



ACT DEPARTMENT OF JUSTICE  
& COMMUNITY SAFETY

Department of Justice and Community Safety

*Human Rights Act 2004*

Twelve-Month Review – Discussion Paper

Renée Leon  
Chief Executive  
Department of Justice and Community Safety  
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## Introduction

The *Human Rights Act 2004* (HRA) came into force on 1 July 2004. From then, most of the individual civil and political rights that are guaranteed under the *International Covenant on Civil and Political Rights* (ICCPR) were incorporated into ACT law.<sup>1</sup>

The primary aim of the HRA is to establish a 'dialogue model' for the protection of human rights in the ACT.<sup>2</sup> The long-term aim is to 'build a human rights culture' of tolerance and respect for human rights reflecting the shared values of Canberrans.

The HRA is based largely on a model Human Rights Bill developed by the ACT Bill of Rights Consultative Committee in its report *Towards an ACT Bill of Rights Act*. However, in some key respects, the HRA contains departures from the Model Bill. The main departure was the decision not to expressly incorporate rights guaranteed under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Other departures relate to the mechanisms that govern the operation of the HRA.

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<sup>1</sup> Individual ICCPR rights which engaged matters exclusively within the Commonwealth's jurisdiction, such marriage and immigration, were not included.

<sup>2</sup> The term 'dialogue model' is used to describe human rights legislation that gives specific responsibility to each arm of government – the executive, the legislature and the judiciary – to consider and report on human rights: *Human Rights Act 2004 - A Plain English Guide*, ACT Department of Justice and Community Safety, 2004.

## Terms of Reference

### *Statutory Requirement*

<b>Section 43 HRA</b>	<b><u>Review of Act after 1st year of operation</u></b>
(1)	The Attorney-General must review the 1st year of operation of this Act and present a report of the review to the Legislative Assembly not later than 1 July 2006.
(2)	The review must include consideration of—
(a)	whether, taking into consideration the 1st year of operation of this Act, rights under the International Covenant on Economic, Social and Cultural Rights should be included in this Act as human rights; and
(b)	whether environment-related human rights would be better protected if there were statutory oversight of their operation by someone with expertise in environment protection.
(3)	This section expires on 1 January 2007.
<b>Section 44 HRA</b>	<b><u>Review of Act</u></b>
(1)	The Attorney-General must review the operation of this Act and present a report of the review to the Legislative Assembly not later than 1 July 2009.
(2)	This section expires on 1 January 2010.

### **Twelve-month review**

Section 43 of the HRA requires the Attorney-General to review the first year of operation of the HRA and table a report in the Legislative Assembly by 1 July 2006.

Under section 43(2) the twelve-month review must include consideration of:

- (a) whether, taking into consideration the 1st year of operation of this Act, rights under the ICESCR should be included in the HRA as human rights; and
- (b) whether environment-related human rights would be better protected if there was statutory oversight of their operation by an expert in environment protection.

### **Five-year review**

In addition to the initial twelve-month review, the HRA also provides for a five-year review of the Act. Section 44 of the HRA requires the Attorney-General to review and report on the operation of the HRA by 1 July 2009.

## ***History and Context***

### **Twelve-month review**

Section 43 was introduced by an amendment proposed by Kerrie Tucker MLA.<sup>3</sup>

In introducing the amendment, Ms Tucker MLA indicated that the Greens had been disappointed with the scope of the Human Rights Bill, in particular, that it did not expressly incorporate economic, social and cultural rights. These rights are expressed in the ICESCR and include the right to work, the right to housing and the right to the highest attainable standard of physical and mental health. She noted that the Chief Minister had said 'these other rights could be included down the track', and that the Bill was 'only a starting point'.

She also referred to linkages between human rights and international law on the environment and the nexus between the environment and rights to health and to life.

The amendments proposed by Ms Tucker MLA were adopted without alteration or any extensive debate in the Legislative Assembly.<sup>4</sup> However, concern was expressed over the proposed timing of the review, in light of its intended purpose. For example, after reiterating his opposition to economic, social and cultural rights, Mr Bill Stefaniak MLA 'cautioned' that a twelve-month review may be premature. He said, 'a year to review anything is probably not a very long period of time' and that 'it took about 18 months before a few problems emerged [for the *Human Rights Act 1998* (UK)].<sup>5</sup>

While the Chief Minister acknowledged the need to allow time for issues to emerge, he indicated that there was scope to begin consideration of economic, social and cultural rights:

... I do not think that means that, while we wait for the legislation ... to settle down, we should not look at other aspects of rights protection. It is quite reasonable to commit ourselves to commence that additional review of other rights that we might include in a year's time, without necessarily disagreeing ... about the need to allow the legislation as passed further time to establish itself.<sup>6</sup>

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<sup>3</sup> Proposed section 42A in item 6 of Proposed Amendments dated 02 March 2004.

<sup>4</sup> Legislative Assembly, *Hansard*, 02/03/04, p 585.

<sup>5</sup> Bill Stefaniak MLA, Legislative Assembly, *Hansard*, 02/03/04, p 585.

<sup>6</sup> Jon Stanhope MLA, Legislative Assembly, *Hansard*, 02/03/04, p 585.

## Review of the *Human Rights Act 2004*

### **Five Year Review**

The Consultative Committee recommended that the HRA be reviewed after 5 years. 'At that stage', the Consultative Committee said, 'the success of the 'dialogue model' could be assessed and consideration could be given to amending the legislation'.<sup>7</sup>

The five year review would examine the effectiveness of the HRA in protecting rights (including Indigenous rights), whether other civil and political or economic, social and cultural rights should be included (including specific Indigenous rights) and whether a dialogue model was working or whether it would be preferable to entrench rights, for example by including those rights in the self-government legislation for the ACT.

This recommendation of the Consultative Committee was immediately accepted:

Legislative protection of human rights is something new for both the ACT and for Australian jurisdictions. At present the effect of the legislation on the ACT community and public administration can only be the subject of informed speculation. Thorough review of the operation of the legislation after five years will enable an assessment of the way it has worked and will allow appropriate adjustments to be made in the light of experience.<sup>8</sup>

### ***Purpose of this Discussion Paper***

The purpose of this discussion paper is to consider the operation of the HRA, particularly the precise issues posed by the statutory review requirement, in light of the history and context surrounding the HRA. It is not to canvass a particular model for the protection of economic, social and cultural rights or to canvass a particular set of economic, social and cultural rights for incorporation into the HRA.

As will be seen, a number of complex issues lie behind the recommendations of the Consultative Committee and the approach reflected in the Government Response. The twelve-month review is a chance to give further consideration to some of these issues as part of a longer process, culminating in the five year review outlined above.

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<sup>7</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, List of Recommendations, at p 5.

<sup>8</sup> Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 9.

## Operation of the HRA

**Under section 43(1) of the HRA, the review must examine how the Act has operated in its first year. This requires the review to canvass experiences with the key elements of the 'dialogue model' and the impact on the development of a 'human rights culture'.**

In line with the Model Bill, the HRA established a 'dialogue model' which essentially seeks to ensure that human rights are taken into account when developing and interpreting ACT law, without displacing the current constitutional arrangements. The model has been described as an 'interpretive statutory model' based on similar models that have been established in the United Kingdom and New Zealand.

The 'dialogue' in this model is facilitated through the various mechanisms, including:

- (a) the *statement of compatibility* by the Attorney-General, in which Government bills are assessed for HRA consistency prior to introduction into the Legislative Assembly,
- (b) the *pre-enactment scrutiny role* of the Legislative Assembly, in which the Standing Committee on Legal Affairs reports on HRA issues raised by all bills prior to passage,
- (c) the *interpretive provision*, in which courts, tribunals and decision makers must adopt, where possible, a human rights consistent interpretation of ACT laws,
- (d) the *declaration of incompatibility*, in which the Supreme Court is empowered to declare a law incompatible where such an interpretation cannot be adopted,
- (e) the *reasonable limits provision*, in which the legislature has the capacity to place justifiable and proportionate limits on HRA rights,
- (f) the *Human Rights Commissioner*, who reviews the impact of laws on human rights, monitors the operation of the HRA and provides human rights education, and
- (g) the *annual reports obligation*, in which government departments and agencies must report on their implementation of the HRA in their annual reports.

## Review of the *Human Rights Act 2004*

After twelve months, it has been difficult to measure the impact of the new legislation. There might seem to be no dramatic changes in the public face of government and this lack of instant impact has led some to wonder whether the HRA has had any impact at all:

[S]ince that day of liberation when we got the Bill there had been not one court case on it, not one executive action which could be said to have occurred because of it, nor one legislative Act in consequence of the new consciousness of human rights to which the Bill gave witness had happened as a result ...<sup>9</sup>

However, while there has not been a sea-change in the three arms of government, there have been cases, executive acts and legislative acts influenced by the HRA.

So, how has the HRA impacted upon the three arms of government?

### ***Judiciary***

To date, the courts and tribunals have arguably been the least affected by the HRA.

