Press* (ACT Discrimination Tribunal, heard 11 July 2006, decision reserved).

<sup>113</sup> ACT Human Rights Commission (HRC), *Annual Report 2007-2008* (2008).

<sup>114</sup> Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review – Report* (2006) Recommendation 7.

<sup>115</sup> Helen Watchirs, '[Submission to the review of the Human Rights Act 2004 \(ACT\)](#)' 24 May 2006, 19.

## Ombudsman

In contrast to the Victorian Charter, the HRA also does not confer any specific complaint handling role on the ACT Ombudsman.<sup>116</sup> However, just as violations of the Act or a failure to take it into account in relevant circumstances could be challenged in judicial review proceedings using standard grounds of review, the ACT Ombudsman has jurisdiction to consider such complaints if they relate to a 'matter of administration' falling within the *Ombudsman Act 1989* (ACT).<sup>117</sup>

**Consideration could be given to extending a similar function to the ACT Ombudsman, as that provided under the Victorian Charter to the Victorian Ombudsman. In the interim, we recommend a fact sheet should be prepared about how the HRA can be used in complaints before the ACT Ombudsman in relation to maladministration.**

## GOVERNMENT CULTURE

When the HRA was introduced, it was envisaged that it would have a significant impact on the ACT public service and would foster the development of a human rights culture within the ACT government. Cultural change within the ACT Public Service has been identified as a key objective of the HRA:

The purpose of the *Human Rights Act 2004* (HRA) is to ensure the Territory Government fulfils its obligations to respect, protect and promote human rights. The long-term goal of the HRA is to achieve cultural change within the ACT public service.<sup>118</sup>

The Project sought to assess the impact of the HRA 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. The findings of that research are attached in full at the end of this report,<sup>119</sup> but it is useful to extract some of the key conclusions and recommendations here.

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<sup>116</sup> The *Victorian Charter* confers on the Ombudsman the power to 'enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter': *Ombudsman Act 1973* (Vic) s 13(1A), inserted by cl 2 of the schedule to the *Charter*.

<sup>117</sup> Interview with Professor John McMillan, Commonwealth and ACT Ombudsman (Canberra, 24 July 2007).

<sup>118</sup> JACS: The Guide to ACT Departments on Pre-Introduction Scrutiny, p 1.

<sup>119</sup> ACTHRA Project, Report on interview research assessing the impact of the *Human Rights Act 2004* on the ACT Public Service (October 2008).

Overall, the research indicates that while the HRA has had a beneficial impact on the culture of the ACT government in some areas, the effect has been neither consistent, nor widespread across government.<sup>120</sup> While much of the initial bureaucratic resistance to the HRA appears to have been largely overcome, there is still inconsistent engagement with the Act at a practical level.

The s 37 compatibility obligation has played an important role in fostering awareness of human rights, and has led to changes in work practices and ultimately, to legislation that in many cases is more respectful of human rights. Our research found that “most participants were aware that there was a Human Rights Unit within JACS”. Although there was some confusion amongst respondents about the difference between the HRU and the Human Rights Commission, the HRU was generally considered “the first port of call for seeking advice on HRA issues”.<sup>121</sup>

As a consequence of this engagement with the HRU, several 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.<sup>122</sup>

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

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<sup>120</sup> ACT Human Rights Act Research Project, interviews with ACT government officers (Canberra, 2006-2008).

<sup>121</sup> ACT Human Rights Act Project, ‘Creating a human rights culture within the ACT government (draft): Report on interview research assessing the impact of the *Human Rights Act 2004* on the ACT Public Service’, 7.

<sup>122</sup> *Ibid*, 13

rights. In part, this is because of a lack of training, information and accessible resources for public servants.<sup>123</sup>

The need to raise awareness about the relevance of human rights to all areas of government is also reflected in the statements on the implementation of the HRA included in the departmental annual reports published since the commencement of the Act.<sup>124</sup> While a few departments have provided detailed commentary on their human rights activities, many have given only perfunctory accounts. Revised guidelines have been issued for human rights reporting which will require more detailed information to be compiled in future annual reports.<sup>125</sup>

It will take time for a human rights culture to permeate all levels of government, but it will also require an ongoing commitment of resources for human rights training and dissemination of information. The amendments to the HRA are likely to increase the perceived relevance of human rights considerations for a broader range of public officials, and to deepen the fledgling culture of human rights developing in the Territory.

**We recommend that the role of the HRU 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 Human Rights Unit and the Human Rights Commissioner should be made clear to all agencies.**

**We recommend that an intensive and ongoing training on the HRA should be implemented across all levels of government. To be most effective, this training should be tailored to specific agencies and roles (so that, for example, front-line decision-makers would receive different training to policy officers), and should provide detailed and practical examples of the application of the HRA to the particular work of those agencies and officers. This training should cover existing obligations of public servants under the HRA, and the new public authority obligations. Further the training should support the guidelines for departments' annual reports, so that there are more sophisticated HRA reports.**

**We recommend that an accessible and up to date resource would be created to assist public servants to understand human rights principles and developments.**

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<sup>123</sup> Ibid.

<sup>124</sup> See *Annual Reports (Government Agencies) Act 2004* (ACT) s 5(2)(a).

<sup>125</sup> Chief Minister's Department (ACT), *Chief Minister's 2007-2010 Annual Report Directions* (2007) 33.

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 (for example the project website or the Human Rights Law Resource Centre website: <http://www.hrlrc.org.au>)

We recommend that 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.

JACS should explore opportunities for the ACT and Victoria to establish a regular bilateral dialogue at officials' level on the operation of HRA and Victorian Charter. This should take place annually or bi-annually and it would be important for officials to meet face-to face initially but subsequent meetings can be done by teleconference, if necessary. One way to take this forward would be for the ACT Attorney-General and the Victorian Attorney-General to meet to determine the terms of reference, as it would be useful to have the dialogue established at the ministerial level; such a meeting could be scheduled into the margins of a SCAG meeting. The agenda should include opportunities for collaboration and information sharing on training (including training of judges), workshops, and current developments. An important outcome from such a dialogue would be to work towards harmonising the operation of the two Acts, it would also be useful for identifying areas of common interests which could be achieved more efficiently collaboratively, than if each jurisdiction were to pursue them independently.

## **MEASURING HUMAN RIGHTS PROGRESS**

The Project ran a small expert workshop on human rights indicators in April 2009 to consider the issues involved in developing appropriate indicators and tools to measure the level of human rights progress in the ACT. We have proposed some specific recommendations, set out below, as a starting point for devising a framework to measure the impact of the HRA on the protection of human rights in the ACT.

### **Public surveys**

There would be benefit in establishing a baseline level of human rights awareness in the ACT community. This would provide the basis for a longitudinal study of human rights awareness over time and provide valuable evidence or feedback about

whether the Government's broader objectives were being met and how community attitudes and knowledge might change over time. It would also provide a mechanism to determine where to better target human rights awareness programs for the community. An independently run survey would be needed to ensure the results are seen as genuinely objective.

The current public survey being conducted by the Human Rights Commission to assess the impact of the HRA on human rights protection in the ACT is a useful model that could be utilised for this purpose.<sup>126</sup> A method for how this might be implemented can be found in the Australian Electoral Study, conducted in parallel with each Federal election. A similar process could be established within the ACT electoral cycle, or to generate additional data points, twice within this cycle (that is, one every two years). Because it would take some years for meaningful trend data to be generated, it would be important that such a program should commence sooner rather than later.

**We recommend that the Human Rights Commission's public survey on the impact of the HRA should be used as the basis for a longitudinal study of human rights awareness in the ACT. A similar process to the Australian Electoral Study could be established within the ACT electoral cycle to generate trend data.**

### Annual reports

Under the revised guidelines for human rights reporting in annual reports,<sup>127</sup> agencies must report against a range of issues, including:

- the number of staff who have attended human rights training sessions;
- internal dissemination of human rights information;
- level and frequency of liaison with the Human Rights Unit;
- reviews of existing legislation; and
- litigation involving the HRA.

We recommend that agencies should also be required to report on:

- reviews of procedures and policies for compliance;
- whether and how they have managed their HRA obligations when outsourcing services, for example, whether contracts and tenders include a requirement for HRA compliance;

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<sup>126</sup> [http://www.surveymonkey.com/s.aspx?sm=eue9Y2N6FAaL\\_2frOPj4WuEA\\_3d\\_3d](http://www.surveymonkey.com/s.aspx?sm=eue9Y2N6FAaL_2frOPj4WuEA_3d_3d)

<sup>127</sup> Chief Minister's Department (ACT), *Chief Minister's 2007-2010 Annual Report Directions* (2007) 33

- whether they have developed guidelines and checklists for incorporating the HRA in decision-making;
- whether they have disseminated information about their human rights obligations to their client groups; and
- whether they have developed a rights framework for complaints handling.

**We recommend that agencies should be strongly encouraged to use the annual reporting framework to initiate a process for benchmarking their performance and setting progressive goals with the view to continuous improvement. This process can be usefully commenced in conjunction with the five year review.**

### Reviews of the HRA

The HRA requires the Attorney-General to review and report to the Legislative Assembly on its operation one year and five years after it came into force.<sup>128</sup> But it makes no provision for further review following the completion of the five year review. The Victorian Charter also provides for two government reviews of the legislation (at the fourth and eighth year stages),<sup>129</sup> but unlike the HRA, the second review must also consider whether further reviews are necessary and the time frames for those reviews.<sup>130</sup>

In order to ensure that the HRA is operating effectively, it should be subject to regular review. Such reviews will also be an important opportunity for assessing human rights progress in the ACT. The value of regular reviews was noted by the ACT Consultative Committee:

[M]any of the arguments against a bill of rights that it fossilises rights, for example, or that it binds future generations to the public morality of the past lose their force if we view a bill of rights as a document capable of renewal and restatement. There is no doubt that a society's perceptions of rights evolve over time. New issues will emerge to confront the ACT community of the future. It may also be that over time a piece of legislation, no matter how carefully designed, needs refining once it has been in operation.<sup>131</sup>

**We recommend that the HRA should be amended to provide for ongoing reviews of its operation by the Attorney-General on a five yearly cycle.**

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<sup>128</sup> ss 43, 44

<sup>129</sup> ss 44, 45

<sup>130</sup> s 45(2)

<sup>131</sup> ACT Consultative Committee, 'Towards an ACT Human Rights Act' Report 2003, p 57.

## COURTS AND TRIBUNALS

### OVERVIEW

At the end of May 2009, the HRA had been referred to in some 91 cases in the ACT courts and tribunals. As of the end of May 2009, there were no declarations of incompatibility issued by the ACT Supreme Court, and there was only one instance of a declaration being sought.<sup>132</sup> The new right of action which came into operation in January 2009 has been used in one case.<sup>133</sup> The new interpretive obligation in s 30 came into force in March 2008 and is discussed further below.

The majority of the HRA cases have been in the Supreme Court (64 cases), with the remainder divided between the Court of Appeal (10 cases), Magistrates Court (four cases), Administrative Appeals Tribunal (six cases), Residential Tenancies Tribunal (four cases) and the Children's Court (one case). A further case was heard by the Discrimination Tribunal in mid-2006, but the judgment remains reserved.<sup>134</sup> Leave to appeal to the High Court was sought but refused in the case of *Griffin v The Queen*.<sup>135</sup> We are unaware of any references to the HRA in decisions by the newly constituted ACT Civil and Administrative Tribunal (ACAT).

**We recommend that ACAT establish a system to monitor and identify cases where HRA issues are mentioned.**

Over 60 per cent of the HRA cases concern the criminal law, covering issues such as bail, search warrants, admissibility of evidence, treatment of persons in custody, the particular rights of children in the criminal process, the right to trial without undue delay, the right to a jury trial and sentencing issues, including circle sentencing, a community-based sentencing option for Indigenous offenders. This focus on criminal issues reflects the general trend of use of bills of rights in other jurisdictions.

The HRA has also been referred to in variety of civil matters, including those involving protection orders, adoption, care matters, defamation, discrimination, personal injury, mental health proceedings and public housing, as well as fencing of yards, poker machine licensing and leasing disputes. However, many of these cases

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<sup>132</sup> *SI v KS* [2005] ACTSC 125.

<sup>133</sup> *Imran Hakimi v Legal Aid Commission (ACT); The ACT (Intervener)* [2009] ACTSC 48 (12 May 2009)

<sup>134</sup> *Emlyn-Jones v Federal Capital Press* (ACT Discrimination Tribunal, heard 11 July 2006, decision reserved).

