Towards an ACT *Human Rights Act*

Report of the
ACT Bill of Rights Consultative Committee

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Where, after all, do universal human rights begin? In small places, close to home – so close and small that they cannot be seen on any map of the world. Yet they *are* the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the large world.

Eleanor Roosevelt[*]

[*] Remarks at the United Nations, 27 March 1953, quoted in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (2001) 239-240.

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SUMMARY OF REPORT

1. After extensive community consultations, the Bill of Rights Consultative Committee considers that some form of bill of rights is appropriate and desirable in the ACT. While highly visible abuses of human rights are not commonplace in the ACT, rights are currently protected in a partial and piecemeal manner under Commonwealth and ACT law. A bill of rights would improve the protection of rights and also provide an accessible statement of the rights that are fundamental to a life of dignity and value.
2. The Committee believes the bill of rights ought to take the form of an ACT *Human Rights Act*—an ordinary piece of legislation, rather than an entrenched bill of rights or a declaration of the Legislative Assembly. The legislation should be designed to encourage a dialogue among the branches of government and the community about the protection of human rights, rather than to allow a judicial or legislative monologue on rights. While such a document would have legal force, its primary purpose would be to encourage the development of a human rights-conscious culture in ACT public life and in the community.
3. However, the dialogue about rights proposed by the Consultative Committee cannot be an open-ended one. After debate, the legislature should still be assigned the 'last say' in relation to human rights issues. The judiciary should not be able to invalidate legislation. Rather, it should be able to give its opinion that a law is incompatible with the *Human Rights Act*. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms with the *Human Rights Act*. The Committee believes that the judiciary should be able to invalidate actions of the executive—including subordinate or delegated legislation—but that the legislature should be able to reinstate such actions by enacting authorising legislation.
4. The Committee recommends the introduction of an ACT *Human Rights Act* that:

    - Provides for effective pre-enactment scrutiny of all legislation to ensure compliance with the *Human Rights Act*;
    - Requires all ACT laws (including the common law) to be interpreted as far as possible in a way that is compatible with the *Human Rights Act*;
    - Allows the ACT Supreme Court to make Declarations of Incompatibility with the *Human Rights Act* in relation to legislation and to invalidate subordinate legislation that is incompatible with the Act;
    - Places an obligation on all bodies performing public functions (except the Legislative Assembly) to act in a way that is compatible with the *Human Rights Act* unless incompatible conduct is required by legislation;
    - Allows the Legislative Assembly to place reasonable limits on the protected human rights in a manner justifiable in an open and democratic society;
    - Provides a range of remedies for a breach of the *Human Rights Act*;
    - Grants standing to any aggrieved person to enforce rights under the *Human Rights Act*;

- Requires government departments to report on their implementation of the *Human Rights Act*; and
- Provides for independent monitoring of the operations of the *Human Rights Act* by an ACT Human Rights Commissioner.

5. The Consultative Committee believes these features will create an appropriate balance between the legislature, the executive and the judiciary in relation to the protection of human rights. The Committee considers that particular consideration should be given to providing access to the *Human Rights Act* by marginalised groups.

6. The Committee proposes that the rights set out in the two major human rights treaties to which Australia is a party—the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights—should be protected by the *Human Rights Act*, in so far as they are within the jurisdiction of the ACT. These rights include:
   - The right to self-determination;
   - The right to work and just conditions of work;
   - The protection of the family;
   - The right to adequate food, clothing and housing;
   - The right to health;
   - The right to education;
   - The right to life;
   - The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;
   - The right to liberty and security of the person;
   - The right to a fair trial;
   - The right to privacy;
   - The right to freedom of thought, conscience and religion;
   - The right to freedom of movement;
   - The rights to freedom of expression, peaceful assembly and association;
   - The right to vote;
   - The right to equality before the law and non-discrimination; and
   - The right of ethnic, religious or linguistic minorities to enjoy their own culture.

7. The Covenants contain some rights that are not within the ACT's legislative power to protect and that should not be included in the *Human Rights Act*. These include:
   - The right to form and join trade unions;
   - The right to social security;

- Rights in relation to marriage and children; and
- The right of an alien not to be expelled from a country without due legal process.