In her twelve-month survey, Dr Watchirs, the Human Rights Commissioner, noted that the HRA had 'only a small impact in a handful of cases where parties have specifically argued human rights issues'.<sup>10</sup>

In her survey of the same cases, McKinnon noted that, while the HRA 'has not gone entirely unnoticed', there has 'not yet been a flood of litigation as a result of the Act'.<sup>11</sup>

For example, while the HRA had been cited in nine cases over twelve months:

[it] could not be said to have been a decisive factor in any of these matters and the judgments do not consider its provisions in any great depth. At most, the Act [was] used to lend support to a conclusion already reached by other reasoning.<sup>12</sup>

Similarly, Mr Refshauge SC, the Director of Public Prosecutions, observed that all of the decisions in these cases:

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<sup>9</sup> Jack Waterford, 'Bills that let judges make laws', *The Canberra Times*, 11 June 2005.

<sup>10</sup> Dr Helen Watchirs, Review of the first year of operation of the Human Rights Act 2004, *Democratic Audit of Australia*, June 2005, p 1.

<sup>11</sup> Gabrielle McKinnon, 'The ACT Human Rights Act 2004 – The First Year', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 2.

<sup>12</sup> Gabrielle McKinnon, 'The ACT Human Rights Act 2004 – The First Year', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 2.



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... were made on the basis of principles of law or the exercise of a discretion that were unexceptional applications of the common law and which were unaffected by or independent of the [HRA] though consistent with it.<sup>13</sup>

Based on this observation, he found the present record to be 'a little disappointing':

There is no evidence of any awareness and certainly not mining of the rich jurisprudence which courts in Europe, [etc.] have created to identify and explain the rights enacted by the respective [provisions]. In two respects, I think the ACT courts, as yet, have failed to recognise this jurisprudence and develop it locally.<sup>14</sup>

His two areas of concern related to the content of rights and the proportionality test.

However, there are a number of factors which affect the intensity of this dialogue.

A key factor, across all these participants, may be the 'influence of institutional size'.

This encompasses not only resource limitations, but limitations of a 'cultural' nature:

[T]he quality of the 'dialogue' between [the judiciary and the legislature] is likely to depend upon the breadth and depth of the surrounding legal/human rights culture, including, for example, the capacities of interest groups, the level of academic interest in any local experiment, and the orientations and expertise of the local legal profession.<sup>15</sup>

These cultural limitations help to explain the lack of cases in the Supreme Court:

Of course, the court is not entirely responsible. Counsel appearing before it ... should be prepared with submissions on the issues and not merely refer to the *Human Rights Act 2004* as if it held an answer. They have a duty to assist the Court to identify and apply the right legislation properly.<sup>16</sup>

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<sup>13</sup> 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, pp 5-6.

<sup>14</sup> 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, p 7.

<sup>15</sup> Leighton McDonald, 'New directions in the Australian bill of rights debate' [2004] *Public Law* 22 at p 30.

<sup>16</sup> 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, p 9.

## **Executive**

By contrast with the courts, the executive has been the most affected by the HRA. In the first year Dr Watchirs has suggested that: '[t]he biggest impact of the Act has been in influencing the formulation of government policy and new legislation'.<sup>17</sup> She had observed 'a marked increase in the awareness of human rights principles due to the kind of scrutiny now required of proposed legislation', among other things.<sup>18</sup>

The same observation has been made by those at the coalface of legal policy work:

At this stage, the conversation within the executive is perhaps the most fruitful in terms of impact on policy development and government action ... This can be a robust dialogue, particularly where agencies are committed to the implementation of a particular policy in a particular way.<sup>19</sup>

And while Bayne expressed concern with some elements of the public dialogue on human rights, he did concede that there was a real conversation within the executive:

[A] great deal of debate and talk occurs within government. A legislative proposal might be addressed ... by the proponent government agency, the Parliamentary Counsel's Office, the Department of Justice and Community Safety, and the Human Rights Office. No doubt this debate has an effect on the final form of a Bill, and probably in many cases in a way that enhances an HRA right.<sup>20</sup>

Not all participants in that dialogue have been satisfied with its openness. For example, Richard Refshauge SC lamented the content of Cabinet Submissions:

Regrettably, because of resource constraints, [the human rights] section in each submission is usually added after the circulation of the consultation draft submissions. This is a pity both because those to whom the submission is circulated for consultation are denied the benefit of the exposition of what are seen as the human rights considerations and thus the opportunity to learn and be informed. It also means that debate about the human rights implications of such submissions are limited because the consultation draft rarely includes an opportunity to comment on what are said to be the human rights implications.<sup>21</sup>

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<sup>17</sup> Dr Helen Watchirs, 'Review of the first year of operation of the *Human Rights Act 2004*', *Democratic Audit of Australia*, p ...

<sup>18</sup> Dr Helen Watchirs, Review of the first year of operation of the Human Rights Act 2004, *Democratic Audit of Australia*, June 2005, p 5.

<sup>19</sup> Elizabeth Kelly, Government in the ACT: a Human Rights Dialogue, paper for 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

<sup>20</sup> Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper for 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 1.

<sup>21</sup> 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, p 10.

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The dialogue within the executive is not limited to legislative and policy development. It also occurs in the context of statutory audits by the Human Rights Commissioner. And this dialogue, by its very nature, has a distinct public character and openness.

Section 41 empowers the Commissioner to review the effect of Territory laws on human rights and to report to the Attorney-General on the results of the review. These reports must be presented to the Legislative Assembly within 6 sitting days.

On 1 July 2005, the Commissioner presented an audit report of the Quamby Youth Detention Centre. The report assessed the operating procedures at Quamby against the relevant human rights standards in the HRA and it made a series of recommendations in relation to the treatment of detainees. It was the first audit prepared under the HRA and it was understood to be the first time that operational practices at Quamby had been assessed against relevant human rights standards.<sup>22</sup>

The report was tabled by the Attorney-General in the Assembly on 18 August 2005. He emphasised the significance of the Commissioner's role in the dialogue model:

It demonstrates the value of these powers in the human rights dialogue that has taken place in the territory. This is the sort of dialogue and action on human rights issues that is making a lead for the rest of the country ... Reports such as these show that the [HRA] is being worked out in a spirit of cooperation between the bodies with responsibility for that task. The process shows that the [HRA] is not an obstacle to good administration, but an essential element.<sup>23</sup>

### **Legislature**

The Assembly has also been engaged in an intense 'pre-enactment dialogue' prior to the passing of a Bill. A key part of that dialogue is the statement of compatibility.

In the first year nearly a hundred bills were assessed for compatibility under the HRA.

The dialogue brings with it a new focus for the Legal Affairs Committee:

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

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<sup>22</sup> Human Rights Office, *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005.

<sup>23</sup> Jon Stanhope MLA, Legislative Assembly, *Hansard*, 18 August 2005, p 2907.

## Review of the *Human Rights Act 2004*

purposes of debate on a bill. A report may thus provide explanation, and outline different points of view, in a way that will facilitate a debate about rights.<sup>24</sup>

### **The Compatibility Statement**

The compatibility statement is widely seen as a key aspect of the dialogue model.<sup>25</sup> For each bill presented by a Minister, the Attorney must prepare a written statement about the bill indicating whether in his or her opinion, the bill is consistent with human rights. If a bill is not consistent, the statement must indicate how it is inconsistent.

#### *Consultative Committee*

The Consultative Committee made the following recommendations:

The [compatibility] statement should be made available to the public and should be given the same status as the Explanatory Statement when interpreting the legislation. This statement would be prepared on the advice of the executive. It should include a discussion of the human rights issues raised by the Bill and how those issues are accommodated within the Human Rights Act.<sup>26</sup>

The Committee recognised, however, that the proposed statement 'was not fail-safe'. Necessarily, it could not be determinative. In particular, it noted that the statement would not take account of amendments in the Assembly. Nor would it stop the legislature or judiciary from taking a different view, 'particularly in relation to issues such as the breadth of the limitation authorised by the reasonable limits clause'.<sup>27</sup>

#### *Government Response*

The recommendation of the Committee was adopted in the bill and passed in the Act.

For each government bill, the Attorney-General must table in the Assembly a statement as to whether, in his opinion, the bill is consistent with human rights.<sup>28</sup>

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<sup>24</sup> Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper for 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

<sup>25</sup> *Human Rights Act 2004*, section 37.

<sup>26</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.13].

<sup>27</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.17].

<sup>28</sup> *Human Rights Act 2004*, section 37.

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### *Comment*

The compatibility statement clearly serves a significant role in the 'dialogue model'. It reflects the internal dialogue among the various component arms of the executive and it is this internal process that has been most dramatically affected by the HRA.

Some commentators are concerned about the content of the compatibility statement. In most cases, a one-page statement is issued as evidence of the conversation between the sponsoring agency and the Human Rights Unit in the Department of Justice and Community Safety on human rights issues.

The one-page statement has been criticised for its failure to facilitate a human rights dialogue among the community, the executive and the legislature. Peter Bayne suggests that 'compatibility statements contribute nothing to dialogue, at least where they merely state that the Bill is compatible,' although he notes, 'the Explanatory Statement may address HRA issues, sometimes at a relatively sophisticated level'.<sup>29</sup>

The brevity of the statement, or the lack of publicity given to the dialogue *within the executive*, seems to have prompted some concern as to the growth of a wider human rights dialogue, and, potentially, the development of a broader human rights culture:

First, a public dialogue may produce a rich legislative history which, in turn, might be brought into account in any curial assessment of whether a provision of an Act is HRA compliant, or, if is not, how it might be interpreted so as to be HRA compliant. Secondly, to the extent that pressure groups and the wider public get involved in the debate, a rights focused culture will thereby be produced.<sup>30</sup>

The lack of publicity may have led others to doubt the existence of a dialogue at all. As noted above, Waterford was not able to identify any impact of the HRA at all.<sup>31</sup>

Effectively, the *content* of the statement, it is said, reflects the *quality* of the dialogue.