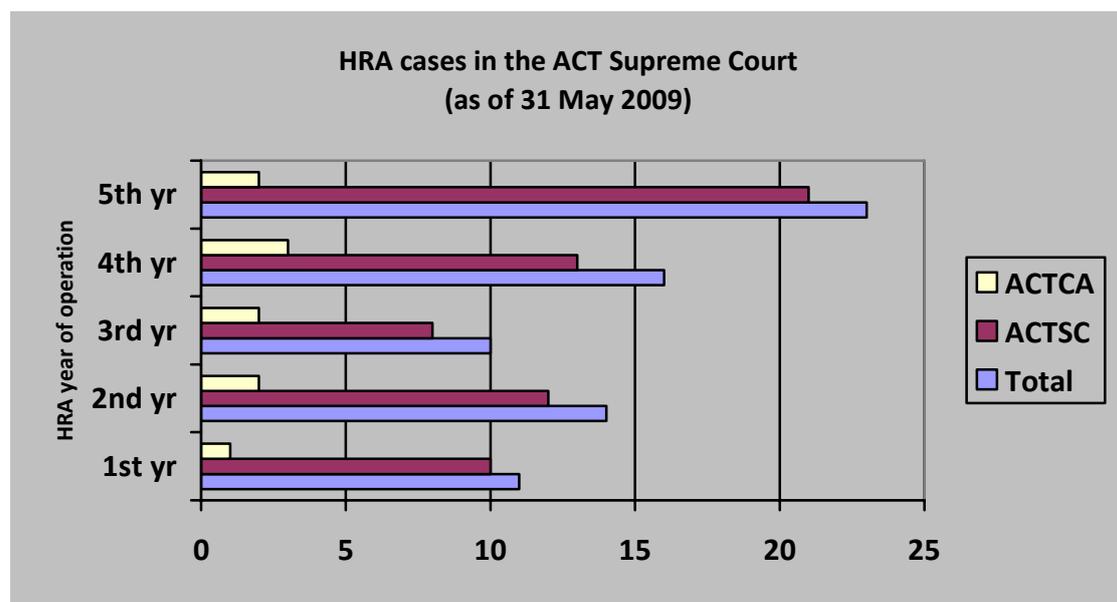
<sup>135</sup> *Griffin v The Queen* [2008] HCA Trans 72.

involve only a very superficial consideration of the HRA, and in most cases, the Act has been used to bolster a conclusion reached on other grounds.

While the HRA has generally been used cautiously by the courts and tribunals, there has nevertheless been a noticeable increase in its application by the Supreme Court this year. There have already been 14 HRA cases in the Supreme Court and Court of Appeal as of 31 May 2009, the same number of cases that referred to the HRA for the whole of 2008.

No of HRA cases by calendar year							
	2004 July-Dec	2005	2006	2007	2008	2009 Jan-May	Total
ACT Supreme Court	5	11	11	12	13	12	64
ACT Court of Appeal	-	1	2	4	1	2	10
<b>Combined total</b>	<b>5</b>	<b>12</b>	<b>13</b>	<b>16</b>	<b>14</b>	<b>14</b>	<b>74</b>

No of HRA cases by year of operation					
	1 <sup>st</sup> yr Jul 04-Jun 05	2 <sup>nd</sup> yr Jul 05-Jun 06	3 <sup>rd</sup> yr Jul 06-Jun 07	4 <sup>th</sup> yr Jul 07-Jun 08	5 <sup>th</sup> yr Jul 08-Jun 09 (as of 31 May 09)
ACT Supreme Court	10	12	8	13	21
ACT Court of Appeal	1	2	2	3	2
<b>Combined total</b>	<b>11</b>	<b>14</b>	<b>10</b>	<b>16</b>	<b>23</b>



Overall, however, the courts and tribunals' engagement with the HRA has been patchy and relatively unsophisticated, with some notable exceptions. This in part may be attributed to the lack of detailed HRA submissions and arguments being presented to the courts and tribunals (see further below). The judiciary has also only received limited training on the HRA; a one-day course was provided to judges when the legislation first came into force in 2004 but we are not aware of any subsequent training initiatives since then. HRA training cannot be a one-off event, but needs to be integrated with ongoing education programs.

**We recommend that the judiciary should be provided with training that focuses on the methodology of applying amended s 30, the direct right of action provision, and sources of international human rights jurisprudence. Training programs need to be ongoing to keep up to date with current developments and include opportunities for regular refresher courses.**

### **Notification of the Attorney-General and the Human Rights Commissioner**

In the original HRA, the Attorney-General and the Human Rights Commissioner were required to be notified only if the Supreme Court was considering making a declaration of incompatibility (s 34). The 2008 amendments extended this provision so that notice must also be given wherever a question arises in a proceeding in the Supreme Court that involves the application of the HRA. Unlike the equivalent provision in the Victorian Charter (s 35), which was criticised in *R v Benbrika* (Ruling No 20) [2008] VSC 80 as likely to lead to unnecessary delays,<sup>136</sup> the new HRA notification provision allows the court to continue to hear severable parts of the proceedings and to hear and determine urgent interlocutory matters.<sup>137</sup>

We understand that the Attorney-General has exercised his right to intervene less than 10 times under the new notice provisions, while the Commissioner intervened in three instances. Encouragingly there is as yet no indication that the new extended requirement is causing any discernable delays to proceedings.

### **Referral power to the Supreme Court**

The HRA does not contain an express reference power to enable the Magistrates Court or the ACAT to refer questions of law relating to the HRA to the Supreme Court

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<sup>136</sup> At [17]-[18].

<sup>137</sup> These exception provisions are very similar to those in s 78B of the *Judiciary Act 1903*(Cth).

for resolution.<sup>138</sup> By contrast, the Victorian Consultative Committee considered that it would be beneficial for a lower court or tribunal to be able to expressly seek guidance from the Supreme Court on interpretive questions relating to the Victorian Charter;<sup>139</sup> s 33 of the Victorian Charter accordingly provides that:

- (1) If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter, that question may be referred to the Supreme Court if—
  - (a) a party has made an application for referral; and
  - (b) the court or tribunal considers that the question is appropriate for determination by the Supreme Court.
- (2) If a question has been referred to the Supreme Court under sub-section (1), the court or tribunal referring the question must not—
  - (a) make a determination to which the question is relevant while the referral is pending; or
  - (b) proceed in a manner or make a determination that is inconsistent with the opinion of the Supreme Court on the question. ...

**We recommend that the HRA should be amended to provide for an express referral power, which would enable questions of law relating to the HRA that are raised in the course of proceedings in the Magistrates Court or the ACAT to be referred to the Supreme Court for resolution. The court or tribunal should be able to make the referral on its own initiative or on application by a party, where it considers that the question is appropriate for determination by the Supreme Court. Consideration could also be given to enabling the court or tribunal to continue to hear severable parts of the proceedings and to hear and determine urgent interlocutory matters to prevent unnecessary delay.**

## INTERPRETING LEGISLATION

The HRA imposes an obligation on courts and other decision makers to interpret all Territory laws compatibly with specified human rights (s 30). The original structure of the obligation contained in s 30(1) was convoluted, as its direction to prefer, as far as possible, an interpretation of legislation that was consistent with human rights, was explicitly subject to a countermanding provision in s 139 the *Legislation Act 2001* to

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<sup>138</sup> Under s 219AB of the *Magistrates Court Act 1930*, there is a limited (general) referral power for indictable matters (in the form of a reference appeal) but only the Attorney-General or Director of Public Prosecutions can make an application. Civil proceedings seem to benefit from a more generous general referral power (see, for example, s 267 of the *Magistrates Court Act 1930*; and s 84 of the *ACT Civil and Administrative Tribunal Act 2008*).

<sup>139</sup> See Chapter 4.5.1 of the Committee's [report](#), [83]-[84].

prefer an interpretation that would best achieve the purpose of that Act. These apparently contradictory directions as to which interpretation should be preferred by decision makers were never directly addressed by the courts, despite the numerous cases in which the HRA was cited.

To improve the operation of this provision, the 12-month review of the HRA recommended that 's 30 ... be amended to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation'. This recommendation was given effect by the *Human Rights Amendment Act 2008* (see further below).

## Original section 30

### Tribunals

A number of tribunal decisions took a narrow view of the interpretive obligation, refusing to consider the application of the HRA unless there was a clear ambiguity in the legislation to be interpreted, even though the original wording of s 30 defined the task of interpretation to include 'confirming or displacing the apparent meaning of the law'.<sup>140</sup>

### Courts

The courts generally appeared to take a broader view of the interpretive mandate than the tribunals.<sup>141</sup> The narrow approach of the Administrative Appeals Tribunal was explicitly overruled by the Supreme Court in the case of *Commissioner for Housing in the ACT v Y*.<sup>142</sup> The Court found that the Commissioner should have interpreted an exemption provision more broadly, in accordance with human rights, and should have given the applicant the benefit of this exemption in assessing her income, overturning the restrictive approach taken by the Tribunal in an earlier case.<sup>143</sup>

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<sup>140</sup> See *Merritt and Commissioner for Housing* [2004] ACTAAT 37; *Z and Commissioner for Housing* [2007] ACTAAT 12, [65]. See also *Dunne/Barden and ACT Department of Education and Training* [2007] ACTAAT 26.

<sup>141</sup> See, for example, *IF v Commissioner for Housing* [2005] ACTSC 80, [59]. See also *R v PJ* [2006] ACTSC 37, [11]-[12] (relevance of *ACT HRA* to provisions of the *Crimes Act 1900* (ACT) authorising the issue of search warrants); *Re an Application for the Adoption of TL* [2005] ACTSC 49 ('TL'), [11] (relevance of *ACT HRA* to interpretation of *Adoption Act 1993* (ACT)); *R v Rao* [2006] SCC No 164 (unreported, Gray J, 11 August 2006) (relevance of s 18 of the *ACT HRA* to s 9C of the *Bail Act 1992* (ACT)).

<sup>142</sup> [2007] ACTSC 84.

<sup>143</sup> *Z and Commissioner for Housing* [2007] ACTAAT 12.

In *SI v KS*,<sup>144</sup> Chief Justice Higgins re-interpreted the fairly clear words of a provision, to give the Magistrate discretion to hear a matter where the failure to comply with a notice requirement would otherwise have effectively resulted in a default judgement against the applicant.<sup>145</sup> Although this outcome suggests a broad and robust approach to the interpretive power, the utility of the decision in relation to use of the HRA was undermined by its lack of explicit reasoning and the fact that the Chief Justice made no express reference to s 30,<sup>146</sup> but relied on the doctrine of separation of powers, and even the *Magna Carta*, to justify the result.<sup>147</sup>

In *Kingsley's Chicken Pty Ltd v Queensland Investment Corporation*, concerning the requirement under s 139 of the *Legislation Act 2001* to interpret legislation consistently with its purpose, the Court of Appeal noted that both this provision and the interpretive provision in s 30 of the HRA shared a similar form to the UKHRA interpretive clause.<sup>148</sup> In this context, the Court endorsed the views of Lord Nicholls in *Ghaidan v Godin-Mendoza*,<sup>149</sup> that such a provision 'may require a court to depart from the unambiguous meaning the legislation would otherwise bear'.<sup>150</sup>

### Amended section 30

Amended s 30 provides:

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

This wording is consistent with the equivalent provision in the Victorian Charter(s 32). It differs from the interpretation provision in s 3 of the UKHRA, which does not expressly refer to the purpose of the legislation. The Explanatory Statement states that the provision 'draws on jurisprudence from the UK such as the case of *Ghaidan v Godin-Mendoza* [2004] 2 AC 557'. The Victorian Consultation Committee also appears to have intended to codify the UK s 3 case law, including *Ghaidan* when

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<sup>144</sup> [2005] ACTSC 125. See Gabrielle McKinnon, 'An opportunity missed? Comment on *SI bhnf CC v KS bhnf IS* [2005] ACTSC 125' (2006) 9 *Canberra Law Review* 21.

<sup>145</sup> *Ibid*, 7-10.

<sup>146</sup> Even though the Attorney-General and the Human Rights Commissioner made detailed submissions on the application of the HRA.

<sup>147</sup> See also *Pappas v Noble* [2006] ACTSC 39.

<sup>148</sup> [2006] ACTCA 9, [49]–[52]. See also *Capital Property Projects (ACT) Pty Ltd v ACT Planning & Land Authority* [2006] ACTSC 122, [20]–[22].

<sup>149</sup> [2004] UKHL 7

<sup>150</sup> *Ibid* [30]

drafting the identical Victorian Charter provision.<sup>151</sup> The Committee specifically referred to the views of Lord Nicholls in *Ghaidan* that the meaning implied must 'go with the grain of the legislation'.<sup>152</sup>

Evans and Evans have suggested that the explicit addition of a purpose constraint is intended to buttress against more radical applications of the interpretive power as evidenced by some decisions from the UK.<sup>153</sup> However, some of these decisions can perhaps be explained by the UK's different constitutional context, where it is subject to enforceable judgments of the European Court of Human Rights (ECtHR). For example in *Ghaidan*, there was direct ECtHR precedence bearing on the issue of discriminatory tenancy laws vis-à-vis same sex couples.<sup>154</sup> By contrast, in *Secretary of State for Work and Pensions v M*,<sup>155</sup> the House of Lords found that differential requirements for child maintenance payments were not discriminatory in part because there was not yet recognition by the ECtHR that same-sex couples fell within the ambit of 'family' for the purposes of Article 8 of the European Convention on Human Rights.<sup>156</sup>

### Tribunals

In the first case to seriously consider the scope of the amended s 30, *Raytheon Australia Pty Ltd v ACT Human Rights Commission*, the Administrative Appeals Tribunal distinguished the approach taken in *Ghaidan* on the basis that the scope of the interpretive power in the HRA is specifically constrained by the purpose of the legislation to be interpreted, unlike s 3 of the UKHRA.<sup>157</sup> The case concerned the interpretation of s 109 of the *Discrimination Act 1991* (ACT), which gives the Human Rights Commissioner discretion to grant exemptions from anti-discrimination provisions. Although the power to grant an exemption is phrased in broad terms, the Commissioner submitted that under s 30, this should be read down to be consistent with the right to equality, and that such a reading was also consistent

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<sup>151</sup> See discussion in Chapter 4.5.1 of the Committee's [report](#).

<sup>152</sup> *Ghaidan*, above [25]

<sup>153</sup> S. Evans and C. Evans, "Legal Redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 Public Law Review 264, 269.

<sup>154</sup> See *Karner v Austria* (Application no. 40016/98), Decision 24 July 2003)

<sup>155</sup> [2006] UKHL 11.