8. The Committee believes that the rights of Indigenous people will be protected within the general framework of the Covenants and does not recommend that specific Indigenous rights be included in the ACT *Human Rights Act* at this stage.
9. The Committee also considers that the responsibilities of institutions and individuals to respect the rights of others, as acknowledged in the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, require no further elaboration at this stage.
10. The Committee believes that as far as is possible the ACT *Human Rights Act* should be written in plain English so that it is accessible to the widest possible audience. It should reflect the evolving needs and aspirations of the community and should be subject to regular review. In particular, the Committee recommends an initial review of the Act's effectiveness after five years of operation.
11. A draft *Human Rights Act* is attached to this report.

RECOMMENDATIONS

Recommendation 1

The Consultative Committee recommends the adoption of a bill of rights in the ACT.

Recommendation 2

Apart from its legal significance, there is cultural and symbolic value in having a single, accessible statement of the rights applicable in the ACT, supported by a community-wide education campaign. This value would be further enhanced by the attachment to the legislation of a short, simply-written preamble that sets out in plain English the purpose of the law.

Recommendation 3

The Consultative Committee recommends that an ACT bill of rights should be in statutory form and should aim to create a dialogue about rights protection between all branches of government.

Recommendation 4

The ACT bill of rights should be titled the *Human Rights Act*.

Recommendation 5

The Consultative Committee recommends that the operation of the ACT *Human Rights Act* be comprehensively reviewed after five years in order to identify its benefits and problems. Public participation should be encouraged in this process. At that stage, the success of the 'dialogue' model could be assessed and consideration could be given to amending the legislation.

The review should examine the following issues:

- The effectiveness of the legislation in protecting rights;
- Whether other civil, political, economic, social and cultural rights should be included in the legislation;
- The effectiveness of the legislation in protecting Indigenous rights;
- Whether specific Indigenous rights should be included in the legislation; and
- Whether a 'dialogue' model of rights protection is working or whether entrenchment of the *Human Rights Act*, or any other option, is preferable.

Recommendation 6

The Consultative Committee recommends that the introduction of the *Human Rights Act* should be accompanied by a broad, ongoing education program that brings its passage and its implications to the attention of the public sector and the ACT community.

Recommendation 7

The Consultative Committee recommends that the government consider methods of ensuring that costs do not deter access to the *Human Rights Act.*

Recommendation 8

The Committee recommends that the *Human Rights Act* come into force after a six-month period to give the legislature, executive and judiciary time to prepare for its operation.

Recommendation 9

The Consultative Committee recommends an ACT *Human Rights Act* providing for**:**

- Effective pre-enactment scrutiny of all legislation;
- An interpretive clause to ensure that all ACT laws are interpreted as far as possible in a way that is compatible with the *Human Rights Act*;
- The ability of the Supreme Court, when considering legislation, to make a Declaration of Incompatibility with the *Human Rights Act*;
- The ability of the Supreme Court to invalidate subordinate legislation that is incompatible with human rights unless the Act authorising the subordinate legislation prevents removal of the incompatibility;
- The capacity for the legislature to place reasonable limits on rights contained in the *Human Rights Act* to such an extent as can be justified in an open and democratic society;
- An obligation on all bodies performing public functions (except the Legislative Assembly) to act in a way that is compatible with the *Human Rights Act* unless incompatible conduct is required by legislation;
- Effective remedies for a breach of the *Human Rights A*ct, including a limited right to damages;
- Standing for any aggrieved person to enforce rights under the *Human Rights Act*;
- Government departments to report on their implementation of *the Human Rights Act* in their annual reports; and
- The creation of an office of an ACT Human Rights Commissioner to provide an independent monitor of the operations of the *Human Rights Act*.

Recommendation 10

The Consultative Committee recommends that the rights set out in the two major human rights treaties to which Australia is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, should be protected by the *Human Rights Act* in so far as they are within the jurisdiction of the ACT.