However, it may be misleading to focus attention on the compatibility statement.

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<sup>29</sup> Peter Bayne, 'Pre-enactment dialogue about proposed laws under the influence of the *Human Rights Act 2004*', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 4.

<sup>30</sup> Peter Bayne, 'Pre-enactment dialogue about proposed laws under the influence of the *Human Rights Act 2004*', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 1.

<sup>31</sup> Jack Waterford, 'Bills that let judges make laws', *The Canberra Times*, 11 June 2005.

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The approach of Government has been to conduct compatibility assessment through consultation between the Human Rights Unit in the Department of Justice and Community Safety and the agency responsible for the relevant bill. The Unit aims 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 problem. This reflects the Department's focus on building a human rights culture.

In effect, the Department's approach is that the case for compatibility will be made at first instance in the Explanatory Statement, prepared with the assistance of the Human Rights Unit.

This approach is complemented by the Unit's involvement in developing Government Responses to Scrutiny Reports by the Standing Committee on Legal Affairs where it raises human rights issues in accordance with its statutory role under the HRA.<sup>32</sup>

So, the compatibility statement is *evidence* of the dialogue, but is not its only *source*. On this basis, the content of the statement may not reflect the quality of the dialogue. It may be more appropriate to focus attention on the Explanatory Statement.

### *Conclusion*

At this stage, the vital statistics on the human rights dialogue may be hard to gauge. Changes in the judiciary, executive and legislature have to be preceded by cultural change in the legal profession, in the public service and in the parliamentary system. It may be premature to look for a fully-developed human rights dialogue after only twelve months, particularly when the participants are still coming to grips with the new language.

### ***Issues for the Review***

- Is the dialogue model in the HRA contributing to a human rights culture in the ACT?
- Could the dialogue be made more effective by changes to the HRA?
- What other changes in the ACT legal and government system would strengthen the growth of a human rights culture?
- Are the audits by the Human Rights Commissioner an appropriate and effective way to review laws for compliance with the HRA?

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<sup>32</sup> *Human Rights Act 2004*, section 38.

## A Direct Right of Action

Some have questioned why the HRA does not provide for a direct right of action and specific remedies for breaches of human rights.

Currently, human rights issues may only be raised in the context of existing litigation.<sup>33</sup> And, except for the ability of the Supreme Court to issue a declaration of incompatibility,<sup>34</sup> only existing remedies that are already available will apply in cases where a human rights argument is raised.

While a new cause of action and a new set of remedies may affect the operation of the HRA, a key and related issue is its application to the conduct of public authorities

Currently, the HRA only applies directly to legislation. It does not explicitly capture the conduct of public authorities. While there may be arguments in favour of creating a direct right of action per se, practically, such a cause of action has most relevance in the context of the conduct of public authorities.

### *The Consultative Committee Report*

The Consultative Committee recommended that the HRA be expressly applied to public authorities and their conduct. It recommended that the HRA impose an express obligation on public authorities to act consistently with the HRA and that it provide for specific remedies in respect of conduct inconsistent with the HRA.

Specifically, it recommended that the rights, and the reasonable limits clause, should regulate the conduct of public authorities, subject to express statutory exceptions:

The ACT *Human Rights Act* should provide that all public authorities must act in a way or engage in conduct that is compatible with the *Human Rights Act*, unless the incompatible conduct is required by legislation ... If public authorities are required to act compatibly with the *Human Rights Act*, they will need to be able to justify particular actions and policies in human rights terms.<sup>35</sup>

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<sup>33</sup> For example, where the operation of a statute is in issue and a party is seeking, in relation to an existing remedy, an interpretation of a provision that is (more) consistent with human rights, relying on the interpretive provision in s 30 of the HRA. Or where the operation of a statute is in issue and a party is seeking a declaration that the statute places unreasonable limits on human rights (a declaration of incompatibility).

<sup>34</sup> The Supreme Court may only issue a declaration of incompatibility if it is hearing a proceeding and it is unable to interpret a Territory law consistently with human rights (HRA, s 32).

<sup>35</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.60].

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It recommended that the bill take a broad approach to which entities might constitute 'public authorities', based on whether or not they exercised 'public functions':

The Consultative Committee recommends that the ACT *Human Rights Act* should regulate the conduct of any body that performs a public function. This will obviously include all government agencies ... [It] should also regulate non-government bodies to the extent that they are exercising a public function. As a consequence, the *Human Rights Act* will reach beyond government into the community sector, charitable organisations, certain [incorporated] associations ...and into the private sector if and when these bodies perform public functions.<sup>36</sup>

And it recommended that the bill make express provision for remedies:

Although this is merely a restatement of existing legal principle, an express clause confirms that breaches of the Human Rights Act must be remedied. The clause should provide that if a public authority breaches the Human Rights Act, the Supreme Court may order whatever remedy is open to it and seems just and equitable in the circumstances. These remedies may include those traditional remedies which the Supreme Court is empowered to make such as a declaration, injunction, writs of mandamus and habeas corpus in addition to specific remedies that the Human Rights Act provides, such as ordering that a public apology be made. Another remedy the Supreme Court could order ... would be the exclusion of evidence obtained in breach of human rights.<sup>37</sup>

### *Government Response*

In response, the Government highlighted the dangers, at least in the short term, in structuring a discrete cause of action in the courts for the protection of human rights:

The Government considers that the best approach for the Act is to introduce legislation that recognises the ICCPR rights and requires laws to be interpreted as far as possible in accordance with them but does not give a direct right of court action to enforce those rights. Recognising that other jurisdictions that have introduced human rights legislation have required time to adapt policies and practise, the Government believes this is an approach that will provide a level of immediate protection and support for the rights while protecting the Territory from the risk of substantial claims in the early days of the Human Rights Act.<sup>38</sup>

It emphasised that the particular 'dialogue model' adopted by the HRA would 'avoid the potential for claims to be made against government agencies and other public

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<sup>36</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.53].

<sup>37</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.74].

<sup>38</sup> Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 4.



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authorities directly for breaching the HRA but will still provide a strong legislated framework against which all legislation will be tested'.<sup>39</sup>

It also emphasised how conduct and remedies would be covered under the HRA:

Through the interpretive provision, rights will be drawn into all areas of ACT law. For example, all statutory discretions would be interpreted as having to be exercised consistently with the rights contained in the Human Rights Act ... As a result, an independent review of an administrative decision (for example by the [AAT]) could overturn a decision on the ground that it was not compatible with the [HRA]. Courts will also be required to interpret laws relating to trials and other proceedings in a way that is consistent, as far as possible, with the HRA.<sup>40</sup>

### *Comment*

At this stage, the jury is out on the status of conduct and remedies under the HRA. Some commentators suggest there is scope for the implication of new remedies. Both Evans and McKinnon cite *Baigent's* case, the decision of the New Zealand Court of Appeal in which a remedy was implied into the Bill of Rights Act.<sup>41</sup> However, there may be good reason to be optimistic about the capacity of the HRA to deal with conduct and provide remedies through the interpretive provision.

As noted above, the 'interpretive provision' is a key aspect of the dialogue model. Subsection 30(1) states that '[i]n working out the meaning of a ... law, an interpretation that is consistent with human rights is as far as possible to be preferred'. Subsection 30(2) makes this rule subject to the 'purposive test' or the requirement that '[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.<sup>42</sup>

The precise operation and effect of the interpretive provision is largely unexplored. Some have suggested that it will have a profound impact on statutory interpretation.

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<sup>39</sup> Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 4.

<sup>40</sup> Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 5.

<sup>41</sup> *Simpson v Attorney-General* [1994] 3 NZLR 667.

<sup>42</sup> *Legislation Act 2001*, section 139.

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Others have suggested that it will only reinforce ordinary common law principles.<sup>43</sup> Still others have suggested that it will have,<sup>44</sup> or may be given,<sup>45</sup> a limited operation.

As a minimum, it requires courts, tribunals and decision makers, where possible, to adopt a human rights consistent interpretation of ACT laws. Where two interpretations equally serve the purpose of a statute, the human rights interpretation must be preferred. But, where a human rights interpretation is in conflict with an interpretation that best achieves the purpose of another statute, the latter will prevail.

The interpretive provision may provide an effective mechanism for the enforcement of human rights in the majority of cases involving claims against the Government. This is because for every link with a statute, there is a link with human rights:

Any existing legislation can use human rights arguments, whether in criminal trials, private torts cases or challenges to government decisions, such as under the *Administrative Decisions (Judicial Review) Act 1989*.<sup>46</sup>

That link provides the basis for the operation of existing remedies:

[A]lthough the Act does not create a new cause of action, it could be utilised as an adjunct to existing causes of action, for example a claim for review of an administrative decision based on an interpretation of legislation inconsistent with human rights, or, possibly, in a claim for breach of statutory duty.<sup>47</sup>

In this way, the existing legal machinery, and public law remedies in particular, may provide an effective mechanism for dealing with the conduct of public authorities.