<sup>156</sup> *Karner* was decided on the 'home' limb of Article 8 ECHR.

<sup>157</sup> *Raytheon Australia Pty Ltd v ACT Human Rights Commission* [2008] ACTAAT 19 at [77]-[79]. See also Spigelman JJ, The Application of Quasi-Constitutional Laws, Second Lecture in the 2008 McPherson Lectures, Statutory Interpretation and Human Rights, University of Queensland, Brisbane (11 March 2008) pp 14-16, [http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/vwFiles/spigelman110308.pdf/\\$le/spigelman110308.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman110308.pdf/$le/spigelman110308.pdf) viewed 26 August 2008.

with the purpose of the Discrimination Act as a whole. The types of exemptions which might fall within this more narrow reading would include allowing transitional arrangements to phase out discrimination, but would not extend to the type of ongoing racial discrimination contemplated in this case.

The Tribunal rejected the Commissioner's approach on the interpretation issue, finding that it was not 'possible' to re-interpret an unfettered discretion to be consistent with the right to equality, as this would be inconsistent with the purpose of the Discrimination Act.<sup>158</sup> The Tribunal specifically distinguished *Ghaidan*, noting that the new HRA interpretive provision is subject to the constraints of the legislative purpose, and thus differs significantly from its equivalent in the UKHRA.

The Commissioner sought but was denied leave to appeal this decision to Supreme Court.<sup>159</sup> The Commissioner had submitted in her leave application that the Tribunal's reasoning reflected an error of law in its finding that s 109 of the Discrimination Act conferred a broadly-based discretion to exempt persons from the Act. The Commissioner also argued that the Tribunal had erred in the way it applied s 30 HRA to the construction of s 109; in particular, the Tribunal did not properly identify the relevant legislative purpose of the Discrimination Act. In dismissing the application with costs, Master Harper determined that that the Commissioner was essentially asking the Court to review the decision of the Tribunal on its merits and to substitute its own decision for a more correct and preferable decision; this he considered was "impermissible and beyond the jurisdiction of [the Supreme] Court,"<sup>160</sup> on the principle that an appellate court will only interfere with the exercise of a discretion where there has been some identified error or manifest injustice.

The denial of leave, as well as the order for the Commissioner to pay costs, is disappointing as the case raised significant, and as yet unresolved, framework issues about how the HRA works, and is an opportunity lost for the Supreme Court to contribute to the dialogue on the scope of new s 30 and to provide guidance on how to apply it. By contrast, the House of Lords has been particularly willing to grant leave to human rights cases since the UKHRA came into force. A recent survey showed that leave applications to the House of Lords which raised human rights arguments had a substantially higher success rate compared to other cases. The

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<sup>158</sup> *Raytheon* at [80]-[81].

<sup>159</sup> *ACT Human Rights Commission v Raytheon Australia Pty Ltd, Aerospace Technical Services Pty Ltd, Australian Maritime Surveillance Pty Ltd, Aeronautical Consulting Training and Engineering* [2009] ACTSC 55 (15 May 2009).

<sup>160</sup> at [69].

authors of the report suggest that this may be attributed to a recognition by the House of Lords that it has a responsibility to make sense of the new legal framework and to give lower courts guidance on how to interpret and apply it.<sup>161</sup>

**We recommend that consideration should be given to amending court procedure rules to provide for cost capping orders in HRA proceedings where there is a substantial imbalance between the financial positions of the parties.**

### Courts

While the effect of the amended s 30 has not yet been conclusively considered by the ACT courts, recent observations made by the Court of Appeal in *R v Fearnside*<sup>162</sup> and in *Casey v Alcock*<sup>163</sup> may be an indication of the methodology that is likely to be adopted in applying the new interpretive obligation. While the Court noted that new s 30 is a broader power to adopt a human rights compatible interpretation, it however rejected the so-called *Ghaidan* approach to interpretation on the basis that the HRA interpretive rule is intentionally weaker than the equivalent UK provision because it is expressly constrained by the purpose of the legislation.

For example, in *Casey v Alcock*, Besanko J rejected the suggestion that the Court of Appeal in *Kingsley's Chicken Pty Ltd v Queensland Investment Corp* [2006] ACTCA 9 meant to suggest that the courts should interpret s 30 HRA in the same way as the House of Lords had interpreted s 3 of the UKHRA in *Ghaidan* (and if it had, then he would not follow it):<sup>164</sup>

Nor, in my respectful opinion, does s 30 in its pre-amended form, or in its present form, authorise and require the Court to take the type of approach taken by the House of Lords in *Ghaidan*.

Besanko J reiterated those views in *R v Fearnside*:<sup>165</sup>

In its present form, s 30 appears to give the Court a broader power to adopt an interpretation of a Territory law which is consistent with a relevant human right. I am conscious of the fact that discussing the matter in the abstract is of limited assistance. Nevertheless, I think s 30 would enable a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the

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<sup>161</sup> Sangeeta Shah and Thomas Poole, *The Impact of the Human Rights Act on the House of Lords*, PL 2009, Apr 347-371

<sup>162</sup> *R v David Arthur Fearnside* [2009] ACTCA 3.

<sup>163</sup> [2009] ACTCA 1 (23 January 2009)

<sup>164</sup> at [108]. Refshauge J agreed, see [120].

<sup>165</sup> *Fearnside*, at [89]

interpretation was consistent with that purpose.<sup>166</sup> On the other hand, I do not think s 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*. There is no reference to purpose in s 3(1) of the United Kingdom Act and the primary constraint in that subsection is stated in terms of what is or is not possible. By contrast, under s 30 in the HRA the purpose ... of the legislative provision must be ascertained through well-established methods, and the interpretation adopted by the Court must be consistent with that purpose....

The Victorian courts and tribunals have shown a greater willingness to seek common ground with the UK approach to human rights interpretation. For example, in *RJE v Secretary to the Department of Justice*,<sup>167</sup> Nettle JA of the Victorian Court of Appeal adopted the interpretive principles identified by Lord Woolfe in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,<sup>168</sup> and expressly left open the question whether the Charter's interpretive provision permitted a *Ghaidan* approach to interpretation.<sup>169</sup> More recently, the Victorian Civil and Administrative Tribunal endorsed the *Ghaidan* approach in a significant test case which comprehensively discussed the various operational aspects of the Victorian Charter, including the scope of its interpretive provision.<sup>170</sup> Justice Bell specifically addressed the difference in wording between the Charter's interpretive provision (identical to s 30 HRA) and the UKHRA provision:

214. [O]ne difference between s 32(1) of the Charter and s 3(1) of the *Human Rights Act* should be noted, if only to put it to one side. Our legislation contains a reference to "purpose". That reference was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in *Ghaidan v Godin-Mendoza* (which had been decided before the Charter was enacted).

215. That conclusion is consistent with the function of the special interpretive obligation in the two statutory schemes. Section 32(1) of the Charter and s 3(1) of the *Human Rights Act* express the same special interpretive obligation and are of equal force and effect. It is also consistent with the report of the [Victorian] Consultation Committee, which referred to *Ghaidan v Godin-Mendoza*, and said the purpose requirement would provide the courts "with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question."...

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<sup>166</sup> Justice Refshauge has also noted that the effect of the amendment has been to 'strengthen the requirement for consistency with human rights: *Capital Property Projects (ACT) Pty Ltd v ACT Planning & Land Authority* [2008] ACTCA 9 ('Capital Property Projects'), [39].

<sup>167</sup> [2008] VSCA 131, []

<sup>168</sup> [2002] QB 48; at [115]

<sup>169</sup> at [119]

<sup>170</sup> *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646

216. The boundaries identified in *Ghaidan v Godin-Mendoza*, on which the purpose requirement is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended. Narrower boundaries would reduce the special interpretative obligation to a restatement of the standard principles of interpretation or the rules already expressed in s 35(a) of the *Interpretation of Legislation Act 1984* [which is similar to the rule in s 139 of the *Legislation Act 2001* (ACT)].

It remains to be seen whether the ACT courts will recognise that it is possible for a robust approach to human rights interpretation to be coupled with a clear demarcation of judicial boundaries. If the courts are too timid in their approach to s 30, the HRA may have little impact on the quality and application of laws from a human rights standpoint, especially if the courts are also reticent to issue declarations of incompatibility.

#### *The relationship between s 30 and s 28*

A related issue is the interaction between s 30 HRA and s 28 HRA.<sup>171</sup> Two competing approaches have emerged in this regard, based on the New Zealand cases of *Moonen v Film and Literature Board of Review*<sup>172</sup> and *Hansen v The Queen*<sup>173</sup>. In brief, the *Moonen* approach requires the decision-maker to first consider possible interpretations of the relevant provision, and ascertain which is most consistent with human rights. This interpretation would be adopted unless it was inconsistent with the purpose of the legislation. Under the *Hansen* approach, the decision-maker begins by ascertaining the ordinary meaning of the legislation, and then determining whether this would limit any human rights. If so, the decision-maker must consider whether the limitation is justifiable under the reasonable limits provision (eg s 28). If the limitation cannot be justified, the decision maker must then consider reinterpreting the provision to be consistent with human rights (eg s 30).

The NZ Court of Appeal recently noted that the NZ Supreme Court in *Hansen* left open the *Moonen* approach to be applied in limited circumstances where there is a

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<sup>171</sup> For a discussion of the interaction of the interpretive provision with the limitation provision, see Evans C and Evans S, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis, 2008) pp 99-102 (arguing for the *Hansen* approach). See also Andrew Butler & Petra Butler, *The New Zealand Bill of Rights Act: A commentary* (2005) 119–22 (arguing for an approach based on *Moonen*).

<sup>172</sup> [1999] NZCA 3

<sup>173</sup> [2007] NZSC 7

‘possible continuum of meaning’ intended by the legislature;<sup>174</sup> however the *Hansen* approach:

... would be appropriate in cases where, although there may be several arguable meanings, there is a frontrunner meaning, clearly intended by the legislature.<sup>175</sup>

In *Fearnside*, Justice Besanko expressed the view that the *Hansen* approach was probably the correct one in the ACT context.<sup>176</sup> The Victorian courts have also expressed a preference for the *Hansen* approach. In *RJE v Secretary to the Department of Justice*, Nettle JA was of similar view<sup>177</sup> (referring to the judgment of Sir Anthony Mason in *HKSAR v Lam Kwong Wai and Lam Ka Man*, where the Hong Kong Court of Final Appeal adopted this methodology)<sup>178</sup>. In *Kracke v Mental Health Review Board & Ors (General)*, Bell J expressed agreement with the approach of Nettle JA.<sup>179</sup>

Ultimately, the question as to which approach – *Hansen* or *Moonen* – better serves the objectives of the HRA is perhaps secondary to the more fundamental question as to whether the courts are prepared to take a balanced view of the scope and operation of s 30. As Justice Bell noted in *Kracke*, if the courts adopt an unduly restrictive approach to the task of human rights re-interpretation, s 30 is likely to be nothing more than a restatement of traditional rules of statutory interpretation.

#### *Use of international human rights law*

Section 31 of the HRA allows ‘international law, and the judgments of foreign and international courts and tribunals, relevant to a human right’ to be used in interpreting rights in the HRA. The Supreme Court has drawn on international and comparative human rights jurisprudence in a number of cases.<sup>180</sup> In *Imran Hakimi*, Justice Refshauge confirmed that:

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<sup>174</sup> per Tipping J in *Hansen*, at [94]

<sup>175</sup> *Television New Zealand v Solicitor-General of New Zealand* [2008] NZCA 519 at [66]

<sup>176</sup> at [94]-[98]. Note that the UKHRA and HK Bill of Rights do not have a general limitation clause like ACTHRA (s28), the Victorian Charter (s7) or NZBORA (s5), but various rights are qualified by internal limits in accordance with the ECHR and ICCPR respectively.

<sup>177</sup> [2008] VSCA 131, [116]

<sup>178</sup> [2006] HKCFA 84

<sup>179</sup> [2009] VCAT 646, [80]

<sup>180</sup> See for example, *Casey v Alcock* [2009] ACTCA 1; *R v Fearnside* [2009] ACTCA 3; *Capital Property Projects (ACT) v ACTPLA* [2008] ACTCA 9; *Stevens v McCallum* [2006] ACTCA 13; *R v PM* [2009] ACTSC 24; and *R v Upton* [2005] ACTSC 52. See also *Perovic v CW*, NoCH 05/1046 (Unreported, Magistrate Somes, 1 June 2006), where Magistrate Somes relied on jurisprudence from the European Court of Human Rights.

[T]he process of identification of the content of rights enshrined in the Human Rights Act is properly to be assisted by the jurisprudence of international courts and tribunals, which consider the same or relevantly similar rights expressed in instruments similar to the Human Rights Act<sup>181</sup>

He noted that the approach in s 31 HRA ‘confirms ... the universality of human rights and so the value of international jurisprudence.’<sup>182</sup>

### Specific issues raised by the courts

The courts have expressed their views on a number of issues relating to the application of the HRA, though often in *obiter*.

