

Research School of Social Sciences
Coombs Building #8, Cnr Fellows & Garran Roads
The Australian National University
Canberra ACT 0200
AUSTRALIA



t: +61 2 6125 7103
f: +61 2 6125 1507
e: gabrielle.mckinnon@anu.edu.au

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Ms Renée Leon
Chief Executive
ACT Department of Justice and Community Safety
Level 9, 12 Moore Street
CANBERRA ACT 2601

Dear Ms Leon

Submission to the Review of the *Human Rights Act 2004* (ACT)

Thank you for the opportunity to make a submission to the 12 month review of the *Human Rights Act 2004* (ACT) ('HRA'). As partners with the Department of Justice & Community Safety in an ongoing Australian Research Council Linkage project evaluating the impact of the HRA, we hope that our research may assist in highlighting those areas where the HRA is most effective, and those where it could be further improved.

1. Background

- 1.1 While the current review focuses on the initial 12 months of the HRA, in which the impact of the HRA was somewhat limited, the developments in a number of areas over recent months indicate that the HRA will continue to gather momentum.¹ One of the most significant achievements of the HRA has been to dispel the fears that have surrounded bills of rights in Australia, paving the way for a number of other States such as New South Wales, Tasmania and Western Australia to consider adopting similar legislation. Victoria has now introduced a Bill for a Charter of Rights and Responsibilities, which is likely to soon be passed into law. It is doubtful that such progress would have been made without the pioneering work of the ACT.
- 1.2 These developments open up the potential for the human rights dialogue that has been initiated by the HRA to extend to a conversation about human rights between States and Territories, where each can learn from the human rights practices and decisions in the other jurisdictions. In fact, while the Victorian Charter substantially follows the ACT model, its differences can be seen as a response to the experience in the ACT over the last two years. In our view the ACT could now benefit from considering the Victorian Charter, and adopting some of its initiatives, such as the application of human rights to public authorities, to further improve the HRA.

¹ For a more detailed survey of recent developments under the HRA, please see Charlesworth and McKinnon, *Australia's First Bill of Rights: The Australian Capital Territory's Human Rights Act*, Law & Policy Paper No. 28, 2006, (copy attached for your reference).

There would be real advantages in co-ordinating these two bills of rights, so that a shared pool of experience and jurisprudence can be developed, with relevance to each jurisdiction.

- 1.3 The review also provides the opportunity to consider further enhancements to the HRA that were contemplated by the Consultative Committee, in particular, through the incremental inclusion of social, economic and cultural rights, so that the HRA can continue to set the standard for others to follow. In this submission, we recommend several improvements to the HRA and its practical application that could be considered by the review.

2. Improving the Quality of the Human Rights Dialogue in the Territory

- 2.1 We consider that there is good evidence that the HRA is contributing to the creation of a dialogue on human rights amongst the three arms of government in the Territory, particularly with respect to the development and scrutiny of new legislation. The ongoing challenge for the HRA is to include the community in the conversation about human rights. In our view, the recommendations below would give the public a greater opportunity to participate in the human rights dialogue.