At the same time, there are inherent limits in the scope of these substitute remedies.

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<sup>43</sup> Judith Potter & Richard Elkins, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective', 12 *Journal of Judicial Administration* (2002) 85, at p 91.

<sup>44</sup> Peter Bayne, legal advisor to the Standing Committee on Legal Affairs, has noted that it will have limited impact where the statute authorises a breach of human rights expressly, by virtue of its unambiguous language, or implicitly, by virtue of its underlying purpose: Legislative Assembly, Standing Committee on Legal Affairs, *Scrutiny Report No 11*, 20 June 2005, at p 9.

<sup>45</sup> Professor George Williams has suggested that '[w]e could expect the Australian judiciary... to be generally circumspect in interpreting a Bill of Rights': G. Williams, *A Bill of Rights for Australia*, UNSW Press, Sydney, 2000, at p 48.

<sup>46</sup> Dr Helen Watchirs, 'Review of the first year of operation of the *Human Rights Act 2004*', *Democratic Audit of Australia*.

<sup>47</sup> Gabrielle McKinnon, 'Strengthening the *ACT Human Rights Act 2004*', paper presented to the Human Rights Office Community Forum, 1 July 2005, p 3.

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The interpretive provision only affects the exercise of powers conferred by statute. The approach will be limited 'when the executive acts outside statutory powers',<sup>48</sup> whether in its unique capacity as government or in its capacity as an ordinary person:

In the ACT the issue of rights abuse is more likely to arise in the context of the powers that the executive can exercise as a legal person – the powers as a landowner to exclude certain types of protesters from government land, for example, or the power to enter into contracts for the operation of detention facilities ... or the power as an employer to make working life intolerable for the whistleblower. Sometimes these powers are limited by statute, but many of the everyday activities of government are carried out using non-statutory powers.<sup>49</sup>

But, there are fewer and fewer areas of government that are unregulated by statute. For example, procurement is increasingly becoming subject to statutory regulation and public sector employment is heavily regulated by statute and statutory standards. And, while a detention facility contract may not be governed by human rights principles, detention practices, which require statutory support, have to be regulated.

The interpretive provision may only affect decisions made under an enactment. So, for example, one commentator has suggested 'while it may regulate government actions, it is not clear that the Act would extend to failure of government or public agencies to develop legislation or policies to positively implement human rights'.<sup>50</sup> But, a failure to take these positive efforts may often be reflected in the effects of existing decisions and the operation of the existing decision making legal framework. If that framework relies on statute, there is scope for the interpretive provisions.

The interpretive provision may suffer from any weaknesses in the existing remedies. For example, public law traditionally does not make any provision for compensation. And the focus of public law remedies is ordinarily on process rather than substance:

[T]he current state of the Australian law means that judicial review will not always provide an effective remedy for rights. The administrative law of the United Kingdom and Australia are beginning to depart from one another, with the UK focusing more on the substance of claims and Australia on process'.<sup>51</sup>

On the other hand, it has been suggested that the HRA may have a wider operation.

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<sup>48</sup> Dr Carolyn Evans, 'Human Rights Act and Administrative Law Talk', paper presented to the ANU Forum, p 2.

<sup>49</sup> Dr Carolyn Evans, 'Human Rights Act and Administrative Law Talk', paper presented to the ANU Forum, p 8.

<sup>50</sup> Gabrielle McKinnon, 'Strengthening the *ACT Human Rights Act 2004*', paper presented to the Human Rights Office Community Forum, 1 July 2005, p 2.

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Andrew Butler has argued that the rights in Part 3 of the HRA may be self-executing. He suggests that, because all statutes are binding on everyone, including the Crown, the rights in Part 3 must also be binding, independent of the machinery in the HRA. Unless public authorities are given immunity, Part 3 will govern their conduct:

[A]ll official conduct is caught by the HRA ... s 121 *Legislation Act 2001* provides the default rule that all ACT legislation binds all governments except to the extent that it expressly provides otherwise. There is nothing in the HRA that otherwise provides. In particular, nothing in Part 4 HRA suggests otherwise; all that Part 4 does is deal with specific issues in relation to the interaction of the HRA and *statutes*; it does not purport to exempt ACT officials from HRA application.<sup>52</sup>

Since then, the 'Butler view' has been given some credence by other stakeholders.<sup>53</sup> However, at this stage, the view has not been tested or supported judicially.

### ***Issues for the Review***

- Should the HRA provide that ACT government authorities must act consistently with the human rights in Part 3 of the HRA?
- Should the HRA provide a direct right of action to the courts to enforce human rights compliance by ACT government authorities?

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<sup>51</sup> Dr Carolyn Evans, 'Human Rights Act and Administrative Law Talk', paper presented to the ANU Forum, p 11.

<sup>52</sup> Andrew S Butler, 'The ACT Human Rights Act: A New Zealander's View', *Ethos*, no 94 (December 2004).

<sup>53</sup> See, for example, Peter Bayne, 'The Human Rights Act 2004 (ACT) and administrative law: A first report', *AIAL Forum*, p 6; Human Rights Office, *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005, note 56 at p 27.

## Building a Human Rights Culture

It was noted above that a long-term aim of the HRA is to build a human rights culture. This includes two related objectives. The first is to promote cultural change within the executive by ensuring that decision makers work within the internationally agreed framework of human rights standards. The second is to promote awareness within the legal profession, the community sector and the wider community of these human rights standards and the ways in which those standards may be applied effectively.

Various measures have been taken to promote this cultural change and awareness.

For example, the Department of Justice and Community Safety has developed a toolkit for public servants to assist in the development of new legislation and policy. It has also developed a formal implementation strategy to outline the roles and responsibilities of agencies in the audit of existing legislation, policy and practices. It has run Inter-Departmental Committees on the implementation strategy and on specific projects such as a strategic review of entry, search and seizure provisions. It has also funded training for judicial officers, policy officers and service delivery staff.

The Human Rights Office has been extremely proactive, consistent with its statutory role of providing education about human rights in general and the HRA in particular.<sup>54</sup> It has provided education and training activities including workshops, seminars and discussion forums and it holds biannual Human Rights Community Forums to discuss issues relating to human rights and the community and government sectors.

The Human Rights Office also produces a wide range of publications on its website.<sup>55</sup>

In addition, there have been a number of issue-specific conferences in the ACT. These include: a national forum on victims' rights organised by the ACT Victims of Crime Coordinator and the Human Rights Office,<sup>56</sup> a forum for awareness of human

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<sup>54</sup> *Human Rights Act*, paragraph 41(1)(b).

<sup>55</sup> These can be found at <http://www.hro.act.gov.au/publications.html>.

<sup>56</sup> *Peaceful Coexistence: Victims' Rights in a Human Rights Framework*, Canberra, 16 November 2005

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rights in a correctional context held by ACT Corrective Services;<sup>57</sup> and a mental health service provision forum held by ACT Health and the Human Rights Office.<sup>58</sup>

Beyond government, work is also being done to raise awareness and discussion. For example, the Regulatory Institutions Network (RegNet) at the Australian National University in conjunction with the Gilbert and Tobin Centre of Public Law at the University of New South Wales held a forum to assess the first year of the HRA.<sup>59</sup> RegNet, with the Department's support, has also established a research project to assess the impact of the HRA over its first five years. As part of that project, RegNet has developed a website which incorporates a case database and news service.<sup>60</sup>

### ***Issues for the Review***

- How effective are existing methods in raising awareness of human rights?
- What other methods might be used to improve awareness?
- Are there particular methods that would increase the engagement of:
  - the legal profession?
  - the community sector?
  - the wider community?

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<sup>57</sup> *Developing a Human Rights Framework for Corrective Services*, Canberra, 2 July 2004.

<sup>58</sup> *How does the ACT Human Rights Act 2004 impact on Mental Health treatment and care?*, Canberra, 21 June 2005

<sup>59</sup> *Assessing the First Year of the ACT Human Rights Act*, Canberra, 29 June 2005.

<sup>60</sup> This can be found at <http://acthra.anu.edu.au/index.html>.

## Economic, Social and Cultural Rights

Under section 43(2)(a) of the HRA, the twelve-month review must include consideration of whether, taking into consideration the 1st year of operation of this Act, rights under the ICESCR should be included in the HRA as human rights.

As noted, the Consultative Committee recommended the incorporation of civil and political rights under the ICCPR along with economic, social and cultural rights under the ICESCR.

The rights contained in the ICESCR are essentially the rights to:

- an adequate standard of living, (including adequate food, clothing and housing);
- the highest attainable standard of health;
- take part in the cultural life of the ACT;
- education; and
- work (including just and favourable conditions of work).

Ultimately, the Government decided not to expressly incorporate ICESCR rights into the HRA. The decision not to expressly incorporate economic, social and cultural rights was perhaps the most significant departure from the Consultative Committee Model Bill.

To understand this decision, it is necessary to examine its history and context.

### ***The Consultative Committee***

The Consultative Committee recommended that economic, social and cultural rights be recognised in the same way as civil and political rights. It did not canvass alternative frameworks:

The Consultative Committee believes that the rights set out in the two major human rights treaties to which Australia is a party, the ICESCR and the ICCPR, should be protected by the *Human Rights Act*. It strongly supports the inclusion of economic, social and cultural rights in the *Human Rights Act* and believes that the perceived difficulties with the implementation of such rights are over-stated.<sup>61</sup>

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<sup>61</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, Summary at p 109.