Recommendation 11

The Committee considers that, at this stage the general human rights framework proposed in the *Human Rights Act*, especially the right to self-determination, and the economic, social and cultural rights contained in it, will offer particular protection to Indigenous people. The protection of Indigenous rights within the general human rights framework should be reviewed in five years. The Committee recommends that the preamble to the *Human Rights Act* include a recognition of the special historical context of Indigenous people in the ACT.

Recommendation 12

The Committee recommends that the preamble to the *Human Rights Act* should make explicit the notion of responsibility as inherent in the concept of human rights.

LIST OF ABBREVIATIONS

ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ECHR	European Convention on Human Rights 1950
UN	United Nations
ACT	Australian Capital Territory

1. INTRODUCTION

Background to the Inquiry

1.1 In April 2002 the Australian Capital Territory's (ACT) Chief Minister and Attorney-General, Jon Stanhope, appointed the ACT Bill of Rights Consultative Committee (the Consultative Committee) to inquire into a possible bill of rights for the ACT. The establishment of the Bill of Rights Consultative Committee implemented a promise of the then Labor Opposition made during the ACT election campaign in October 2001.

1.2 The Chair of the Consultative Committee was Hilary Charlesworth, Professor of Law and Director of the Centre for International and Public Law in the Law Faculty at the Australian National University (ANU). Members of the Committee were: Larissa Behrendt, Professor of Law and Indigenous Studies and Director of the Jumbunna Indigenous House of Learning at the University of Technology, Sydney and member of the Council of the Australian Institute of Aboriginal and Torres Strait Islander Studies; Elizabeth Kelly, Executive Director of the Policy and Regulatory Division, ACT Department of Justice and Community Safety; and Penelope Layland, poet and speechwriter, and former Associate Editor of *The Canberra Times*.

1.3 This is not the first time the ACT has debated whether or not a bill of rights should be adopted. In 1993, the then ACT Attorney-General Terry Connolly MLA released an Issues Paper on an ACT Bill of Rights. Forty-eight written submissions were received, with a majority (58%) in favour of some form of bill of rights and 42% against. A public seminar was held on the topic on 7 May 1994.[1] In early 1995 Mr Connolly circulated an Exposure Draft of a proposed ACT Bill of Rights. The Connolly Bill lapsed after the Labor Party lost government at the March 1995 ACT election.

1.4 Since the 1970s there have been a number of proposals for bills of rights, at both the federal and state level. None has been successful.[2] Among the more recent proposals:

- In 1988 the Commonwealth government proposed amending the Australian Constitution in various ways to protect particular rights, including extending to state and territory action the modest protection already given to individuals against federal government action.[3] The proposals were rejected at a referendum;
- In 1998 in Victoria the *Constitution (Declaration of Rights and Freedoms) Bill* was introduced in response to a report of the Legal and Constitutional Committee of the Victorian Parliament.[4] The Bill sought to amend the

[1] ACT Attorney-General's Department, *A Bill of Rights for the ACT: Record of Proceedings 7 May 1994* (1994).

[2] For a brief history of earlier proposals see http://www.gtcentre.unsw.edu.au/bills-of-rights-resources.html.

[3] *Constitution Alteration (Rights and Freedoms) Bill 1988* (Cth).

[4] Legal and Constitutional Committee of the Victorian Government, *Report on the Desirability or otherwise of Legislation Defining and Protecting Human Rights,* Parliament of Victoria, April 1987.

Victorian Constitution to insert a (legally unenforceable) Declaration of Rights and Freedoms as a guide for the legislature. The Bill lapsed with the 1988 Victorian election. It was re-introduced by the Cain government in November 1988, but its passage was not actively pursued. The Bill was eventually allowed to lapse at the 1992 election;

- In 1995 and 1996, the Law Council of Australia debated a draft Australian Charter of Rights and Freedoms but did not ultimately approve the draft;
- In 1998, the Queensland Parliament's Legal, Constitutional and Administrative Review Committee held an inquiry into whether Queensland should adopt a bill of rights. It recommended against a bill of rights for Queensland, proposing instead an educational campaign on human rights;[5]
- In 2001, the New South Wales Parliament's Standing Committee on Law and Justice conducted an inquiry into whether NSW should adopt a bill of rights. The Committee recommended against a bill of rights.[6]