Content of Compatibility Statements

- 2.2 The compatibility statement tabled by the Attorney-General under section 37 of the HRA with each new government bill is an important mechanism for promoting a human rights dialogue within the Territory. In general, the compatibility statements tabled by the Attorney-General comprise a simple statement, certifying that the Attorney-General has examined the bill, and that in his opinion the bill as presented to the Legislative Assembly is consistent with the HRA. We are aware of only one compatibility statement, for the Mental Health (Treatment and Care) Amendment Bill 2005, that included a statement of reasons for the Attorney-General's opinion, although we understand that a detailed memorandum of advice was separately tabled in the Assembly in relation to the compatibility of the Terrorism (Extraordinary Temporary Powers) Bill 2006 with the HRA.
- 2.3 We acknowledge that regardless of the content of the statement, the requirement to certify compatibility serves a crucial purpose in ensuring that the government must undertake a human rights assessment of all new legislation it proposes. As well as improving the standard of legislation, this process is likely to generate a dialogue within the executive, as the Department responsible for the bill will be required to scrutinize its own legislation and to justify any potential infringements of human rights to the Human Rights Unit, which is the final arbiter of compliance.
- 2.4 Nevertheless, in our view the lack of content in the compatibility statement means that an opportunity is being lost to broaden the dialogue to include the community, who could gain greater insight into how human rights are being applied by the government in the formulation of legislation. We note that the Victorian Charter of Rights and Responsibilities Bill 2006 in clause 28(3)(a) provides that where compatibility is asserted, the member tabling the statement must state *how* the legislation is compatible with human rights.
- 2.5 We accept that Victoria is a much larger jurisdiction than the ACT, and that resource constraints might make it difficult to provide a detailed statement of reasons with each compatibility statement in the Territory. We understand that the government has instead taken a policy decision to include human rights considerations in the explanatory statement. However, this material is prepared by the Department responsible for the bill, rather than the

Human Rights Unit, and therefore may not fully reflect the reasons for a compatibility statement being issued.

- 2.6 In our view it would be preferable for a summary of the reasons for compatibility to be included in each compatibility statement. However, if this is not possible, we would recommend that the government provide reasons wherever significant issues of human rights are raised by legislation, and not only where the bill is already the subject of great public controversy.

Exposure Drafts to include statement of Human Rights Implications

- 2.7 An additional practical mechanism for increasing public participation in the consideration of human rights issues is the publication of exposure drafts of significant bills, to allow for public consultation and input. The publication of an exposure draft of the Terrorism (Extraordinary Temporary Powers) Bill 2006 (ACT) demonstrated good consultation practice, and stood in stark contrast to the secrecy and haste that accompanied the Commonwealth Anti-Terrorism Bill (No. 2) 2005. In our view this process could be further improved from the perspective of creating human rights dialogue if the exposure drafts of such legislation also included an outline of the government's position on the human rights implications of the draft bill, so that the community could consider and respond to these views, before the bill is tabled in the Legislative Assembly.

3. Direct Duty on Public Authorities

- 3.1 The ACT Consultative Committee considered that the HRA should include a provision creating a direct obligation on public authorities to act consistently with human rights (subject to the reasonable limits exception in section 28) unless legislation specifically authorised them to act otherwise. This recommendation was not adopted in the final HRA, as it was considered that the government needed protection from the risk of substantial claims in the early days of the HRA. However, now that nearly two years have elapsed since the HRA came into effect, and there has been only very limited use of the HRA in the Courts, it is appropriate to reconsider whether this approach is still warranted.
- 3.2 Although the Discussion Paper notes that in practice most activities of government are regulated by legislation, which is subject to the interpretation provisions of the HRA, the importance of a duty on public authorities would be to clarify the situation to ensure that all government officers are directly accountable for acting in accordance with human rights. As you know, our project is conducting research into the experiences of ACT government officers in relation to the HRA. One of the challenges that is emerging at this early stage is how to ensure that the HRA has relevance not just to those who develop legislation, but also to officers involved in administrative decision making and carrying out other duties within government. A direct obligation to act in accordance with the HRA is likely to have more meaning for these officers than the current provision in section 30 that relates to the interpretation of legislation.
- 3.3 In deciding whether a direct duty should be placed on public authorities, the Victorian Human Rights Consultation Committee considered the ACT model, and suggested that the government should prefer the approach taken in the *UK Human Rights Act* that included a direct obligation:

The Committee considers that including a duty in such clear terms is preferable to the course taken in the ACT which leaves room for debate and lacks clarity. Based on the lessons learned from other jurisdictions, the Committee believes that the Charter should be as explicit as possible regarding the duties imposed on public authorities. This would

provide clear direction to public authorities, assist senior public servants in their efforts to promote a human rights culture within their departments and give life to human rights standards for everyone engaged in public service in Victoria.²

- 3.4 The Victorian government accepted the Committee's recommendation and included a direct obligation in Clause 38 (1) of the Charter of Rights and Responsibilities Bill, which states that:

it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

This provision is subject to the qualification that an act or decision is not illegal if, as the result of a statutory provision, the public authority could not reasonably have acted otherwise or made a different decision.