## Indivisibility

Generally, it sought to reject perceived distinctions between the ICESCR and ICCPR:

The Consultative Committee hopes that, by identifying the deep connections between the two Covenants in the Human Rights Act, the simplistic distinctions often drawn between economic, social and cultural rights on the one hand and civil and political rights on the other will be seen to have no substance.<sup>62</sup>

In particular, the Consultative Committee sought to dispel as artificial the traditional notion that civil and political rights are 'negative' and economic, social and cultural rights are 'positive'. Broadly, this notion is that civil and political rights essentially operate to restrain government action where a decision to act would breach human rights, whereas economic, social and cultural rights compel government action where a failure to act would lead to human rights breaches. The Committee recognised that many civil and political rights are intertwined with economic, social and cultural rights, that many civil and political rights require positive action for their fulfilment and that, in general, *all* categories of rights are 'universal', 'inter-dependent', 'inter-related' and 'indivisible'.<sup>63</sup>

The Committee then sought to address the traditional concerns with respect to economic, social and cultural rights relating to enforceability, justiciability and financial implications.

## Enforcement

The Committee canvassed two alternative approaches to enforcement:

The first alternative clearly recognises the different obligation of implementation attaching to rights set out in the ICESCR compared to those in the ICCPR. It provides that ICESCR rights are subject to 'progressive realisation' and that, in applying such rights, a court or tribunal is required to balance the nature of the benefit from observing such human rights with the fiscal cost involved. In other words, the obligation on the ACT government to protect economic, social and cultural rights is one to take reasonable measures within its available resources to realise the rights progressively. The second alternative does not explicitly distinguish between economic, social and cultural rights on the one hand and civil and political rights on the other. It provides that limitations may be placed on rights if the limitations are reasonable and justifiable taking into account all relevant factors including the nature of the right, the importance of the purpose of

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<sup>62</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [5.32].

<sup>63</sup> Vienna Declaration, [UN Doc. A/CONF.157/24](#) at [5] & [8].



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the limitations, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the limitation's purpose [that is, rights should be subject to a 'reasonable limits' clause].<sup>64</sup>

In keeping with the view that all rights are indivisible, the Committee expressed a preference for a 'reasonable limits' clause rather than 'progressive realisation'. This 'reasonable limits' clause was ultimately incorporated into section 28 of the HRA.

### **Justiciability**

The Committee rejected the view that economic, social and cultural rights were not justiciable (or beyond the competence of the courts given the nature of the issues at stake):

Another objection often made to protecting economic and social rights in national legal systems is that they are not justiciable in the same way as civil and political rights and would require courts to become embroiled in political and economic issues. For example, [in the early South African cases] [i]t was argued that these rights were not 'universally accepted fundamental rights' and that they would require the judiciary to decide on budgetary matters thus breaching the principle of separation of legislative, executive and judicial powers.

The Committee considered that the South African Constitutional Court had 'rejected this challenge', making orders in relation to the consistency of government policies and measures with economic, social and cultural rights without becoming 'embroiled in political and economic issues' or 'breaching the principle of separation of powers'.

### **Financial Implications**

The Committee rejected the idea that economic, social and cultural rights would impose significant costs on government and the community that were beyond the means of the ACT. First, the draft bill recognised that the obligation to implement economic, social and cultural rights was 'not absolute, and may be limited in reasonable ways to take account of budgetary realities'. Second, the draft bill gave the Supreme Court complete flexibility in terms of issuing remedies that might have no financial impact. Third, the draft bill acknowledged the primacy of the Legislative Assembly in the 'dialogue model'.

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<sup>64</sup> Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [5.46].

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### **Government Response**

Broadly, the Government accepted the Consultative Committee's recommendations. In particular, it accepted 'in principle' the recommendation that economic, social and cultural rights 'should be given the same status as civil and political rights' but it decided not to incorporate them directly into law 'having considered the unique position of the ACT':

At this stage we have decided to take a more cautious approach because of the constitutional and service delivery arrangements in our jurisdiction. There are features of Territory Government that are unique and which limit our capacity to have full and total control over such matters ... The ACT is also committed to a number of inter-governmental agreements. These agreements require the ACT Government to act in a particular way or to use a certain set of guidelines in determining how services are to be provided ... In addition, some services are provided by Commonwealth agencies [and are not amenable to the HRA].<sup>65</sup>

The Government accepted most of the points raised by the Consultative Committee. It accepted that 'all categories of human rights are universal, inter-dependent, inter-related and indivisible' but noted that 'implementation of some of the economic, social and cultural rights presents more of a challenge than the civil and political rights'.

Despite the assurances of the Consultative Committee, the Government expressed concern that, notwithstanding the flexibility in a 'progressive realisation' test, economic, social and cultural rights might require 'a high level of government resource commitment' and entail 'judgments about whether or not resources have been appropriately allocated'.

The concern was not that economic, social and cultural rights would impose additional costs, but that '[i]n a situation of limited resources, a successful claim by one person that a right has been violated is likely to result in resources being drawn away from other[s]'. Moreover, while civil and political rights were 'easily compatible with general common law principles', there was no mature comparative domestic jurisprudence on economic, social and cultural rights and there was no 'objective indicator of when they are achieved':

While the Government supports the proposed human rights in principle, there is concern that application of policies to individual situations where there is a difficult question of allocation of scarce resources may expose the Government to liability. As there are few countries where the ICESCR rights are enshrined in

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<sup>65</sup> Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

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law, there is little guidance available in the form of decided cases about the extent of that liability. Acknowledging that exposure to a possible large liability for costs in relation to those rights would result in resources being diverted from service provision, the Government will reserve the economic, social and cultural rights from inclusion in the Human Rights Act at this time.<sup>66</sup>

'Nevertheless,' the Chief Minister noted, 'this does not mean that we do not consider these rights to be just as important as civil and political rights'. He indicated he was 'committed to incorporating economic, social and cultural rights into Government policy and planning and will explore ways in which this can be achieved':

It is considered that the economic, social and cultural rights are not so easily adapted as the civil and political rights to protection through the court process and are better recognised and protected through inclusion in a foundation planning document such as the ACT Social Plan.<sup>67</sup>

In this way, the Government conveyed its intention to postpone the question of expressly incorporating economic, social and cultural rights into the HRA. However, it left open the possibility that economic, social and cultural rights could be subject to an alternative framework.

### **Other Jurisdictions**

A number of jurisdictions have incorporated a range of economic, social and cultural rights into the domestic sphere. Various implementation methods have been used:

- direct enforceability through justiciable rights (South Africa),
- indirect enforceability through directive principles for public policy (India), and
- indirect protection through civil and political rights (Canada and Europe).

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<sup>66</sup> Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

<sup>67</sup> Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

## ***Direct Enforceability***

### *South Africa*

The South African Constitution 1996 protects a discrete set of economic, social and cultural rights including the right to housing,<sup>68</sup> rights to health care, food, water and social security,<sup>69</sup> the right to education,<sup>70</sup> and environmental rights.<sup>71</sup>

The Constitution is a self-consciously transformative document. As one commentator has observed, '[u]nlike many classic liberal constitutions, the primary concern is not to restrain state power, but to facilitate a fundamental change in unjust political, economic and social relations'.<sup>72</sup> It is acutely conscious of the historical context and the deep inequalities that motivated the desire to recognise economic, social and cultural rights. For example, the Preamble to the Constitution identifies its purpose as being to:

[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights, [l]ay the foundations for a democratic and open society ... [i]mprove the quality of life of all citizens and free the potential of each person, and [b]uild a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

This split from traditional constitutional approaches has been noted by the courts:

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.<sup>73</sup>

All of the rights protected by the Constitution are subject to a general 'reasonable limits' clause, which operates in a similar way to section 28 of the HRA.<sup>74</sup>

In addition, the rights (and their enforcement) can be divided into three main types.<sup>75</sup>

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<sup>68</sup> Article 26.

<sup>69</sup> Article 27.

<sup>70</sup> Article 29.

<sup>71</sup> Article 24.

<sup>72</sup> Sandra Liebenberg, 'Needs, rights and transformation: Adjudicating social rights in South Africa', *ESR Review*, November 2005, Vol 6 No 4, p 3.

<sup>73</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at [262].

<sup>74</sup> Article 36.

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- The first category protects the right of everyone to 'have access to' adequate housing, health care, food, water and social security.<sup>76</sup> They are subject to the 'progressive realization' clause, requiring the government to adopt 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the relevant] right'.
- The second category consists of children's economic, social and cultural rights;<sup>77</sup> the right of everyone to basic education, including adult basic education;<sup>78</sup> and the economic, social and cultural rights of detained persons, including sentenced prisoners.<sup>79</sup> These rights are not subject to an internal 'reasonable limits' clause. That is, they are not qualified by references to 'progressive realisation' and resource constraints.
- The third category of rights prohibits certain kinds of conduct by public and private authorities, including prohibition of arbitrary or non-judicial eviction<sup>80</sup> and refusal of emergency medical treatment.<sup>81</sup>

The Bill of Rights in the Constitution has its own application and interpretive clauses. The rights bind all arms of government, and private individuals and entities to the extent applicable taking into account the nature of the right and its relevant duties.<sup>82</sup> Any person, including third parties, may approach a competent court alleging that a right has been 'infringed or threatened' and the court may grant 'appropriate relief'.<sup>83</sup> When interpreting the rights, a court is required to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.<sup>84</sup> When interpreting legislation or developing the common law, a court is required to 'promote the spirit, purport and objects of the Bill of Rights'.<sup>85</sup>

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<sup>75</sup> Sandra Liebenberg, 'The protection of economic and social rights in domestic legal systems' in C.Krause et al (eds), *Economic, Social and Cultural Rights: A Textbook* (2<sup>nd</sup> edition), Martinus Nijhoff Publishers.