For example, the Supreme Court has taken the view that its own powers, being conferred by statute, must be construed and exercised in accordance with the HRA. Under s 20 of the *Supreme Court Act 1933* (ACT), the Supreme Court has ‘all original and appellate jurisdiction that is necessary to administer justice in the Territory’ and any ‘jurisdiction conferred by a Commonwealth Act or a law of the Territory’. The Court has affirmed the relevance of the HRA to its power to grant stays of proceedings in criminal cases or to decide whether to take coercive measures to compel a witness to testify.<sup>183</sup> It has similarly noted the relevance of the HRA when exercising specific discretions conferred on it by other statutes, for example its power to grant bail under the *Bail Act 1992* (ACT),<sup>184</sup> its power to authorise adoption and dispense with parental consent under the *Adoption Act 1993* (ACT),<sup>185</sup> its power to strike out applications under the *Court Procedures Rules 2006* (ACT),<sup>186</sup> or its discretion to permit a personal injury action to proceed even though the applicant has failed to give the respondent notice of her intention to bring proceedings within the prescribed time.<sup>187</sup> The Court has not considered whether it is obliged to take

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<sup>181</sup> a *Imran Hakimi v Legal Aid Commission (ACT); The ACT (Intervener)* [2009] ACTSC 48 (12 May 2009), at [71]

<sup>182</sup> at [74]. But he was also mindful that s 31(2)(a) prevented the ordinary canons of statutory construction from being ignored: at [77].

<sup>183</sup> *R v YL* [2004] ACTSC 115, [31].

<sup>184</sup> See eg, *R v Kristiansen* [2008] ACTSC 83 where Refshauge J interpreted s.43 of the *Bail Act 1992* (ACT) which relates that the Supreme Court can only review a decision of the Magistrates Court in relation to bail: if there was ‘a significant change in circumstances relevant to the granting of bail’, or if there was fresh evidence or information that was previously unavailable, as against s18 of the ACT HRA (right to liberty).

<sup>185</sup> *Re an Application for the Adoption of TL* [2005] ACTSC 49; *Re Adoption of D* [2008] ACTSC 44.

<sup>186</sup> *West v NSW* [2007] ACTSC 43, [19]-[22].

<sup>187</sup> *Al-Rawahi v Niazi* [2006] ACTSC 84, [39] (referring to s 21 of the ACT HRA).

the HRA into account in stating or developing the common law in the exercise of its statutory jurisdiction.

A range of other HRA-related issues have come before the courts. For example, the Supreme Court has held that the power of the Director of Public Prosecutions to enter a *nolle prosequi* under the *Director of Public Prosecutions Act 1990* (ACT) must be read in light of the rights in ss 21 and 22 of the HRA.<sup>188</sup> It has suggested that while 'there is nothing in the [HRA] which prevents the legislature from enacting offences of strict liability',<sup>189</sup> the right to liberty and security of person and protection against arbitrary arrest and detention in s 18(1) 'would be inconsistent with disproportionate punishments or the imposition of punishment for conduct for which the actor is not, on any rational view, responsible'.<sup>190</sup> Another case has held that the status of magistrates as civil servants would be inconsistent with s 21 of the HRA.<sup>191</sup> The courts have also decided that the provision in the *Magistrates Court Act 1930* (ACT) permitting an appeal by the prosecution upon the ground that 'the decision ... should not in law have been made' is consistent with the right not to be tried for an offence for which one has 'already been finally convicted or acquitted according to law'.<sup>192</sup> The courts have also decided that the HRA affects police powers when the Australian Federal Police are applying for and executing warrants under ACT law.<sup>193</sup>

The Supreme Court has also used the HRA to amend sentence to protect the rights of people on remand or serving sentence to freedom from torture and degrading treatment (s 10).<sup>194</sup>

The remedial power of the courts in cases involving violations of the HRA has not attracted much attention. Prior to the direct right of action and remedy provision, the courts relied on their inherent powers to rectify some breaches of human rights.<sup>195</sup> Thus, the Supreme Court has held that in the case of unreasonable delay in bringing a person to trial contrary to the HRA, a stay may be appropriate. In two cases, conditional stays were granted, which were to become permanent if the

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<sup>188</sup> *R v YL* [2004] ACTSC 115. See also *R v SH* [2009] ACTSC 50 (8 May 2009).

<sup>189</sup> *Hausmann v Shute* [2007] ACTCA 5, [37].

<sup>190</sup> *Ibid* [39].

<sup>191</sup> *S v DPP (ACT)* [2007] ACTSC 100, [7].

<sup>192</sup> *King v Fricker* [2007] ACTSC 101, [28]-[30].

<sup>193</sup> *R v PJ* [2006] ACTSC 37, [11]. See also *R v Caruso* [2006] ACTSC 45, [30].

<sup>194</sup> *R v Porritt* [2008] ACTSC 71 .

<sup>195</sup> See, for example, *Stevens v McCallum* [2006] ACTCA 13, [138].

prosecution did not indemnify the defendants for certain costs related to the delay in bringing on the trial, which were not the fault of the accused.<sup>196</sup> In a case in the Children’s Court, a permanent stay of proceedings was granted because of unjustified delay in bringing a prosecution.<sup>197</sup>

A recurring issue with bills of rights in other jurisdictions has been the extent to which the rights contained in such instruments go beyond the rights already enjoyed under statutory provisions or the common law.<sup>198</sup> The ACT courts have recognised that, while many of the protections contained in the HRA are already guaranteed by existing laws, the HRA extends those protections in some areas. One example is the guarantee of a right to a fair hearing under s 21 of the HRA. The Court of Appeal in *R v Griffin*<sup>199</sup> noted that s 21 now is the source, under Territory law, of the right to a fair trial.<sup>200</sup> The difference may be one of emphasis rather than of substance. It does, however, mean that there is now a positive right to a fair trial rather than the right not to be tried unfairly as the common law provides.<sup>201</sup>

### The legal profession

The legal profession has displayed a relatively low level of interest in the HRA. While there have been some cases where lawyers have put forward detailed submissions under the HRA, there is still reticence amongst the ACT legal profession to invoke the HRA. When it is raised, “the references to the Act are, for the most part, simply that: references to the *Human Rights Act 2004*.”<sup>202</sup>

The Human Rights Commissioner has run a number of general training sessions, but there has been little funding for education programs in the ACT compared to those preceding the introduction of the UKHRA and the Victorian Charter.

The ACT legal profession has also generally tended to dismiss the value of a bill of rights that contains no explicit right of action. A leading Hong Kong and New Zealand

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<sup>196</sup> *R v Upton*, [2005] ACTSC 52, [23]. See also *R v Martiniello* [2005] ACTSC 9.

<sup>197</sup> *Perovic v CW* No CH 05/1046 (Unreported, Magistrate Some, 1 June 2006).

<sup>198</sup> Andrew Byrnes, ‘And Some Have Bills of Rights Thrust upon Them: The Experience of Hong Kong’s Bill of Rights’ in Philip Alston (ed), *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (1999) 318.

<sup>199</sup> [2007] ACTCA 6.

<sup>200</sup> Affirmed by Refshauge J in *Commonwealth v Davis Samuel Pty Ltd [No 3]* [2008] ACTSC 76.

<sup>201</sup> *Ibid* [4]. See also *R v Upton* [2005] ACTSC 52, [18] (‘the right to trial without undue delay [in ACT HRA s 22(2)(c)] may confer a great power on this Court than the common law position’).

<sup>202</sup> Richard Refshauge, ‘The ACT Human Rights Act and the Criminal Law’, Paper presented at the Conference Assessing the First Year of the ACT Human Rights Act, ANU, 29 June 2005)

barrister, Gerard McCoy QC, has speculated that this might be the result of either 'forensic somnolence or intellectual recumbency',<sup>203</sup> but it is more likely a product of the small size and strongly practical focus of the Canberra legal community and its unfamiliarity with international human rights law and standards.<sup>204</sup> The limited use of the HRA mirrors the early New Zealand experience, where it took almost five years for the *Bill of Rights Act 1990* (NZ) to be used regularly. The earlier take-up of the UKHRA may be explicable by the experience of UK lawyers with human rights litigation under the European Convention on Human Rights and the fact that the UKHRA provided an explicit right of action against public authorities from the start. Invocation of the UKHRA is now almost a necessary step on the way to the European Court of Human Rights, due to the requirement under the European Convention that local remedies be exhausted.<sup>205</sup>

The existence of a direct right of action under the HRA, introduced in force from 2009, might significantly increase the appeal of the Act to the legal profession. Nevertheless, it is possible the exclusion of damages as an available remedy under the new amendments will continue to exert some restraint on the development of human rights litigation in the Territory.

**We recommend targeted funding for the Human Rights Commissioner to provide training to the legal profession. In particular training programs should focus on the methodology of applying amended s 30, the direct right of action provision, and sources of international human rights jurisprudence. Training programs should be ongoing and include opportunities for regular refresher courses.**

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<sup>203</sup> Gerard McCoy, 'Sibylline Observations: The *Human Rights Act 2004* (ACT)' (Paper presented at the Conference Assessing the First Year of the ACT Human Rights Act, ANU, 29 June 2005): <http://acthra.anu.edu.au/resources/index.html>

<sup>204</sup> See, for example, Richard Refshauge SC, 'The *Human Rights Act 2004* and the Criminal Law', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, 7.

<sup>205</sup> European Court of Human Rights, *Key case-law issues: Exhaustion of Domestic Remedies*, 28 April 2006: <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Key+case-law+issues>

**ANNEX I: INTERVIEW REPORT**

**Creating a human rights culture within the  
ACT government**

**Report on interview research assessing the impact of  
the *Human Rights Act 2004*  
on the ACT Public Service**

**ACT Human Rights Act Research Project ANU**

**October 2008**

## Executive Summary

The ACT Human Rights Act Research Project is an ARC linkage project between the ANU and its Industry Partner, the ACT Department of Justice and Community Safety (JACS), which aims to monitor and evaluate the impact of the *Human Rights Act 2004* (ACT) (*HRA*) over the first five years of its operation. One aspect of this research involved a series of interviews conducted with officers of the ACT government after the introduction of the *HRA* to test the predictions about the effect of the *HRA* on work practices and culture within the government. This report has been prepared to summarise the key findings of this interview research.

Overall, the interviews indicate that while the Act has had a beneficial impact on the culture of the ACT government in some areas, the effect is not consistent, nor widespread across government. Important progress has been made in these early years, as most participants were aware of the *HRA* and had a positive perception of it, suggesting that any initial bureaucratic resistance to the Act has been largely overcome. However, there is not a consistent engagement with the Act at a practical level.

The clearest effect of the *HRA* has been on the development of policy and legislation, where the *HRA* has led to changes in work practices and ultimately, to legislation that in many cases is more respectful of human rights. Participants directly involved in the development of legislation were all aware of the *HRA*, and had experience with its application, but (with some notable exceptions) did not always have a sophisticated understanding of its provisions. Amongst this group, engagement with the *HRA* still varied considerably, with some officers seeing human rights scrutiny as a task for the Human Rights Unit within JACS, rather than something they needed to deal with in any depth. In other agencies human rights compatibility was taken very seriously, and some officers had developed a genuine interest in and knowledge of human rights principles and case law. These participants worked in partnership with the Human Rights Unit and Human Rights Commissioner, but retained a sense of responsibility for human rights compatibility of their legislation.

Participants involved in legislative development identified a range of challenges in applying the *HRA* in their work, including a lack of training, information and resources, and inadequate time to properly engage with human rights issues. Most were aware of the Human Rights Unit, and many reported positive interactions with the Unit, but others considered the Human Rights Unit to be under-resourced, and would have liked the Unit to be able to provide greater assistance. Some participants did not have a clear understanding of the distinct roles and responsibilities of the Human Rights Unit and the independent Human Rights Commissioner, and a number assumed that the Commissioner was responsible for training government agencies, or for giving advice on policy and drafting issues.

Amongst participants not directly involved in legislative development, the *HRA* is perceived to be of less relevance, and does not appear to have led to any real changes in approach or decision-making. A small minority of participants were not aware of the *HRA* at all, and others had a very limited understanding of its content and application to their areas of work. The interviews suggest that there is some complacency about existing legislation and practices, and an assumption that these

already meet human rights standards. Human rights were often equated with ordinary morality or common sense. There was little or no familiarity with the requirement to interpret legislation consistently with human rights where possible.

The ACT government has already taken an important step to increase accountability for human rights within the Executive government by introducing amendments to the *HRA* that impose direct responsibilities on public authorities to comply with human rights. This should make the Act more relevant and accessible to front-line staff, and should make human rights an important consideration in decision-making. However, this interview research suggests that significant training and a plan for implementation will be required to ensure that government agencies are properly prepared for these amendments coming into effect. It is important that these efforts be co-ordinated, and that agencies have a clear understanding of where to look for training and assistance with the implementation of the amendments and the *HRA* more generally.

## Recommendations

1. Intensive and ongoing training on the *HRA* should be implemented across all levels of government. To be most effective, this training should be tailored to specific agencies and roles (so that, for example, front-line decision-makers would receive different training to policy officers), and should provide detailed and practical examples of the application of the *HRA* to the particular work of those agencies and officers. This training should cover existing obligations of public servants under the *HRA*, and the new obligations which will come into force on 1 January 2009.
2. An accessible and up to date resource would be useful to assist public servants to understand human rights principles and developments, to 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 (for example the project website <http://acthra.anu.edu.au> and the Human Rights Law Resource Centre website: <http://www.hrlrc.org.au> )
3. 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.
4. The Inter-Departmental Committee on Human Rights should be re-convened to oversee the implementation of the amendments imposing obligations on public authorities, and the Human Rights Commissioner should be invited to participate in this forum.
5. The role of the Human Rights Unit within JACS should be maintained and 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 Human Rights Unit 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 Human Rights Unit and the Human Rights Commissioner should be made clear to all agencies.