- 3.5 In our view, a similar provision should be introduced into the HRA to improve human rights accountability at all levels of the ACT bureaucracy, and to re-invigorate the creation of a human rights culture within government. Such a provision would also ensure that case law that is likely to be generated in the larger jurisdiction of Victoria will provide a useful source of guidance for the ACT government in the implementation of its human rights obligations.

4. Remedy for Breach of Human Rights by Government

- 4.1 The ACT Consultative Committee regarded it as a natural corollary of imposing a direct duty on public authorities that a remedy be available in the courts where such a duty is breached. Indeed the imposition of a duty without any mechanism to ensure accountability for a breach would be unlikely to improve government compliance with human rights.

- 4.2 However, the Committee was sensitive to the concerns of government about the financial implications of such a remedy. In the draft bill appended to the Consultative Committee's report, a suggested remedy provision was included in clause 9, which detailed the range of orders that a court might make where a public authority has acted unlawfully. This clause specifically provided that:

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.

This clause provides guidance to the courts to ensure that damages are used as a measure of last resort, and only where necessary to do justice in the case.

- 4.3 The Victorian Charter takes an even more restrictive approach, providing in clause 39 that where an act of public authority is unlawful by virtue of clause 38 of the Charter, an existing cause of action (such as an application for review of a decision under administrative law) may be used to seek a remedy. However the clause specifically precludes an order for damages in such a case. In our view this approach is unnecessarily limited and would prevent a court from ensuring that justice is done between the parties in those rare cases where a breach of human rights by a public authority has caused significant loss to an affected person, and no other remedy could rectify the situation.

² Rights, Responsibilities and Respect: Report of the Human Rights Consultation Committee, p63

- 4.4 We consider that the approach of the Consultative Committee strikes a better balance between the need to manage the cost implications of the HRA and giving real meaning to a commitment to human rights.

5. Social Economic and Cultural Rights

- 5.1 In its Concluding Observations on Australia in 2000,³ the UN Committee on Economic, Social and Cultural Rights noted that:

In spite of existing guarantees pertaining to economic, social and cultural rights in the State party's domestic legislation, the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions.⁴

The UN Committee strongly recommended that Australia incorporate the International Covenant on Economic Social and Cultural Rights (ICESCR) into its legislation, in order to ensure the applicability of the provisions of the Covenant in the domestic courts.

- 5.2 In considering the rights that should be protected under the HRA, the ACT Consultative Committee emphasized the indivisible nature of human rights, and recommended that the HRA include relevant rights found in ICESCR, in addition to civil and political rights. These include the right to an adequate standard of living, the right to the highest attainable standard of health, the right to housing, clothing and food, the right to education, and the right to work in just and favourable conditions.
- 5.3 The Consultative Committee recognized that such rights would be more challenging to put into practice, and recommended the inclusion of a provision acknowledging that such rights be subject to progressive implementation. They suggested that courts should be required to consider the financial circumstances of a public authority and the cost of acting in a manner compatible with human rights, in reaching any decision in relation to these rights.⁵
- 5.4 Although the ACT government decided not to initially include these rights in the HRA, in his second reading speech, the Chief Minister acknowledged that this represented a 'beginning', and that the inclusion of ICESCR rights could be looked at as part of a review of the HRA in the future.⁶ Given the benign and cautious approach that has been taken by the courts so far in adjudicating matters under the HRA, it appears that the government could now have more confidence in broadening the scope of the protected rights to include those social, economic and cultural rights over which the Territory has jurisdiction. Rights such as education, health and housing are of real practical significance to people in the ACT, particularly to those who are most disadvantaged. For example, the case studies collected as part of the Housing is a Human Right Project⁷ in the ACT clearly demonstrate that adequate housing is a fundamental pre-requisite to exercising civil and political rights, and to participating fully in the community.
- 5.5 Although it is theoretically possible that protected rights, such as the right to equality, may provide indirect protection for particular social, cultural or economic rights, it is difficult to

³ Concluding Observations of the Committee on Economic, Social and Cultural Rights : Australia. 01/09/2000. E/C.12/1/Add.50.