<sup>76</sup> Articles 26(1) and 27(1).

<sup>77</sup> Articles 28(1)(c), 28(1)(d), 28(1)(e).

<sup>78</sup> Article 29(1)(a).

<sup>79</sup> Article 35(2)(e).

<sup>80</sup> Article 26(3).

<sup>81</sup> Article 27(3).

<sup>82</sup> Article 8.

<sup>83</sup> Article 38.

<sup>84</sup> Article 39(1)(a).

<sup>85</sup> Article 39(2).

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In the past decade, a body of case law has developed on these various principles. From the outset, courts accepted that economic, social and cultural rights would be 'justiciable'.

In the very early judgments they rejected the idea that these rights were beyond the competence of a court because enforcement could have 'budgetary implications':

[W]e are of the view that these rights are, at least to some extent, justiciable ... [M]any of the civil and political rights entrenched in the [Constitution] will give rise to similar budgetary implications without compromising their justiciability.<sup>86</sup> The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.<sup>87</sup>

So, it was thought, the process would not conflict with the separation of powers.

The courts have been cautious about their capacity to influence budgets and policies. Generally, they have shown a reluctance to disrupt high policy or political decisions:

The provincial administration which is responsible for health services ... has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.<sup>88</sup>

In deference to the other arms of government, the courts focus on reasonableness:

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.<sup>89</sup>

This 'constitutional balance' is at the heart of the 'reasonableness review' process:

This standard strikes an appropriate balance between the need to ensure that constitutional obligations are met, on the one hand, and recognition for the fact

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<sup>86</sup> For example, the courts have affirmed the right of prisoners to vote in elections, and obliged the government to make all reasonable arrangements necessary to enable them to exercise this right: *August and another v. Electoral Commission and others*, 1999 (4) BCLR 363 (CC).

<sup>87</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, at [77] and [78].

<sup>88</sup> *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17, per Chaskalson P, at [29].

<sup>89</sup> *Minister of Health and others v Treatment Action Campaign and others* [2002] ZACC 15 at [38].

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that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances.<sup>90</sup>

However, it does not stop the court from adjudicating on policies where necessary:

A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right ... has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make ... a court may also 'make any order that is just and equitable'.<sup>91</sup>

As with the proportionality assessment in section 28 of the HRA, a body of case law has developed on the 'reasonableness review' process undertaken by the courts. A key aspect of the process is that 'the socio-economic rights, and the corresponding obligations of the state, [are] interpreted in their social and historical context'.<sup>92</sup> In other words, there is a methodology attached to the 'reasonableness review' which is overtly sensitive to the broader environment in which the claim is made. So, while courts may 'evaluate policy', and while decisions may have 'budgetary implications', outcomes are anchored in the underlying socio-economic environment.

Another feature of the 'reasonable limits' clause in the South African Constitution is its application to 'minimum core' obligations or to the particularized negative rights. As noted above, courts have accepted from the outset that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'. This approach has had special significance in relation to the right of access to housing.<sup>93</sup> In effect, courts are prepared to impose 'minimum core' obligations on the state in relation to actions that have the effect of impairing an existing enjoyment of a right.

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<sup>90</sup> *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005(2) SA 359 at [87]-[88].

<sup>91</sup> *Treatment Action Campaign* at [101].

<sup>92</sup> *Treatment Action Campaign* at [24].

<sup>93</sup> 'Although [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing': *Government of RSA and others v Grootboom and others* [2000] ZACC 19 [33]; '[A]t the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1)': *Jaftha and others v Van Rooyen and others* 2005 (2) SA 140 (CC) per Mokgoro J at [34].

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### *Other examples*

Other jurisdictions have incorporated at least one justiciable economic, social and cultural right into the domestic sphere. For example, the right to education is recognised in the UK *Human Rights Act 1998*,<sup>94</sup> and is 'without difficulty guaranteed and applied by the UK courts, if in a relatively circumscribed and qualified form'.<sup>95</sup>

### ***Indirect Enforceability***

#### *India*

Like the South African Constitution, the Indian Constitution protects economic, social and cultural rights such as the right to education,<sup>96</sup> rights to health and a standard of living,<sup>97</sup> and environmental rights<sup>98</sup>. However, unlike South Africa, these rights are not justiciable. They are included as 'directive principles', which the executive and legislative arms of government have a duty to apply when making law.<sup>99</sup> As 'directive principles of state policy', they are guiding, but not enforceable by the courts:

The [directive principles] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.<sup>100</sup>

This approach to economic, social and cultural rights is not applied to civil and political rights. These 'fundamental rights', which include the right to life<sup>101</sup> and the right to equality,<sup>102</sup> are justiciable. The Constitution prohibits laws that are

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<sup>94</sup> The right to education is guaranteed in Article 2 of the first protocol to the European Convention on Human Rights and is incorporated into UK law by the *Human Rights Act 1998*. See also Section 23 of the Canadian Charter of Rights and Freedoms which protects minority language educational rights.

<sup>95</sup> Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 12.

<sup>96</sup> Article 45.

<sup>97</sup> Article 47.

<sup>98</sup> Article 48A.

<sup>99</sup> Article 37. A similar approach is taken under the Sri Lankan Constitution: 'The [directive principles and fundamental duties] do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.' (Article 29). Other countries which have adopted the directive principles scheme include Ghana, Namibia, Uganda, Nigeria, and Papua New Guinea.

<sup>100</sup> Article 37.

<sup>101</sup> Article 21.

<sup>102</sup> Article 14.



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inconsistent with these rights<sup>103</sup> and it guarantees a full suite of remedies for the enforcement of those rights.<sup>104</sup> These remedies bind all arms of government: the judiciary, executive and legislature.<sup>105</sup>

But, the courts have said that, in some instances, civil and political rights must be interpreted in light of these economic, social and cultural principles (as a consequence of the principle that these rights are indivisible and interdependent). Accordingly, these economic, social and cultural principles should, if possible, be read into civil and political rights:

The courts have also used the directive principles to develop case law around the fundamental right to life allowing an implied right to a livelihood,<sup>106</sup> the basic necessities of life such as adequate nutrition, clothing, reading facilities,<sup>107</sup> and the rights to shelter,<sup>108</sup> health<sup>109</sup> and education.<sup>110</sup> However, they have also been cautious about budgetary and policy implications. Instead, the focus has been on creating a basis for protecting the objectives in the directive principles from threats by requiring due process before they can be denied.

### ***Indirect Protection***

Some jurisdictions have sought to protect economic, social and cultural rights indirectly through the interpretation and application of an existing civil and political rights protection framework. In particular, civil and political rights such as the right to equality and non-discrimination, and the right to due process (fair trial) are emerging as potentially effective means for protecting economic, social and cultural rights.

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<sup>103</sup> Article 13.

<sup>104</sup> Article 32.

<sup>105</sup> Article 144.

<sup>106</sup> *Tellis & other v. Bombay Municipal Corporation and others*, (1987) LRC (Const) 351 (the so-called 'pavement-dwellers' case). Articles 39(a) and 41 oblige the state to direct its policy towards securing the right to an adequate means of livelihood and the right to work.

<sup>107</sup> *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, (1981) 2 SCR 516 at 529.

<sup>108</sup> *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & others*, (1997) AIR SC 152.

<sup>109</sup> *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426 (right to emergency medical treatment).

<sup>110</sup> *Jain v. State of Karnataka*, (1992) 3 SCC 666; *Krishnan v. State of Andhra Pradesh & other*, (1993) 4 LRC 234.

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### *Canada*

The courts have applied the 'right to equal protection and benefit of the law without discrimination'<sup>111</sup> to social justice objectives even though the Canadian Constitution does not include economic, social and cultural rights:

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public ... [therefore] a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of Article 15 [of the Canadian Charter of Rights and Freedoms].<sup>112</sup>

The courts held the failure to provide interpretation services deprived deaf patients of equal benefit of health care services.<sup>113</sup> This failure could not be justified as a reasonable limitation as there was no evidence that the type of accommodation sought by the deaf patients in health services would 'unduly strain the fiscal resources'<sup>114</sup> of the government.

Nevertheless, the courts generally have been cautious about their capacity to adopt novel interpretations to influence budgets and policies.<sup>115</sup>

In 2000, an expert panel in Canada considered the direct enforcement of economic, social and cultural rights in the context of a broader review of the *Human Rights Act 1977*.<sup>116</sup> The panel concluded that direct enforcement would require a 'substantial extension' of the existing machinery under the Act and was therefore not feasible at the time.

The panel indicated it was 'concerned about the breadth of the issues — legal, constitutional and political — that would be raised by the addition of social and economic rights to the Act that were enforceable by [Human Rights] Tribunal

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<sup>111</sup> Article 15 of the Canadian Charter of Rights and Freedoms, which is similar to Section 8 HRA.