Terms of reference

1.5 The terms of reference for the Bill of Rights Consultative Committee were:

- Through community consultation, [to] conduct an inquiry into, and report to the Government on, whether it is appropriate and desirable to enact legislation establishing a bill of rights in the ACT, and if so:
- What form the bill should take, with special reference to whether the bill would be
  a) entrenched, and if so by what method;
  b) an ordinary statute; or
  c) a Declaration of the ACT Legislative Assembly.
- What effect the bill would have on the exercise of executive and judicial powers, including:
  a) the circumstances, if any, in which a bill of rights should be binding on individuals as distinct from the Legislative, Executive and Judicial arms of Government and persons or bodies performing a public function or exercising a public power under legislation;
  b) how an ACT bill of rights would operate in relation to Commonwealth law;
  c) the extent and manner in which the rights declared in a bill of rights should be enforceable;

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[5] Legal, Constitutional and Administrative Review Committee of the Legislative Assembly of Queensland, *The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland adopt a Bill of Rights?*, 18 November 1998, available at http://www.parliament.qld.gov.au.

[6] NSW Standing Committee on Law and Justice, *A NSW Bill of Rights*, October 2001, NSW Parliament (Paper No. 893), available at http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/committees?open&tab=committees.

d) what, if any, limits the bill of rights should be subject to;

e) whether the ACT Legislative Assembly should be able to override particular rights set out in a bill of rights and, if so, in what circumstances and in accordance with what procedures;

f) whether there should be a legislative requirement on courts to construe legislation in a manner that is compatible with international human rights instruments.

- What rights should be protected by the bill, with special reference to:

  a) whether the rights declared in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights should be incorporated into domestic law by such a bill of rights;

  b) whether the rights of Indigenous people should be specifically included;

  c) whether the catalogue of rights should be accompanied by a parallel statement of responsibilities.

Consultation program

1.6 The Consultative Committee devised a program of community consultation to ensure broad discussion of the issues set out in its terms of reference.

1.7 A web page (www.jcs.act.gov.au/prd/rights/index.html)was created to publicise the Consultative Committee's work and to provide extensive background information on the issues facing the inquiry. An email address and a dedicated phone line were established.

1.8 In April 2002, the Consultative Committee published an *Issues Paper*. Copies were sent to over 1500 groups and individuals and copies were made available at ACT government shop-front centres. The *Issues Paper* was also available on the Consultative Committee's web page.

1.9 The Issues Paper included a call for public submissions that resulted in 145 written submissions (for details see Appendix 1). A breakdown of views as to whether the ACT should adopt a bill of rights is as follows:

SUMMARY OF SUBMISSIONS

Total of Submissions received: **145**

	No.	%
Submissions supporting a bill of rights	88	60.69
Submissions opposing a bill of rights	46	31.73
Submissions neutral as to a bill of rights	7	4.82
Submissions not stating a position on a bill of rights	4	2.76
TOTAL	**145**	**100.00**

1.10 A pamphlet about the inquiry was sent to all ACT households as an insert in the *Canberra Chronicle* in August 2002.

1.11 A number of opinion pieces on the issues raised by the inquiry were published in *The Canberra Times* during 2002[7] and Consultative Committee members participated in a variety of radio and television interviews and talk-back sessions. The opinion pieces and a Deliberative Poll (described below) generated a lively correspondence in the Letters section of *The Canberra Times*.

1.12 The Consultative Committee held six evening 'town meetings' in 2002:

Date	Locality	Venue
Tuesday 18 June	Tuggeranong	Community Centre Hall 245 Cowlishaw St
Monday 1 July	Gungahlin	Resource Centre Ernest Cavanagh St
Wednesday 31 July	Phillip	The Hellenic Club Olympus Room, Matilda St
Tuesday 13 August	Belconnen	Churches Centre Ground Floor, Benjamin Way
Tuesday 27 August	Griffith	Public Library Community Room, 25 Blaxland Cres
Tuesday 10 September	Acton	ANU Arts Centre Theatre Union Court, Via North Rd

1.13 The meetings were advertised in *The Canberra Times* and the *Canberra Chronicle* and on the Consultative Committee web site, as well as through locally-distributed flyers and the widely distributed pamphlet. Local ABC radio station 2CN also publicised the meetings. Attendances at the town meetings varied greatly. The smallest meeting attracted four people and the largest fifty.