# 1. Background

The Australian Capital Territory's *Human Rights Act 2004 (HRA)* was the first bill of rights to be passed in Australia. The *HRA* is an Act of the Legislative Assembly modelled on other modern legislative bills of rights. Rather than give ultimate power to the judiciary to determine disputes about human rights, it aims to create 'dialogue' about human rights between the legislature, Executive and judiciary. The *HRA* imposes specific obligations upon the Executive government to consider human rights in the development of legislation and policy, and to interpret legislation consistently with human rights where possible. In March 2008, amendments to the *HRA* were passed introducing an explicit duty on public authorities to comply with human rights, and a legal right of action for breach of this duty. These obligations will come into effect on 1 January 2009.

When the *HRA* was introduced, it was envisaged that it would have a significant impact on the ACT public service and would foster the development of a human rights culture within the ACT government. The Bill of Rights Consultative Committee, which recommended the enactment of the *HRA*, noted that:

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 in the community generally.<sup>206</sup>

Similarly, JACS has emphasised that cultural change within the ACT Public Service is a key objective of the *HRA*:

The purpose of the *Human Rights Act 2004 (HRA)* is to ensure the Territory Government fulfils its obligations to respect, protect and promote human rights. The long-term goal of the *HRA* is to achieve cultural change within the ACT public service.<sup>207</sup>

While the creation of a 'culture of human rights' in government is often seen as an important outcome of a bill of rights such as the *HRA*, the content of such a culture is not usually explicitly defined. In a working paper of the project, we have suggested that a useful definition of a human rights culture might be:

A pattern of assumptions shared by government officers, and taught to new officers; that human rights must be considered and respected in carrying out all government functions and in developing new law and policy.<sup>208</sup>

The development of such a culture is likely to be progressive, and could involve the following stages:

## 1. Awareness of human rights and specific legislation

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<sup>206</sup> ACT Consultative Committee, 'Towards an ACT Human Rights Act' Report 2003, p41.

<sup>207</sup> JACS: The Guide to ACT Departments on Pre-Introduction Scrutiny, p 1.

<sup>208</sup> Giving Meaning to a 'Culture of Human Rights' Working Paper No 3. September 2006, Gabrielle McKinnon, RegNet, ANU

2. Engagement – perception of human rights as relevant, and accepting the need to comply with procedural rules.

3. Commitment to respecting human rights.<sup>209</sup>

Informed by this general framework, the ACT HRA Research Project sought to assess the impact of the *HRA* 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.

## **2. Methodology**

The research project conducted 37 interviews between April 2006 and October 2008 with officers from the JACS, ACT Health, the Department of Territory and Municipal Services, Department of Treasury, Department of Disability, Housing and Community Services, Chief Minister’s Department, the Human Rights Commission, the ACT Planning and Land Authority, ACT Policing and the Ombudsman. Potential participants were selected from position charts for each agency, with assistance from key contacts within the agency, and encompassed a diverse range of positions, including senior executives, policy and legal officers, and frontline staff and administrators. Participation in the study was voluntary, and was undertaken on the condition that the names and position titles of participants would not be disclosed by the researchers. The information provided to potential participants is included in Appendix A, and the consent form is included in Appendix B.

The majority of interviews were conducted face to face, with a small number (2) conducted by telephone, and took around one hour each. Notes were taken of all interviews and audio recordings were also made where participants consented to this. A standard set of questions was developed and used as the basis for the interviews. These questions focused on preparation and training, perceived relevance of the *HRA*, examples of the application of the *HRA* to participants’ work, challenges, and changes in attitudes and work practices as a result of the *HRA*. The outline of questions is included in Appendix C. While these questions served as starting point, the interviews often involved more wide-ranging discussion of issues raised by participants. For interviews conducted after the passing of amendments to the *HRA* in early 2008, additional questions were asked about the preparations being made for these amendments.

## **3. Findings of the Research**

### **a. Awareness of the HRA**

The interviews indicate that most ACT government officers across all roles and areas of government have a general awareness of the *HRA*. All but two of the 37 participants reported that they were aware of the *HRA* when we first contacted them about participating in the research. Those who were not aware of the Act worked in

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<sup>209</sup> Ibid

the health field, and had roles which involved the training and supervision of front-line staff, but neither had involvement in the development of legislation. Amongst the other participants who were aware of the Act, there were widely varying levels of knowledge about its specific provisions, with many having just a general understanding or overview of the *HRA*, rather than a detailed knowledge of the different rights protected, or the mechanisms for enforcement of human rights under the Act. Most participants were aware that there was a Human Rights Unit within JACS which was the first port of call for seeking advice on *HRA* issues, and many were also aware of the Human Rights Commissioner.

## **b. Preparation and training for the introduction of the *HRA***

The *HRA* came into force on 1 July 2004. Although a bill of rights had been mooted since the release of the report of the ACT Bill of Rights Consultative Committee Report in May 2003, many participants considered that there had not been extensive preparation within their agencies for the introduction of the *HRA*:

‘It wasn’t publicised a great deal. The main knowledge of it was actually through the papers. There was no overt publicising of it in the department as far as I am aware.’

‘There may have been something distributed around about its introduction ... but if it happened, that’s all it would have been.’

Only 12 out of 37 participants reported that they had received any training on the *HRA*, either before or after its introduction. A number of training sessions were conducted around the time of the Act coming into effect, however, it appears that this training targeted only a limited group of public servants. Many of the interviewees had joined the ACT public service after this time and thus missed out on opportunities for training:

‘I didn’t have any early training in relation to its implementation. We’ve been in a position where we’ve had to work through it ourselves.’

‘I’m really applying it from my own understanding of the Act itself in talking to people I work with. I haven’t had any actual training.’

‘We were actively looking for training opportunities but we really didn’t see many opportunities.’

‘Although there was a big push for the training at the start, it would be useful to have an update.’

‘There is certainly an awareness of the *Human Rights Act*, but not always respect for or understanding about the Act. It comes down to how it has been implemented, whether there was sufficient training for people at the front-line.’

While there was general support for more training, there were mixed views about whether it would be useful for all government officers. Some participants considered that all officers should be actively encouraged by their supervisors to attend training, as otherwise it tended to be only those who had a personal interest in human rights

who would go along, rather than those who might benefit most from the training. Others participants considered that while awareness training needed to be rolled out to decision-makers at all levels and incorporated into induction programs, in-depth training should be targeted at those most likely to apply it in their work, as it would otherwise be quickly forgotten.

Many commented that training sessions needed to focus on specific examples relevant to their particular areas of work:

‘I need a clearer understanding of how it should affect our policy and legislation. So more training on practical application would be a good idea.’

‘I have not received any training on the Act, and neither have my staff. I spoke to one individual in the agency who attended compliance training. Her views were that it was highly theoretical and did not provide information on the practical application of the Act in a way which would be relevant to the agency. For example, there was a strong focus on arrest (which is rarely used by any ACT government agency apart from the police), rather than on the exercise of other powers of entry, search and seizure which would be more relevant.’

Some felt that training should also focus on the interrelationship between different human rights, and between the *HRA* and other international human rights instruments

‘It could also look at the jurisprudence sitting under certain rights, eg protection of the family and protection of child – how do those rights interrelate, looking at the broader picture where there is jurisprudence about how those rights sit together.’

‘When looking at areas like mental health, it’s not just the *Human Rights Act* that is underlying the principles of service delivery approach. You’ve got things like the World Health Organisation, the UN Declaration on the Rights of the Mentally Ill. These things need to be integrated so that when the Human Rights Commission is putting training packages together, it needs to be focused on the service that they’re delivering to.’

Although JACS had taken primary responsibility for providing training within government, with the Human Rights Commissioner providing training to the community and the legal profession, many participants mistakenly thought that the Human Rights Commissioner was responsible for government training, and perceived that the Commissioner could be doing more in this regard.

Participants interviewed after the passing of the *Human Rights Act Amendment Act* 2008 reported that they had not yet received any training on the effect of the amendments introducing new duties on public authorities:

‘I haven’t seen much in the way of preparation. There may have been training, but it hasn’t been aggressive enough and not ‘outreach’ enough. The Human Rights Commission really needs to get on with that.’

### **c. Attitudes towards the *HRA***

Interview participants who had been involved in the development and introduction of the *HRA* reported that the Act was not universally welcomed by the ACT bureaucracy in the early stages. Some senior executives advised against the introduction of the Act, but the more general issue was a lack of ‘buy-in’ or ‘ownership’ of the *HRA*:

‘Generally, there was disinterest rather than active opposition.’

However, the interviews we conducted indicate that these attitudes have shifted and that the great majority of government officers are now supportive of the *HRA*. Of [37] participants interviewed, 31 were positively disposed towards the Act, 3 were neutral, and only 3 were negative in their attitude.

Many considered that it was symbolically important to have a statement of basic rights, and that having rights enshrined in legislation makes them more useful:

‘It doesn’t have much clout to it, but I do believe we need to put those things in law to say that we do have these things we hold dearly and no you can’t step over them. It’s something that does need to be in legislation because we’re always looking at how we can cut corners, especially the policy-makers and money-keepers, looking at ‘can we do things smarter?’ and ‘can we make people do this because it’s more economical?’ The bottom line is that people have rights that go against what public policy would like it to be.’

‘We assist and advocate for people on their rights ... and this Act actually outlines in legislation what people’s rights are.’

‘It’s basic common courtesy, it’s treating people the way we’d like to be treated. But it’s got that ability to make it a bit stronger, so that right can’t be overridden.’

‘It’s given us a legal stick to say, this is not just us getting on our soapbox, there is actually a law here.’

‘It’s given us a stronger voice, because it is set in law.’

‘Without the legislation, they tend to be dismissive. With the legislation, they can’t dismiss it. They’re more likely to say, we’ve got around this in a better way.’

‘It gave me authority for this specific initiative’

### **d. Perceived relevance of the *HRA***

Although almost all participants considered the *HRA* to be a good thing, there was more divergence in participants’ perception of the relevance of the Act to their work. Only 14 participants considered the *HRA* to be particularly relevant to their work, with another 14 reporting that the Act had some relevance, and 9 reporting that the Act had little or no relevance to their work. Although only a small sample, the results show a strong correlation between the degree of involvement of participants in

legislative and policy work and the perception of relevance of the *HRA*. All of those participants who considered the Act to be of high relevance were involved in the development or scrutiny of legislation, whereas all of the participants who reported the Act to be of little or no relevance were involved in the front-line implementation of policy.

In many ways this disparity is not surprising, given the mechanisms for enforcement of human rights under the *HRA*. In its original form, the *HRA* required scrutiny and compatibility statements for new legislation, but did not impose an explicit obligation on public servants to comply with human rights in decision-making. Instead, the *HRA* imposed a general interpretive obligation, so that anyone working out the meaning of a Territory law was required to interpret the law to be consistent with human rights, subject to the purposive test in the *Legislation Act*. Although in theory this interpretive obligation required public servants who were implementing a legislative framework to have regard to human rights in working out what was allowed or required under their legislation, it did not provide clear guidance for non-legal staff.

### **e. Perspectives of front-line decision-makers**

Generally front-line decision-makers we interviewed did not consider it to be their role to re-interpret settled understandings of their legislative frameworks. None of these participants referred to the interpretive provision of the *HRA* unless prompted. When questioned about the application of the interpretive provision to their legislation, participants indicated that their frameworks were already consistent with human rights principles, so no change was necessary:

‘It’s not the sort of thing we discuss at all really, in the course of our work. We’re under the impression that our legislation is compliant, or doesn’t go against the tenor of the *HRA*.’

‘It didn’t really bother us because we felt, by reference to the Act ... that what we were doing didn’t seem to go against what was in the *HRA*.’

‘We think that people’s rights are important, and we would think that irrespective of the *HRA*. We believe that our legislation appears to preserve those rights.’

‘My perception of it was ... that it really wasn’t going to affect our workplace a great deal anyway. I consider it, to be perfectly honest, a bit of a waste of time. These things are already covered in legislation anyway. I don’t know why they need to be spelt out so much, because it could cause problems in enforcement potentially.’

However, most participants, even if they did not consider the *HRA* relevant to their own work, identified that the *HRA* was important in other areas of public policy:

‘I was perhaps a little sceptical when I first heard about because I thought ... that it was a political stunt ... but I appreciate that there are some areas of activity where there are weaknesses that human rights are not adequately protected.’

A number of participants equated human rights with common sense, professional ethics or general moral values, which were already respected:

‘That’s what we do ... anyway. Our discipline [social work] is a very strong advocate of human rights. ... There’s not much that I’ve actually had to go back and use [in the *HRA*] because this is the kind of stuff that we’ve been advocating as a discipline for many years. It sits very nicely with the work that we do and the philosophical approaches we have.’

‘The themes within the *HRA* are common-sense themes anyway. We do need to respect people’s privacy; we do need to treat people equitably. But I would consider these things common-sense things that are more a part of management style or approach rather than needing to legislate for it. ... I think it’s a waste of time because these structures can be put in through policy and other ways, and not legislation.’

‘The community already has basic standards that they believe and if a government department tried to legislate to infringe those, then there would be quite a few submissions and people speaking out against that piece of legislation, and I don’t think the *HRA* has really changed that.’

Other participants considered that human rights were of less relevance where their work involved other pressing social concerns, such as threats to public safety:

‘We’ve got a greater public good that is ongoing public safety. ... We need to take fairly forceful actions and some people may perceive them to be breaching their rights.’

The assumption by many front-line staff that existing policies and practices already comply with human rights can be an obstacle to change, and can be challenging for those trying to introduce policies and procedures based on a more sophisticated analysis of human rights principles:

‘In terms of working out the limitation on human rights we have had a lot of issues with areas where current practice would be doing one thing and a review would indicate that that practice may not be a proportionate limitation on certain rights. In terms of driving that forward, we have experienced difficulties with an argument that often comes through about resources and administrative convenience and really trying to change existing practice by saying “well that’s not actually a proportionate limitation on those rights.” The search and seizure provisions is an example of that where we had one view of what the limitations should be and that view was informed by our discussions with our JACS colleagues and the *HRA* but the legislation really had to change existing practices and drive those forward.’

