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

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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.[1]

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.[2]

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.[3]

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

[1] ACT Consultative Committee, 'Towards an ACT Human Rights Act' Report 2003, p41.
[2] JACS: The Guide to ACT Departments on Pre-Introduction Scrutiny, p 1.
[3] 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.[4]

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 the health field, and had roles which involved the training and supervision of front-

[4] Ibid

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 Commisssion 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.'
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> 'We assist and advocate for people on their rights … and this Act actually outlines in legislation what people's rights are.'
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> '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.'
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> '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.[5]

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.'

[5] At p 7.

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

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.’[6]

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:

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> ‘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.’

> ‘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 is 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 Professionals Act 2004

The Health Legislation Amendment Bill 2006 (No 2) originally included an amendment which would insert a new s59A into the *Health Professionals 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) 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?