⁴ Ibid at paragraph 15

⁵ *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, ACT 2003, Appendix 4 draft bill at p23

⁶ Jon Stanhope, Hansard, ACT Legislative Assembly at p4247

⁷ The case studies are available at: <http://www.actshelter.net.au/1.html>

point to any cases in the ACT where such indirect protection can be demonstrated. Indeed in perhaps the only case that might have raised such an issue, *Merritt v Commissioner for Housing*,⁸ the applicant sought to have her right to housing recognized by relying on the right to protection of the child and family under section 11 of the HRA. However the Administrative Appeals Tribunal did not consider that the serious difficulties faced by this family entitled them to priority housing, and did not view the HRA as relevant to the determination. Even in jurisdictions such as Canada where a Charter of Rights had long been established, the record of the courts in protecting social, economic and cultural rights through other rights in the Charter has been mixed at best.⁹

- 5.6 In addition to the lack of enforceability of social, economic and cultural rights in the courts, the exclusion of these rights from the HRA means that the government and the Scrutiny Committee are not specifically required to consider the consistency of new legislation with these ICESCR rights. Indeed, there is a danger that while the Scrutiny Committee formerly had a broad remit to consider all of the human rights implications of proposed legislation, including ICESCR rights, it may now be more likely to focus scrutiny only on the ICCPR rights that are protected under the HRA.
- 5.7 Further, while social, cultural and economic rights have been reflected in the priorities and goals of the Canberra Social Plan, the Plan does not specifically require the ACT government to ensure that its policies are consistent with these rights, and thus cannot be regarded as providing real protection for social, economic and cultural rights at a policy level.
- 5.8 We consider that the government should extend the rights protected under the HRA to include key social, economic and cultural rights. If the government also introduces a direct duty and remedy as a result of the review, it could consider excluding the application of remedies to social, economic and cultural rights for a defined period, to allow an opportunity for the public service to become familiar with the application of these rights. At a minimum, we strongly recommend that the government consider introducing the right to education, which is included in the UK *Human Rights Act*. This right (drawn from Article 2, Protocol 1 of the European Convention) has been cautiously interpreted in the UK and European courts, and would be unlikely to have a financial impact on the Territory.¹⁰

6. Conclusion

- 6.1 With the experience of nearly two years of the HRA to draw from, the ACT is in a strong position to continue its leadership in the field of human rights in Australia. We hope that the government will take this opportunity to make considered improvements to the HRA to increase its effectiveness in promoting a human rights culture within the Territory, and to again set an example for other States and Territories to follow.

⁸ [2004] ACTAAT 37.

⁹ See eg, the Concluding Observations of the Committee on Economic, Social and Cultural Rights : Canada. 10/12/98. E/C.12/1/Add.31, where the Committee stated that it was “*deeply concerned at the information that provincial courts in Canada have routinely opted for an interpretation of the Charter which excludes protection of the right to an adequate standard of living and other Covenant rights.*” See also the more recent case of *Gosselin v. Québec (Attorney General)*, [2002] 4 SCR 429, 2002 SCC 84, in which the majority of the Supreme Court of Canada found that a regulation did not infringe the Charter right to equality even though it limited welfare payments to people under 30 years old to one third of the amount paid to people over 30, and there was evidence that this amount was not sufficient to provide an adequate standard of living.

¹⁰ See eg Lord Bingham in *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14 where he noted that the right is “*a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the State.*”

Please do not hesitate to contact Gabrielle McKinnon on 6125 7103 if you have any queries about this submission, or if we can be of further assistance to the review.

Yours sincerely

Andrew Byrnes
Professor of International Law, University of New South Wales

Hilary Charlesworth
Professor of International Law and Human Rights, Australian National University

Gabrielle McKinnon
Regulatory Institutions Network, Australian National University