‘A lot of that hadn’t filtered down or had only filtered down in terms of what we were saying about the *HRA* so I don’t think there had been a lot of training of some front-line people in terms of the *HRA*, so what they were getting was really a lot of messages that what they were doing was not consistent with the *HRA*, and we were the ones having to give that message. I’m not sure what other messages they were getting – we’ve heard things and it seems some people see it as a negative thing because they’re being told, “you can’t do that” and “that’s not a justifiable limitation” and their world view is that, for example, safety and security is everything and what is

proposed would compromise their safety and security or the safety and security of others.’

‘So it is striking that balance that is the tension, because if it’s only being drip fed down from a legislation driven process and there isn’t any other formal training about what the *HRA* should mean in all decision making then that is problematic.’

Overall, the interviews suggest that the interpretive obligation in the *HRA* has not had a significant impact on the work practices or perceptions of those involved in front-line implementation of policy and decision making, as opposed to those involved in the development of policy and legislation.

## **f. Perspectives of participants involved in legislative development and scrutiny**

One of the central mechanisms for protection of human rights under the *HRA* is the requirement it imposes on the Attorney-General to provide a statement of compatibility in respect of each government Bill, certifying whether the Bill is consistent with the *HRA* (s 18).

*JACS Guidelines for ACT Agencies Developing Legislation and Policy* notes that this requirement:

[I]s intended to ensure that human rights become an integral part of policy and law making. It also reflects the government’s commitment to achieving its goals in a way that respects fundamental human rights and limit rights only to the extent that is necessary and justifiable. By requiring policy and legislation to be developed consistently with human rights standards and tested before implementation, the Territory government can avoid the human cost of policies that breach human rights.<sup>210</sup>

The compatibility statement requirement has clearly affected work practices within the ACT government, as agencies proposing new legislation must consider human rights issues in the formulation and drafting of the laws and ultimately get the sign-off of the Human Rights Unit on compatibility:

‘Every time we get a new submission or there is new legislation proposed, we do consider it.’

‘When we pass legislation, we have to deal with [the Human Rights Unit in JACS] because they issue compatibility statements. If they have any concerns, there’s emails going backwards and forwards. What is useful is that they are looking at it from trying to move forward: if you make these changes, it would be compatible. ... It’s like, “we suggest that you include this and take out that”. ... That’s one thing that has changed: that didn’t exist before the *HRA*’

‘it’s something that you think about in every job.’

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<sup>210</sup> At p 7.

The compatibility statement requirement has also been supplemented by an internal requirement that Cabinet Submissions indicate whether new proposals are consistent with the *HRA*. This requirement was aimed to create awareness of human rights across all government departments at an earlier stage in the process of legislative development. As one participant commented, this has been effective in ‘keeping human rights issues front of mind’. Other participants noted that:

‘In relation to Cabinet submissions, we have to obviously say that the legislation is compliant. While I’ve been there, we’ve only put up a couple of Cabinet submissions on our own and that was a relatively straightforward process.’

‘Human rights are one of the issues required to be discussed in the Cabinet Submissions. There is explicit recognition that they are important criteria.’

Although the Human Rights Unit gives advice on human rights issues in Cabinet Submissions, and provides a sign-off on statements of compatibility for each government Bill, the Unit has sought to encourage agencies to take ownership of human rights issues arising from their legislative proposals. As the Attorney-General has noted:

‘The approach of the Human Rights Unit is to define the questions for agencies to ask themselves, send them away to explore those questions, and return to participate in a conversation, rather than receive the definitive answer to their human rights issue. Each interaction is a tutorial on the particular human right engaged, rather than a conference with a client at which advice is provided. This reflects the Government's focus on building a human rights culture within the public sector.’<sup>211</sup>

In keeping with this approach, several 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 Human Rights Unit. These officers generally relied on either the Office of Parliamentary Counsel or the Human Rights Unit to pick up human rights breaches:

‘To my knowledge, people I work with aren’t going through the *HRA* itself to make sure that the provisions do not actually breach the Act. It’s more general discussion while the legislation is being produced rather than “let’s look at the *HRA*, is there a breach?”’

‘We would send our Cabinet Submissions to JACS and they would probably send it to their human rights division. If they had human rights issues they would advise us.’

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<sup>211</sup> ACT, *Parliamentary Debates*, 6 December 2007, 4156 (Simon Corbell).

‘When we come to do drafting instructions, we always include the clause ... “ensure that it is consistent with the *HRA*.” We leave it largely up to the drafters to ensure that it is consistent with the *HRA*.’

‘I would like to be able to say that I had had time ... to absorb all those materials and be updating myself on a regular basis on what the latest decisions might have been ... but I can’t say I really do. ... It comes back to relying on the expertise of [the HRU].’

### **g. Examples of the application of the *HRA***

Participants working in the development of legislation and policy provided a range of examples of the application of the *HRA* in their work.

#### *The Children and Young People Bill*

One clear example of the positive impact of the *HRA* in the development of new legislation is the Children and Young People Bill 2008. The Bill raised a number of potential human rights concerns, including therapeutic protection orders, which allow a young person to be detained for a treatment plan to address critical health issues such as self-harm or anorexia. The Bill also dealt with pre-natal reporting of unborn children at risk, and with practices and procedures for managing children in youth detention facilities, including strip-searching. Policy officers involved in preparing this very significant legislation were highly engaged with the human rights issues involved, and worked collaboratively with the Human Rights Unit and the Human Rights Commissioner to ensure that the Bill limited human rights as little as possible, and included many safeguards for rights which had not been considered necessary in other jurisdictions.

For example, in relation to pre-natal reporting, one participant noted that:

‘The Bill does provide much greater protection for the rights of the pregnant woman than in other jurisdictions such as Queensland, where there is no requirement to seek consent at all, and appraisals can be done as if the child was already born. Really they are applying a framework for born children over the unborn child. We have the benefit of the *HRA* saying that such a high level of intervention is not proportionate on the pregnant woman’s right to privacy where no child has been born at that stage.’

Participants highlighted the influence of the 2005 audit of the Quamby youth detention facility by the Human Rights Commissioner in relation to the youth justice provisions of the Bill:

‘The Human Rights Audit was helpful in identifying processes that needed to be improved and informed the development of the Bill significantly.’

Other departments also commented on the Children and Young People Bill and some participants noted that the legislation had been changed in response to additional human rights concerns they had raised at that stage:

‘In commenting on other submissions, such as... in relation to the Children and Young People Bill, some of our comments were *HRA* related and so it was relevant in that regard. ... In response to our comments, they have reviewed it and changed the legislation. So they’re certainly responsive to comments in that regard.’

### *Review of Mental Health Legislation*

The *HRA* had also an impact on the conduct of an ongoing review of mental health legislation. A framework was established so as to incorporate human rights principles from the beginning:

‘From a health policy point of view, part of the way we’re dealing with that is that we’ve invited the Human Rights Commissioner to be part of the stakeholder consultation, because she is one of the monitoring bodies (from her own legislation and also from a mental health point of view). Her views need to be taken into account.

That’s at a stakeholder level. At a government policy level, the Department of JACS has a Human Rights Unit, and they are part of the policy team that are also preparing the government response to the stakeholder consultation. We’ve tried to include both Human Rights Commission and the Human Rights Unit into the actual framework of the review process so that as we’re going through, we have expert advice.’

However, it was not clear whether the *HRA* would have a distinct effect on the final outcome of the new legislation, as there were already many other frameworks in place:

‘From a policy point of view, you have a more formal benchmark against which you have to perform. In mental health, in the review of the Act, I’m not actually sure whether, at the end of the day, it [the *HRA*] will add a great deal to the shape of the Act that comes out, because there are so many other human rights benchmarks against which mental health Acts will be measured. You’ve got the World Health Organisation, the UN, you also have very informed carers and consumers who go to the European Court of Human Rights for their judgments on mental health issues, [and other Australian and international legislation to compare with].

So in reviewing the Mental Health Act, I think we’ll probably get to the same position, largely, whether the *HRA* is there or not. What it does mean is that there is a benchmark in the ACT against which we *will* be measured, and which any limitations on human rights will have to be justified by the government in the Legislative Assembly. And that’s a reasonable thing. And probably that formal process type of stuff would probably not have been gone through ... without the *HRA*.’

### *Amendments to the Health Professions Act 2004*

The Health Legislation Amendment Bill 2006 (No 2) originally included an amendment which would insert a new s59A into the *Health Professions Act*, giving the presidential member of the Health Professions Tribunal the power to issue a warrant to detain a witness and bring them before the Tribunal. This amendment was effectively a re-enactment of an existing provision, which had not been picked up as a concern in a review of health legislation conducted by the Castan Centre, and had been given a statement of compatibility. However, the provision was criticised by the

Scrutiny Committee as likely to breach human rights. As a result of the Scrutiny Committee's comments and debate in the Legislative Assembly, the government amended the bill to remove this provision. A participant involved with the preparation of this legislation explained that the *HRA* had played a significant role in the amendment of the Bill:

'Without the Act there, there's less chance for that embarrassment or public accountability. With it there, it would've changed the way our decisions are made for sure. Even though we were on solid ground with s 59A ... the government was still reluctant to press on with it ... because there was this obvious feeling that people were upset about this particular provision. Even if the grounds they were upset about it were wrong, we still accepted that and decided to have another look at it.'

'We can see that that's an improvement. ... It's building in further safeguards to ensure that people's liberties are not removed unnecessarily.'

### *Other Examples*

Other examples given by participants of legislation or policy where the *HRA* had an impact are:

- search and seizure:

'There's been tension at the end between the policy units and HRU about whether the power was warranted or not. ... [The HRU] has influenced a lot of bills in this particular area.'

- Health legislation: Castan Centre review of legislation:

'As a result of that audit, there were recommendations made as to certain provisions having to be changed. So we've set about trying to make those changes. We've done nearly all of them but there are a couple that require extensive consultation. The report has been used quite extensively.'

- informed consent for transplants, drug and alcohol policy:

'In our area we discuss it a lot because it keeps coming up.'

- powers of attorney for end of life decisions:

'The *HRA* would have to be considered in quite a lot of detail.'

## **h. Challenges**

Participants who used the *HRA* in their work were asked about challenges they faced in applying the Act.

### *Time pressures*

One challenge which was consistently identified by participants was the time frame in which they were required to develop legislation and to obtain the human rights compatibility approval from the Human Rights Unit. This was particularly the case when the Act was first introduced:

‘It was messy in the early months, in terms of everybody working out who was who and how much time they were going to need, which varied a lot depending on the job. It runs much more smoothly process-wise now than it did; we kind of lurched a long a bit at the beginning.’

Participants also reported that it could be difficult to get the timing right as to when to involve the Human Rights Unit in the process. While in theory it would be ideal to get the input of the Unit at an early stage, this was not always possible or practical:

‘It’s good to, on the one hand, have the human rights eye over things as early as possible so that it can help shape the policy in a human rights compliant way, but a lot of the departments in getting their Cabinet Submissions together ... I don’t know how much they’re thinking of those points at that stage, or how much capacity the Human Rights people would have in any event when they’re in the preliminary stage of formulating what they’re going to do.’

‘One of the challenges was that a lot of the debate happens at the very end. They [the HRU] were very helpful in engaging on a lot of policy aspects but because it was very complex, a lot of it was not knowing until the very end until the [Cabinet] Submission stage when it had to be addressed very quickly.’

‘There were some very early comments on a very early draft which really was only useful in terms of re-enacting existing provisions to give a sense of what existing provisions might be incompatible, but it was really very difficult to engage at the broader newer policy level in terms of trying to get a sense of whether the issues we were trying to pursue would be compatible.’

‘One [PCO] drafter would say “have you got the HRU tick off on this?” and we would say “well, we have tried to engage them but they have so many demands on their time they don’t have time to read umpteen million drafts of the bill.” They want the final product.’

‘We did try to engage them early, as we didn’t want to leave a bill of this size to the last minute to be told to go back to the drawing board. They came in on key areas that they were concerned about at an early stage and gave general advice but as it transpired it was a matter of scrutiny at the last minute. It was stressful but fortunately we didn’t have big human rights issues to resolve at the last minute.’

‘When you’re developing legislation, it takes you so much time to get it where it is, that when you send it around to other agencies for comments, you really don’t want to change anything too major.’

Most participants had favourable views of the Human Rights Unit, although some considered that there were not enough lawyers in the Unit, and that they should be better resourced. Importantly, all participants involved in the development of legislation were aware of the Human Rights Unit as a centralised pool of human rights expertise.

### *Resources*

Some participants considered that there was a lack of accessible resources to help them to apply the Act, and that this posed a challenge in trying to analyse the human rights implications of proposed legislation.

When the *HRA* was introduced, the Human Rights Unit prepared a number of high quality documents aimed at assisting government officers to apply the human rights in their work, such as the *Guidelines for ACT Departments: Developing Legislation and Policy*. These are publicly available on the Department's Human Rights website (<http://www.jcs.act.gov.au/humanrightsact/indexbor.html>) These materials have not yet been updated to reflect case law developments, or the recent amendments to the *HRA*.

When asked what resources they relied on in applying the *HRA*, most participants referred to the Human Rights Unit as the most important resource available to them, but very few mentioned the *Guidelines* or the JACS website. However, those who were aware of these resources considered them very useful.