<sup>112</sup> *Eldridge v AG of British Columbia* [1997] 3 BHRC 137, para 78.

<sup>113</sup> *Eldridge v AG of British Columbia* [1997] 3 BHRC 137.

<sup>114</sup> *Eldridge v AG of British Columbia* [1997] 3 BHRC 137, para 92.

<sup>115</sup> *Gosselin v Quebec (Attorney General)* [2002] 4 S.C.R. 429. In this case, the court considered whether the right to an adequate level of social assistance falls within the scope of the right to life, liberty and security in Article 7 of the Charter. The court found that the differential welfare regulation did not breach the equality provisions of the Charter or deprive the claimant of the Charter right to life, liberty and security of the person, citing 'insufficient evidence' to support adopting such a 'novel' interpretation to impose a positive obligation on the government.

## Review of the *Human Rights Act 2004*

order'.<sup>117</sup> Those concerns included a lack of clarity about which rights should be considered, which entities should be subject to those rights, the language and operation of the appropriate 'reasonable limits' test, the wide distribution of federal, provincial and territorial responsibilities, and the capacity of orders to affect budgets and policies.

### *The European Court of Human Rights*

The court has recognised the indivisibility and interdependency of civil, political, economic, social and cultural rights:

Whilst the [European Convention on Human Rights] sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention<sup>118</sup>

It has held a case of environmental damage and accompanying health problems to be a violation of the ECHR right to a private and family life and applied economic, social and cultural rights to restrict the scope of the ECHR right of property.<sup>119</sup> It also rejected a landlord's challenge to rent control legislation on the basis that the government in question was protecting the right to housing.<sup>120</sup>

### ***Other Jurisdictions***

#### *Northern Ireland*

In 2004, the Northern Ireland Human Rights Commission considered similar issues in the context of a consultation process to develop a Northern Ireland Bill of Rights.

The process highlighted a similar range of issues to those discussed above:

The responses that opposed the inclusion of socio-economic rights highlighted three major concerns: that decisions on the allocation of resources for health,

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<sup>116</sup> The *Canadian Human Rights Act 1977* is anti-discrimination legislation akin to the *ACT Discrimination Act 1991*.

<sup>117</sup> Canada, Department of Justice, *Report of the Canadian Human Rights Act Review Panel*, June 2000, p 114.

<sup>118</sup> *Airey case*, Series A No 32, October 9 1979.

<sup>119</sup> *Lopez Ostra v Spain* (1994) 20 EHRR 277; See also *Fadeyeva v Russia* (application no.55723/00, Chamber Judgement delivered 9 June 2005).

<sup>120</sup> *Mellacher v Austria*, Series A No 169, December 19 1989

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housing and the environment are primarily political and cannot in practice be decided by judges; that there can be no justification for granting rights on such matters to people in Northern Ireland when they are not granted in the rest of the United Kingdom or (except as noted below) in the Republic of Ireland; and from a slightly different perspective that including necessarily limited and imprecise rights of this kind may raise expectations that cannot in practice be delivered. The main arguments in favour of their inclusion have been, first, that not to do so would be in conflict with current international standards and experience and, second, that the overwhelming body of responses and the public opinion surveys carried out for the Commission have supported provisions in this area ... But ... from a slightly different perspective there has been some concern that the ... initial proposals would not give directly enforceable rights to those affected..<sup>121</sup>

The Commission canvassed three options:

The first is to include provisions in the Bill of Rights guaranteeing that essential minimum standards in this area will be directly enforceable through the courts. The second is to include provisions requiring a progressive realisation of a much broader set of social, economic and environmental rights, relying not primarily on implementation through the courts. The third possibility is to adopt a mixed approach – insisting that minimum standards be directly enforceable but requiring other standards to be achieved progressively over time in other ways.<sup>122</sup>

Other commentators have distinguished 'minimum' and 'substantive enforcement':

The minimum enforcement model seeks to protect due process rights in the social and economic rights sphere. It does not guarantee formal rights explicitly defining social and economic rights. We envisage this model operating by means of the courts having legal capacity to decide whether access to particular services provided by the state to citizens and others, is fair, impartial, non-discriminatory and subject to procedural protections (such as a right to appeal).<sup>123</sup>

The substantive enforcement model seeks to define and enforce a set of social and economic rights protections ... [Each existing example of such a model] tends to demonstrate a highly selective element--generally related to the particular social and political history of the constitution-making process.<sup>124</sup>

They compared these approaches with a 'programmatic response':

A programmatic response requires government to tackle the issue of social and economic rights through a pro-active development of strategies, which serve to embed social and economic rights in policy and practice ... A programmatic approach does not rely exclusively on legal remedies but operates to shape how

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<sup>121</sup> Northern Ireland Human Rights Commission, *Progressing a Bill of Rights for Northern Ireland: An Update*, April 2004 p 14.

<sup>122</sup> Northern Ireland Human Rights Commission, *Progressing a Bill of Rights for Northern Ireland: An Update*, April 2004 p 15.

<sup>123</sup> Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', *E.H.R.L.R.* 2004, 2, 158-180, at p 162.

<sup>124</sup> Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', *E.H.R.L.R.* 2004, 2, 158-180, at p 164.

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legislation, policy and practice are developed and implemented. Programmatic rights [are] a set of legal and political objectives, grounded in and supporting legally enforceable rights, which require appropriate policies, programmes and measures to ensure their promotion, access, enforcement and effectiveness.<sup>125</sup>

### *United Kingdom*

In 2004 the United Kingdom Joint Committee on Human Rights considered the case for giving 'further legal effect' to economic, social and cultural rights in the United Kingdom.

The Committee considered the standard objections in relation to justiciability and the capacity of the courts to make orders having a direct impact on budgets and policies. It observed that 'at least some element' of every socio-economic right was 'capable of judicial application' but recognised objections based on the separation of powers:

[C]oncerns about the potential of economic and social rights to undermine the role of government and Parliament raise important issues that are not to be dismissed lightly, and which have been arisen in other jurisdictions where economic, social and cultural rights have been enforced. It is Parliament and government which must retain the primary responsibility for economic and social policy, an area where the courts lack substantial expertise and have limited institutional authority. This principle must ... condition the scope of any extension of the powers of the courts in relation to economic, social and cultural rights.<sup>126</sup>

So, while it acknowledged that some models for incorporating economic, social and cultural rights 'would have the potential to interfere with economic and social policy development by government and Parliament in a way which would be inappropriate and undesirable', the Committee suggested 'it is also possible that incorporation of these rights could, with appropriate safeguards, be achieved without such constitutional impropriety'.

It was attracted to the South African model on the basis that the process of 'reasonableness review' seemed to assimilate into existing public law concepts:

[T]he South African approach to the protection of economic, social and cultural rights is not radically different from that of UK public law. It preserves the existing principles of judicial review of executive action, but in the context of an extended set of standards (of socio-economic rights) against which reasonableness and non-discriminatory impact of that action is to be judged. It allows the courts to

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<sup>125</sup> Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', *E.H.R.L.R.* 2004, 2, 158-180, at p 166.

<sup>126</sup> Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003-04*, p 25-26.

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undertake scrutiny of economic, social and cultural rights protection, whilst confining this scrutiny to matters within the courts' institutional competence.<sup>127</sup>

The Committee concluded that the case for incorporation merited further attention. 'Any such measure,' the Committee said, 'should recognise the limits of the courts' institutional competence in relation to rights that are progressively realised, and should limit judicial scrutiny to grounds of reasonableness and non-discrimination'.<sup>128</sup>

Permitting the courts to adjudicate on ... rights along principles of non-discrimination and reasonableness of decision-making would entail considerably less significant re-allocation of resources than permitting the courts to assess, for example, adequate minimum levels of rights to adequate housing or benefits.

In the medium term, the Committee made other suggestions for incorporation:

We .. recommend that, in the preparation of legislation, government departments should look beyond the range of the Convention rights to the wider international obligations which the UK has accepted in the human rights field. The examination of proposed legislation against these standards should be made explicit in the explanatory notes to Bills ... More widely, we recommend that attention to the Covenant rights should be reinvigorated throughout the public sector. ... The government ... needs to promote the Covenant rights as a set of positive guarantees and aspirations—as a standard under which the endeavours of Parliament, the government, public authorities and civil society can unite.<sup>129</sup>

### ***Issues for the Review***

- Should decisions by courts on economic, social and cultural rights be able to:
  - directly impact on budgets?
  - directly impact on policies?
- Is there a set of economic, social and cultural rights that has a stronger case for protection:
  - right to education?
  - right to housing?
  - right to health?
- Should economic, social and cultural rights be subject to the existing dialogue model?
- Should economic, social and cultural rights be subject to a progressive realisation requirement in legislation?
- Is there a stronger argument for incorporation of minimum standards which do not require action, but prevent action that impinges on economic, social and cultural rights?

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<sup>127</sup> Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 26.

<sup>128</sup> Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 27.

<sup>129</sup> Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 57.