A majority of participants agreed that up-to date resources and a research guide would assist them in applying the *HRA*. Some participants considered that it would be useful for them to have access to case law and other resources to interpret the *HRA* requirements rather than simply relying on the Human Rights Unit at the scrutiny stage, because that way the law could inform the way policy was developed and provisions were drafted at the outset, and avoid compatibility problems arising at the last minute.

'There have been times when the Human Rights Unit have drawn on instruments under other human rights legislation in other jurisdictions which we wouldn't have been aware of. So I think more guidance around what extra material should be consulted by policy officers. Really, the guide is a great reference, but it is really "where to?" from the guide and "where to?" from the international instruments. It really was the Human Rights Unit who were saying "well UK case law says this". We didn't have necessarily the time or expertise to go and research case law, so I think extra guidance for people about where to look beyond the guide would have been useful.'

'For people developing legislation and policy, more direction [is needed] about where to go to get source material and to what extent is it the responsibility of policy officers developing bills across ACT government to look at case law from other human rights jurisdictions.'

However, others questioned whether this level of detail might be too much for those without legal training:

‘I think international case law might muddy the waters. It might work for legal people involved in the area who can judge the relevance of international jurisprudence, but I would be reluctant to disseminate that sort of material more broadly to my policy staff.’

It would be nice to [go searching for international case law] ... but the reality is that we’re working with a lot of different jobs and time frames and our priority is giving effect to the policy we’ve been asked to give effect to. ... It’s not so much the materials as having the time.’

### **i. Participants’ perception of cultural change**

In our interviews, as well as asking questions aimed at gauging participants’ knowledge and experience in using the Act, we also directly asked participants whether they considered that the *HRA* had had any impact on the culture of their agency. Just under half of the participants considered that it had positively affected the culture in their area:

‘Before the Human Rights Act in my experience, human rights language wasn’t used at all.’

‘I definitely think it’s changed the culture. We’re much more aware. ... It’s not just people dealing with the legislation, although we have more exposure to it.’

‘It’s changed the whole landscape.’

‘Coming from another jurisdiction, the extent to which human rights issues are to the fore here is very noticeable. It is embedded in the consciousness of officials. It very genuinely forms part of the way in which the government transacts its business.’

‘There is a sense of valuing the framework and the rights themselves and seeing them as part of everyday conversation.’

‘I certainly think there’s a change ... at a nominal level in that it’s talked about, it’s part of everyday life. But it probably doesn’t go as deeply as it should ... It’s still superficial.’

However, 20 out of 37 participants did not perceive a change in culture within their agency. For these participants, the *HRA* had not affected their day-to-day practice, or had not brought about deep-seated change:

‘I have come into contact with it, but it’s not a day-to-day aspect that I deal with, and it’s not at the forefront of my mind when I’m doing legal work. ... It’s something that we need to consider, but ... it really isn’t discussed to a great extent.’

‘With the legislation we’re doing, a lot of people are just thinking, “how can we get this through scrutiny?” rather than a holistic rights view of the world.’

Many participants found it difficult to think of examples where the *HRA* had actually changed the way they did their work, or led to a different outcome:

‘It will be interesting to see how it will work in practice. With some legislation, for example the prison, it might be more of an issue, or it might play a greater part, but I’m not sure if it really has had a huge effect on the way people do things or the way legislation would be drafted anyway. ... I think we would have done it the same way.’

‘I don’t believe that there have been any huge, ground-breaking advances in protecting a person’s rights as a result of the Act.’

‘It’s had really no impact on the way we do our business.’

‘I have worked in government departments before ... and working in that environment was no different to working in the environment I’m in now. So I don’t see a significant impact.’

Some participants considered that the *HRA* was sometimes used only when it was convenient to back up an argument:

‘Agencies use it to advance their interests – if they want a project progressed or want to stop a particular project.’

‘In the same way, it’s just fuel for the opposition if they want to embarrass the government.’

‘People talk about it but use it for their own needs. [They] use it for their own interpretation ... it’s for them to choose.’

One participant gave the example that while all the evidence and research suggested that having a needle exchange program in the prison was beneficial to prisoners, and this would be most consistent with human rights, the government was refusing to consider this because of prison guard concerns. Similarly, the government had failed to apply a human rights framework to drug testing in prisons:

‘While they talk about a human rights framework, the Act has been in force for 3 years, but how has JACS changed their drugs interdiction programs? I would say that they have escalated them, not applied a human rights mirror to them.’

#### **4. Conclusion**

Overall the interviews present a mixed picture of the impact of the *HRA* on ACT government culture. The groundwork has been laid for a human rights culture, as our research suggests that most government officers are at least aware of the Act, and have a positive attitude towards it. However, at the level of engagement with the Act, the *HRA* cannot be said to have penetrated uniformly into the culture of the ACT bureaucracy. There is a clear disparity between the perceptions of officers working in legislative development, who have a higher level of engagement with the Act, and others at the front line, who do not generally consider the *HRA* relevant to their work.

Even amongst those involved in legislative development there are varying degrees of ownership and responsibility for human rights issues. Nevertheless, some participants have noticed a genuine change in the culture of their agency. Others have demonstrated a substantial knowledge of the Act and a willingness to engage in human rights analysis at a high level. It seems that there are areas of government in which the *HRA* is having a significant impact and that pockets of human rights culture are forming in certain agencies and around particularly committed individuals.

Our research suggests that those who are actively engaged in the application of the *HRA* in their work face challenges in terms of the timing of human rights scrutiny, and in accessing resources, including the Human Rights Unit, to assist them to understand the human rights implications of their legislation, and would benefit from further training and resources.

The lack of engagement of front-line staff with the *HRA* may be partly addressed by the recent amendments to the Act taking effect on 1 January 2009. These amendments will impose an explicit obligation on public authorities (which would apply to all the participants we interviewed) to take human rights into account in decision-making, and to comply with human rights in any actions taken, unless required by legislation to act otherwise (the new Part 5A). The amendments also create a right of legal action for breach of human rights by public authorities.

These obligations should impact more directly on front-line officers, and could result in court actions against the government if not complied with. However, the current perceptions and general complacency about compliance with human rights indicated in the interviews with front-line staff suggests that there will need to be significant preparation and training for the implementation of these obligations. As yet there does not appear to have been any training rolled out to agencies on the implications of the amendments, and this will need to be made an urgent priority.

As the amendments will affect all government departments and agencies, it would also make sense for training and implementation efforts to be co-ordinated across the whole of government. An Inter-Departmental Committee on human rights has been convened in the past to deal with cross-cutting human rights policy issues such as search and seizure provisions. This Committee could play an important role in overseeing the implementation of the significant new amendments, and would benefit from the involvement of the Human Rights Commissioner, as well as the Human Rights Unit.

Audits which have been carried out by the Human Rights Commissioner of the ACT youth detention and corrections facilities have been useful in systematically evaluating existing legislation, practices and procedures for compliance with human rights in those areas. Similar audits or internal reviews within each Department and agency would be a useful starting point to identify possible compliance issues with existing practices.

Based on this research, we have proposed some specific recommendations, set out below, to address the issues raised by participants, and to ensure that the human rights culture within the ACT government continues to grow and mature.

## Recommendations

1. Intensive and ongoing training on the *HRA* should be implemented across all levels of government. To be most effective, this training should be tailored to specific agencies and roles (so that, for example, front-line decision-makers would receive different training to policy officers), and should provide detailed and practical examples of the application of the *HRA* to the particular work of those agencies and officers. This training should cover existing obligations of public servants under the *HRA*, and the new obligations which will come into force on 1 January 2009.
2. An accessible and up to date resource would be useful to assist public servants to understand human rights principles and developments, to 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 (for example the project website <http://acthra.anu.edu.au> and the Human Rights Law Resource Centre website: <http://www.hrlrc.org.au> )
3. 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.
4. The Inter-Departmental Committee on Human Rights should be re-convened to oversee the implementation of the amendments imposing obligations on public authorities, and the Human Rights Commissioner should be invited to participate in this forum.
5. The role of the Human Rights Unit within JACS should be maintained and 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 Human Rights Unit 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 Human Rights Unit and the Human Rights Commissioner should be made clear to all agencies.

## **Appendix A**

### **INFORMATION SHEET ACT Human Rights Act Research Project**

We are studying the impact of the ACT *Human Rights Act* on the work and the culture of the ACT government. This research is part of a joint project between the Australian National University and the ACT government, supported by a grant from the Australian Research Council.

#### **Why are we carrying out this research?**

The ACT *Human Rights Act* is the first bill of rights in Australia. Since it came into force on 1 July 2004, the ACT government has been required to consider human rights when developing or interpreting legislation and policy. We are conducting this research to find out more about the effect of the *Human Rights Act* on different areas of government, including issues of preparation, training and support; how the Act is implemented in practice; challenges it presents and whether it has changed the outcomes of government decisions.

We hope that the information we obtain from this research will help the ACT government to identify ways in which it can improve the implementation of the Act, and needs for support, training and other resources. This information will be relevant to the debate about bills of rights, and to other jurisdictions such as Victoria that are considering adopting a bill of rights.

This research will also help us to identify key issues arising from the implementation of the *Human Rights Act* so we can develop surveys to gather information from government officers on a broader scale.

#### **What does the research involve?**

We have selected you as a potential participant because you work in an area likely to be affected by the *Human Rights Act*. Participation in the project is purely voluntary, and there will be no adverse consequences if you decide not to participate.

If you participate in this research project, we will ask you to attend an interview with one of our researchers which will last up to one hour. This will involve signing a consent form and answering questions about your work and your experience of the *Human Rights Act*. We can hold the interview at the ANU, or at your office at a time convenient to you. If you agree, we may record the interview on audio tape.

You may withdraw from participation in the project at any time, and you do not need to provide any reason to us. If you decide to withdraw from the project we will not use any of the information you have provided to us.

The results of this study will be reported to the ACT government and may be published in academic journals or books. However, the names of individual officers or position titles will not be reported in connection with any of the information obtained in interviews. We will provide you with the results of the research once it is published.

### **Are there any risks if I participate?**

We do not intend to seek any information in interviews which is particularly sensitive or confidential within government. Although information will not be attributed to particular officers, it is possible that because the ACT government is relatively small, others may be able to guess the source of information provided in interviews. Accordingly, it is important that you do not tell us information which is defamatory or confidential.

In particular, government officers have an obligation to preserve the confidentiality of ACT government Cabinet business and processes and not to disclose information relating to Cabinet business including the preparation of papers or proposals for Cabinet consideration. Breach of this obligation is an offence under s 153 of the *Crimes Act* (ACT).

Further information on the confidentiality of Cabinet business and processes is available in Directions on Cabinet Procedure: ACT Government Cabinet Handbook 2005 ([http://www.cmd.act.gov.au/Documents/Cabinet\\_Handbook.pdf](http://www.cmd.act.gov.au/Documents/Cabinet_Handbook.pdf)) or by contacting the Cabinet Office (phone 6205 0232).

On the other side of this page you will find contact names and phone numbers in case you have questions or concerns about the study.

### **Contact Names and Phone Numbers.**

If you have any questions or complaints about the study please feel free to contact:

Professor Hilary Charlesworth, Regulatory Institutions Network, Australian National University, Tel: 6125 6040; Email: CharlesworthH@law.anu.edu.au

If you have concerns regarding the way the research was conducted you can also contact the ANU Human Research Ethics Committee:

Human Ethics Officer, Human Research Ethics Committee, Australian National University. Tel: 6125 7945.  
Email: Human.Ethics.Officer@anu.edu.au

## Appendix B

### CONSENT FORM ACT Human Rights Act Research Project

Researchers: Professor Hilary Charlesworth and Ms Gabrielle McKinnon ANU;  
Professor Andrew Byrnes, UNSW.

1. I .....(please print) consent to take part in the ACT Human Rights Act Research Project. I have read the information sheet for this project and understand its contents. I have had the nature and purpose of the research project, so far as it affects me, fully explained to my satisfaction by the research worker. My consent is freely given.
2. I understand that if I agree to participate in the research project I will be asked to attend an interview. This will take up to one hour and will involve questions about the impact of the *ACT Human Rights Act 2004* on my work.
3. I understand that while information gained during the research project may be published in reports to the ACT government, and in academic journals or books, my name and position title will not be used in relation to any of the information I have provided, unless I explicitly indicate that I am willing to be identified when quoted.
4. I understand that my personal information such as my name and work contact details will be kept confidential so far as the law allows. This form and any other identifying materials will be stored separately in a locked office at the Australian National University. Data entered onto a computer will be kept in a computer accessible only by password by a member of the research team.
5. I understand that I have an obligation to preserve the confidentiality of ACT Government Cabinet business and processes and not to disclose information relating to Cabinet business including the preparation of papers or proposals for Cabinet consideration.
6. I understand that under section 153 of the ACT Crimes Act 1900, disclosure of information which comes into a person's possession by virtue of that person being an officer of the Territory, where it is that officer's duty not to disclose such information, is a criminal offence.
7. I understand that I may withdraw from the research project at any stage, without providing any reason and that this will not have any adverse consequences for me. If I withdraw, the information I provide will not be used by the project.

Signed ..... Date .....

#### Audio taping

I consent to have my interview audio taped by the interviewer. I understand that the tapes will be stored securely at the Australian National University and will be erased at the conclusion of the study.

Signed.....Date.....

**Researcher to Complete**

I ..... certify that I have explained the nature and procedures of the research project to ..... and consider that she/he understands what is involved.

Signed ..... Date .....