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- Should these rights be expressed as directive principles of public policy?
- Should they be subject to other public reporting and accountability mechanisms?
- Is the process of reasonableness review in South Africa consistent with existing principles of judicial review and the institutional competence of the courts?
- How would the protection of economic, social and cultural rights integrate into the existing HRA, given it does not apply directly to public authorities or create special remedies?
- How far can economic, social and cultural rights be protected through the existing rights in the HRA?
- Would protection of economic, social and cultural rights require changes in existing legal mechanisms, such as provision for public interest litigation?

## Environment-Related Human Rights

**Under section 43(2)(b) of the HRA, the twelve-month review must include consideration of whether environment-related human rights would be better protected if there was statutory oversight of their operation by an expert in environment protection.**

As noted above, the twelve-month review requirement partly reflects concern expressed by the ACT Greens about a departure from the Model Bill on the issue of economic, social and cultural rights. Allied to its concern over economic, social and cultural rights was a concern over environmental rights:

The other thing that I am disappointed about is the lack of reference in the committee's report to environment and to [environmental rights in the Bill] ...<sup>130</sup>

While international human rights treaties generally recognise the importance of environmental protection,<sup>131</sup> there is, as yet, no binding human right to a healthy environment in international law.<sup>132</sup> However, there is increasing recognition that the protection of human rights and the protection of the environment are interdependent and interrelated, and that civil, political, economic, social and cultural rights can be violated as a result of environmental degradation. In particular, civil and political rights such as the rights to life<sup>133</sup> and privacy,<sup>134</sup> and economic, social and cultural

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<sup>130</sup> Kerry Tucker MLA, Legislative Assembly, *Hansard*, 25/11/03, p 4581.

<sup>131</sup> For example, the Convention on the Rights of the Child refers to aspects of environmental protection in respect to the child's right to health.

<sup>132</sup> In contrast, express recognition of the right to a healthy environment can be found in the domestic law of various countries such as South Africa, France, Costa Rica, Argentina, Chile, Ecuador, and the Philippines.

<sup>133</sup> For example, in *Oneriyildiz v. Turkey* (Chamber Judgement delivered November 30, 2004), the European Court of Human Rights found that the government in question had violated the applicant's right to life by failing to prevent the deaths caused by a methane explosion at a municipal waste dump.

<sup>134</sup> For example, in *Lopez Ostra v Spain* (1994) 20 EHRR 277, the European Court of Human Rights held that environmental pollution emitted by a waste treatment plant constituted a breach of the right to a private and family life (Art 8 ECHR). In *Fadeyeva v Russia* (application no.55723/00, Chamber Judgement delivered 9 June 2005), the Court held that the government in question had violated the applicant's right to a private and family life because it had failed to design or apply effective measures to protect residents from excessive toxic emissions generated by a steel-plant. In *Guerra v Italy* (1998) 26 EHRR 357, the Court found that not only do governments have the obligation to prevent environmental pollution and hazards but also where the risks to health are severe, they are under the obligation to provide information to the affected individuals. See also UK case law: *Dennis v Ministry of Defence* [2003] Env LR 34 (successful reliance on the ECHR right to a private and family life for a claim relating to aircraft noise) and *Marcic v Thames Water Utilities Ltd* [2004] 2 A.C. 42 (public authorities liable for breaching a customer's right to a private and family life by failing to prevent a sewer from repeatedly flooding).



rights such as the right to health<sup>135</sup> can be adversely affected by failures to protect the environment.

### ***Consultative Committee and Government Response***

The Consultative Committee took account of the arguments in favour of environmental rights. But it did not recommend the inclusion of a substantive right to a healthy environment. The general thesis of its Report was that *all* categories of rights are 'universal', 'inter-dependent', 'inter-related' and 'indivisible'. An implicit aspect of that thesis is that environmental-related rights and interests would find expression or protection through their nexus with other rights including civil and political rights.

For similar reasons, the Government did not support incorporating a free-standing environmental right directly into law. It considered that many of the civil and political rights protected in the Human Rights Act would apply to environmental matters.<sup>136</sup>

While the ACT Greens favoured express recognition of environmental rights,<sup>137</sup> it, nevertheless, accepted that environmental interests could be protected (to a greater or lesser degree) within the framework of established human rights.<sup>138</sup>

Ultimately, the issue is expressed in the review requirement as a consideration of 'whether environment-related human rights would be better protected through statutory oversight of their operation by an expert in environment protection'.

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<sup>135</sup> For example, the UN Committee on Economic, Social and Cultural Rights has asserted that:

*The right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinates of health, such as . . . a healthy environment.* (General Comment 14)

<sup>136</sup> For example, the rights to equality (s8), life (s9), protection of the family and children (s11), privacy (s12), peaceful assembly and association (s15), freedom of expression (s16), public life (s 17), fair trial (s 21) and minority rights (s27).

<sup>137</sup> Kerry Tucker MLA, Legislative Assembly, *Hansard*, 25/11/03, p 4582.

<sup>138</sup> Kerry Tucker MLA, Legislative Assembly, *Hansard*, 02/03/04, p 453.

### ***Environment protection in the ACT***

The ACT has a range of laws that protect the environment, including:<sup>139</sup>

- *Nature Conservation Act 1980* (ACT), which provides for public notification of draft nature conservation strategies, consultation with the public on relevant criteria and guidelines for declarations about special protection status for species. The ACT Administrative Appeals Tribunal (AAT) can be asked to review decisions made by the Conservator of Flora and Fauna.
- *Land (Planning and Environment) Act 1991* (ACT), which provides for public consultation and the involvement of the Legislative Assembly in variations of the Territory Plan, and participatory environmental impact assessment procedures. The Act complements the *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) and *Planning and Land Act 2002* (ACT) which provide for the creation of a Territory planning authority responsible for the Territory Plan.
- The *Environment Protection Act 1997* (ACT) provides for public inspection of documents, prescribes a general environmental duty and specific duties to notify of actual or threatened environmental harm and the existence of contaminated land, notification and consultation about draft environment protection policies, and consultation in relation to applications for environmental authorisation.
- The *Water Resources Act 1998* (ACT) preserves the operation of civil remedies and the common law, provides for consultation in relation to the ACT Water Resource Management Plan, creates a general duty not to damage waterways, creates a right to compensation in specified circumstances, and provides for review by the ACT AAT of specified decisions made under the Act.
- The *Heritage Act 2004* (ACT) which establishes a system for the recognition, registration and conservation of natural and cultural heritage places and objects, including Aboriginal places and objects, in the ACT.

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<sup>139</sup> Summary by Dr Hanna Jaireth, *Review of the operation of the Human Rights Act 2004 (ACT) concerning environment-related human rights*, Background paper for the Human Rights Office Community Forum 'Reviewing the ACT Human Rights Act One Year On', 1 July 2005.

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Under the HRA, all public officials, statutory office holders and the judiciary have a duty to interpret these laws consistently with human rights unless the law clearly authorises an interpretation that is inconsistent with the HRA.<sup>140</sup>

### **Mechanisms for statutory oversight**

#### ***Environment Commissioner***

The *Commissioner for the Environment Act 1993* establishes the Environment Commissioner, appointed by the Minister for the Environment. The Commissioner:

- produces *State of the Environment* reports for the ACT;
- investigates complaints from the community regarding the management of the Territory's environment by the ACT Government or its agencies;
- conducts investigations directed by the Minister;
- initiates investigations into actions of government agencies where those actions have a substantial adverse impact on the Territory's environment; and
- makes recommendations for consideration by the ACT Government, and includes in its Annual Report the outcomes of those recommendations.

#### ***Assembly Committees***

##### *Standing Committee on Legal Affairs*

The HRA requires a Legislative Assembly Committee to report to the Assembly on human rights matters raised on all bills.<sup>141</sup> The Assembly's Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee) already performs this function and in practice the obligation under the HRA to report to the Assembly about human rights matters falls to that Committee.

The Committee has adopted a broad view of the notion of 'human rights issues raised by bills'. It has not restricted its consideration to the rights recognised in the

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<sup>140</sup> Section 30 of the *Human Rights Act 2004*.

<sup>141</sup> Section 38 of the *Human Rights Act 2004*

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HRA, and has 'regard to both domestic and international law in ascertaining whether a human rights issue arises'.<sup>142</sup>

Dr Hanna Jaireth has suggested that:

[The Committee's scrutiny] function, in relation to environment-related human rights arising in bills, could be shared with the Standing Committee on Planning and the Environment, following the relevant nomination by the Speaker of the Assembly pursuant to section 38(2)(a) of the HRA.<sup>143</sup>

### *Standing Committee on Planning and the Environment*

The Standing Committee on Planning and Environment examines 'matters related to planning, public works and land management, conservation and heritage, transport services, and planning, environment and ecological sustainability'. It may appoint persons with specialist knowledge, and to call for persons, papers and records.

### ***Issues for the Review***

- Are environmental-related rights sufficiently protected through existing civil and political rights in the HRA?
- Would environmental-related rights be better protected if economic, social and cultural rights were incorporated into the HRA?
- Are environmental-related rights sufficiently protected through Assembly Committee processes?
- Is there adequate oversight of environmental-related rights by the Commissioner for the Environment?

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<sup>142</sup> Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper for 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

<sup>143</sup> Dr Hanna Jaireth, *Review of the operation of the Human Rights Act 2004 (ACT) concerning environment-related human rights*, Background paper for the Human Rights Office Community Forum 'Reviewing the ACT Human Rights Act One Year On', 1 July 2005.