## Appendix C

### ACT Human Rights Act Research Project

#### Indicative Outline of Questions

1. How did your area of the department prepare for the introduction of the *Human Rights Act*? Do you consider you had enough time to prepare?
2. What training have you received on the *Human Rights Act*? Do you think you would benefit from further training? What areas in particular?
3. How relevant is the *Human Rights Act* to your work or that of your area? How often would you discuss human rights issues with colleagues?
4. In what situations or contexts would you need to consider the *Human Rights Act* in your work? Can you give me some examples?
5. How do you actually go about applying the *Human Rights Act*? What approach do you take if human rights appear to conflict with an objective your area is trying to achieve?
6. What resources do you draw upon when you are required to apply the *Human Rights Act* in your work?
7. Has the *Human Rights Act* affected the way you or your area conduct your work, or the time frame in which decisions are made? In what ways?
8. Have you faced any challenges in applying the *Human Rights Act*? What were they?
9. Has the *Human Rights Act* led you to do things differently or reach a different decision in relation to any matter? Can you give me examples?
10. Is there anything else the government could do to help you to apply the *Human Rights Act* in your work?
11. Do you think that your perceptions or attitudes about the *Human Rights Act* have changed since it was first announced? In what ways?
12. Do you consider that the Act it has changed the culture of your area or department? In what ways?
13. Are there any other comments you would like to make about the impact of the *Human Rights Act* upon your work or on the government generally?

## ANNEX II: SELECTED PUBLICATIONS

### Working Papers

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ACT Human Rights Act Research Project, [Creating a Human Rights Culture within the ACT Government: Report on Interview Research Assessing the Impact of the \*Human Rights Act 2004\* on the ACT Public Service](#), October 2008.

Gabrielle McKinnon, [Giving Meaning to a Culture of Human Rights](#), September 2006

### Submissions/Advice

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[Submission to the WA Consultative Committee on a Human Rights Act](#), 31 August 2007

[Submission to the 12 Month Review of the \*Human Rights Act 2004\*](#), 22 May 2006

[Submission to the ACT Legal Affairs Committee on the Exposure Draft of the Terrorism \(Extraordinary Temporary Powers\) Bill 2005 \(ACT\)](#)

[Submission to the Senate Inquiry into the Anti-Terrorism Bill \(No 2\) 2005 \(Cth\)](#)

[Advice to Chief Minister Jon Stanhope on the draft Anti-Terrorism Bill \(Cth\)](#)

[Submission to the Victorian Consultative Committee on Human Rights, August 2005](#)

### Books and Book Chapters

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Andrew Byrnes, Hilary Charlesworth & Gabrielle McKinnon, *Australian Bills of Rights: History, Politics, Law*, Sydney: UNSW Press 2009

Andrew Byrnes & Gabrielle 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'*, eds. M. Gani & P. Matthew, ANU e press 2008, pp 361 -377

Hilary Charlesworth, 'The Universal Declaration of Human Rights' in *Max Planck Encyclopaedia of International Law*, OUP (published online)

Hilary Charlesworth 'Bills of rights, national' in *The New Oxford Companion to Law*, eds P. Cane & J. Conaghan, Oxford: OUP 2008, pp 76-78

Hilary Charlesworth, 'International Covenant on Civil and Political Rights' in *The New Oxford Companion to Law*, eds P. Cane & J. Conaghan, Oxford: OUP 2008, p 603

Hilary Charlesworth, 'International Covenant on Economic, Social and Cultural Rights' in *The New Oxford Companion to Law*, eds P. Cane & J. Conaghan, Oxford: OUP 2008, pp 603-4

Gabrielle McKinnon, '[Would a Bill of Rights Enhance Social Cohesion in Australia](#)' in *Social Cohesion in Australia*, eds J. Jupp, J. Nieuwenhuysen, & E. Dawson, Melbourne: Cambridge University Press 2007, pp.191-203

Hilary Charlesworth, 'International Human Rights Law' in *The Oxford Companion to Australian Politics*, eds B. Galligan & W. Roberts, Melbourne: OUP 2007, pp 281-283

Hilary Charlesworth, 'Australia's First Bill of Rights: the Australian Capital Territory's Human Rights Act' [PDF] in *Protecting Rights without a Bill of Rights: Institutional performance and reform*, eds T. Campbell, J. Goldsworthy & A. Stone, Ashgate 2006, pp. 289-304

Hilary Charlesworth, 'A Bill of Rights: An End to our Solitude' in *Time for Change: Australia in the 21<sup>st</sup> Century*, ed T. Wright, Melbourne: Hardie Grant Books 2006, pp 217-236

Hilary Charlesworth, '[Human Rights and Statutory Interpretation](#)' [PDF] in *Statutory Interpretation: Australian Approaches*, eds S. Corcoran & S. Bottomley, Sydney: Federation Press 2005

### Other Papers and Articles

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Gabrielle McKinnon, '[Strengthening Human Rights: Amendments to the Human Rights Act 2004 \(ACT\)](#)' (2008) 19 *Public Law Review* 179

Gabrielle McKinnon, '[Home Truths: Housing Rights under the Human Rights Act](#)' (2008) 21(1) *Parity* 23.

Hilary Charlesworth, 'Democratic objections to bills of rights', *The Sydney Papers* Vol 20 Issue 3 (Winter, 2008), p 126

Hilary Charlesworth and Gabrielle McKinnon, 'Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act' Centre for International and Public Law, Law & Policy Paper No.28, 2006

Hilary Charlesworth, '[Who Wins Under a Bill of Rights?](#)', *University of Queensland Law Journal*, vol. 25, no. 1, 2006, pp. 39-53

Hilary Charlesworth, *Human Rights: Australia versus the UN*, Discussion Paper [Democratic Audit Website](#), August 2006

Gabrielle McKinnon, '[An Opportunity Missed?](#)' Comment on *SI bhnf CC v KS bhnf IS [2005] ACTSC 125* Canberra Law Review, Vol 9, 2006, p21-30

Gabrielle McKinnon 'The ACT Human Rights Act 2004 – The First Year' *Ethos: Journal of the Law Society of the ACT*, August 2005.

Gabrielle McKinnon, '[The ACT Human Rights Act: the impact in the Courts Legislation and Policy](#)' [PDF], [Democratic Audit Website](#) July 2005

## Conferences/Presentations

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Hilary Charlesworth, 'The Universal Declaration of Human Rights at 60: Older and Wiser?' (New Zealand Centre for Public Law Conference, 9-10 December 2008)

Hilary Charlesworth, 'The ACT Human Rights Act' (Protecting Human Rights Conference, University of Melbourne, 3 October 2008)

Hilary Charlesworth, 'How Universal is the Universal Declaration of Human Rights? The Future of Human Rights in the 21st Century' (La Trobe University Centre for Dialogue Annual Lecture, 2 October 2008)

Gabrielle McKinnon, Presentation to the ACT Law Society on the Amendments to the Human Rights Act, 16 April 2008: [Powerpoint slides](#)

Hilary Charlesworth, 'Terry Connolly's Contributions to the Protection of Human Rights in the ACT' (Human Rights and Restorative Justice, a workshop in honour of Justice Terry Connolly, ANU, 28 February 2008)

Hilary Charlesworth, 'The Local and the Global in Human Rights' (International Human Rights Day Address, ACT Baha'i Centre, 9 December 2007)

Hilary Charlesworth, 'Human rights issues confronting a new Australian government' (The Justice Project, Canberra Human Rights Forum, 8 November 2007)

Hilary Charlesworth, 'Debating a NSW Charter of Rights' (NSW Bar Association, Sydney, 5 November 2007)

Hilary Charlesworth, 'Should Western Australia Adopt a Human Rights Charter?' (Inaugural Peter Benenson Lecture, Perth, 15 October 2007)

Hilary Charlesworth, 'Are human rights the past or the future for Australia?' (Mitchell Oration, Adelaide, 7 July 2007)

Hilary Charlesworth, 'Do We Need an Australian Bill of Rights?' (Australian Law Students Association Conference, Canberra, 4 July 2007)

Hilary Charlesworth, 'Do Human Rights Laws Work?' (International Women's Day Breakfast, WA Equal Opportunity Commission, Perth, 8 March 2007)

Hilary Charlesworth, 'ACT and State experiences with human rights legislation and implications for the Commonwealth' (Australian Corporate Lawyers Association, Canberra, 21 February 2007)

Hilary Charlesworth, 'Terrorism and Human Rights: Australia in an International Context', (Federal and State Supreme Court Judges' Conference, Perth, 24 January 2007)

Hilary Charlesworth, 'Reviewing the Human Rights Act' (ACT Human Rights Community Forum, 8 December 2006)

Hilary Charlesworth, 'Human Rights in the Age of Terror' (Maurice Blackburn Oration, Moreland City Council, Melbourne, 25 September 2006)

Hilary Charlesworth, 'Should Queensland have a Bill of Rights?' (Forum on Australian Bills of Rights, University of Queensland, 11 August 2006)

Gabrielle McKinnon, Presentation to delegation from the Vietnam Women's Union coordinated by The Australian Human Rights Centre UNSW, on the ACT Human Rights Act, 8 August 2006

Gabrielle McKinnon, 'Giving Meaning to a 'Culture of Human Rights' (Legislatures and Protection of Human Rights Conference, University of Melbourne, 21 July 2006)

Gabrielle McKinnon, Presentation to the ANU clinical legal program at First Stop Youth Legal Centre on the ACT Human Rights Act, 6 July 2006

Hilary Charlesworth, 'Human Rights at the International Level' (Australian Lawyers Alliance Conference, Canberra, 22 June 2006)

Gabrielle McKinnon, '[The ACT Human Rights Act: The Second Year](#)' (Australian Bills of Rights and Beyond Conference, ANU, 21 June 2006)

Hilary Charlesworth, 'An Australian Bill of Rights: Will it Undermine or Support Australian Democracy?' (Sir Ronald Wilson Lecture, Perth, 11 May 2006)

Hilary Charlesworth, 'Speaking of Rights and Liberties in an Age of Terrorism: An Evening in Conversation with Professor Conor Gearty and Professor Hilary Charlesworth' (NSW Parliament House, 3 May 2006 available at <http://www.gtcentre.unsw.edu.au/webcast/188.asp>)

Andrew Byrnes & Gabrielle McKinnon, 'The ACTHRA and the Anti-Terrorism Act (No.2) 2005' (Terrorism and the Rule of Law Conference, Canberra, April 2006)

Gabrielle McKinnon, 'The Impact of the ACT Human Rights Act on the Anti-Terrorism Debate' (Regulatory Institutions Network Annual Conference, ANU, 8 December 2005)

Hilary Charlesworth, 'The Human Rights Act (ACT) 2004 – An Overview' (NSW Young Lawyers Seminar - Annual Human Rights in Practice, 31 October 2005).

Hilary Charlesworth, 'The Protection of Human Rights in Australia' (Keynote address at the 2005 Local Government Community Services Association of Australia, Melbourne, 25 October 2005)

Gabrielle McKinnon, 'Strategic Litigation - Making the Most of Limited Bills of Rights' (National Association of Community Legal Centres Conference, Canberra, 10 October 2005)

Hilary Charlesworth, 'Human Rights and Terrorism' (Judicial Conference of Australia, Maroochydore, 2 September 2005)

Gabrielle McKinnon, '[Strengthening the Human Rights Act](#)' [PDF] (Human Rights Office Community Forum, 1 July 2005)

Gabrielle McKinnon, [‘The ACT Human Rights Act – The First Year’](#), (Assessing the First Year of the ACT Human Rights Act Conference, ANU, 29 June 2005)

Hilary Charlesworth, ‘The ACT Bill of Rights’ (Australian Government Solicitor’s Constitutional Law Forum 2005, 18 May 2005)

Andrew Byrnes, [‘The ACT Bill of Rights: its relevance and potential effectiveness’](#) [PDF] (State Legal Convention, Adelaide, 22-23 July 2004)

### Media articles

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Hilary Charlesworth, ‘Resist attempts to dilute our human rights’, *The Age*, 2 October 2008.

Hilary Charlesworth, ‘Wrong anti-rights case’ (Letter to the Editor), *The Australian*, 19 July 2008.

Gabrielle McKinnon, ‘Balanced consideration’ (Letter to the Editor), *The Australian*, 12 April 2008

Hilary Charlesworth and Gabrielle McKinnon, ‘Amendment to ensure administration is brought to rights’, *Canberra Times*, 25 February 2008

Hilary Charlesworth, ‘Destructive Hicks saga shakes faith in our government’, *Canberra Times*, 9 April 2007

Hilary Charlesworth, ‘Working charters open door to better governance’, *Australian Financial Review* 27 April 2007

Hilary Charlesworth and Gabrielle McKinnon, ‘Still Work to be Done to Develop a Culture of Human Rights’, *Canberra Times*, 4 September 2006

### Conferences/Seminars organised by the Project

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‘Legislative Bills of Rights in Australia Conference’ on 3 October 2008 together with the Gilbert + Tobin Centre for Public Law (UNSW) and the Centre for Comparative Constitutional Studies (University of Melbourne).

‘Protecting Human Rights Conference’ on 25 September 2007, together with the Gilbert + Tobin Centre for Public Law (UNSW) and the Centre for Comparative Constitutional Studies (University of Melbourne).

‘Australian Bills of Rights: The ACT and Beyond Conference’ on 21 June 2006 together with the Gilbert + Tobin Centre for Public Law (UNSW) and the Centre for International and Public Law (ANU)

‘Terrorism and Human Rights Seminar’ in April 2006 with Professor Conor Gearty, a leading UK researcher on human rights.

'Assessing the first year of the ACT Human Rights Act Conference' on 29 June 2005 together with the Gilbert + Tobin Centre for Public Law (UNSW) and the Centre for International and Public Law (ANU)