[7] Bill Stefaniak, 'Our laws are enough' *The Canberra Times,* 25 April 2002; Hilary Charlesworth, 'Maybe human rights are not so well protected' *The Canberra Times,* 29 April 2002; Tom Campbell, 'Giving more power to the judiciary' *The Canberra Times,* 17 May 2002; Larissa Behrendt, 'Bill of Rights would help all Aussies but especially the least advantaged' *The Canberra Times,* 19 July 2002; George Williams, Megan Davis & Vanessa Bosnjak, 'The Constitution is not Protection Enough' *The Canberra Times,* 23 September 2002; Max Spry, 'Flaws in the case for Bill of Rights' *The Canberra Times*, 30 September 2002.

1.14 Meetings were held with many community groups, including those representing different cultural, ethnic and religious backgrounds, Indigenous peoples, the aged, those with disabilities and women. Overall, thousands of Canberrans were involved in direct, face-to-face consultations. Details of the Consultative Committee's community consultations are set out in Appendix 2.

1.15 The culmination of the Consultative Committee's public consultation program was a Deliberative Poll, held at Old Parliament House on 29-30 November 2002 involving 200 randomly-selected ACT residents. The concept of a Deliberative Poll is outlined in Appendix 3.

1.16 Issues Deliberation Australia (IDA), a non-profit Adelaide-based company, was commissioned by the Consultative Committee to conduct the poll. ACT resident and former Governor-General, Sir William Deane AC, and former federal politicians, the Hon. Barry Jones AO and the Rt Hon. Ian Sinclair AC, acted as moderators at the Deliberative Poll. The Poll was supported by many volunteers from the ACT and around Australia, community groups, the ANU and the University of Canberra.

1.17 Questionnaires indicated that, prior to the Deliberative Poll, a small majority of those participating in the Deliberative Poll were in favour of a bill of rights for the ACT (52%), a substantial minority rejected one (32%) and 22% were undecided. After the opportunity to learn more about the issues and questioning the experts, the undecided group split evenly for and against a bill of rights, with a larger majority in favour (59%) and a larger minority against (41%). The final report prepared by IDA for the Consultative Committee is available at www.jcs.act.gov.au/prd/rights/index.html. The executive summary is reproduced in Appendix 3.

1.18 With the Centre for International and Public Law at the Law Faculty, ANU, the Consultative Committee also sponsored a series of seminars on issues relating to bills of rights generally. The seminars included presentations by Justice Frank Iacobucci of the Canadian Supreme Court, Professor Peter Bailey of the Law Faculty, ANU, Dr Adrienne Stone of the Research School of Social Sciences, ANU and Mr Leighton McDonald of the Law Faculty, ANU. The seminar series concluded with a major conference (co-sponsored with the ANU's National Institute of Government and Law) on 'Comparative Perspectives on Bills of Rights', held at the National Museum of Australia on 18 December 2002. Speakers included Ms Francesca Klug OBE, on the United Kingdom *Human Rights Act*, the Honourable Ted Thomas QC, on the New Zealand Bill of Rights, Professor Penelope Andrews, on the South African Bill of Rights and Professor Andrew Byrnes, on the Hong Kong Bill of Rights.

1.19 The extensive consultations undertaken by the Consultative Committee tapped the rich and varied views of the community on whether the ACT should adopt a bill of rights. This report draws on all aspects of the consultations. The Consultative Committee thanks all those who so generously gave their time and expertise to the process. Your contributions were invaluable.

2. IS A BILL OF RIGHTS APPROPRIATE AND DESIRABLE FOR THE ACT?

2.1 The Consultative Committee's terms of reference posed the initial general question of whether a bill of rights is appropriate and desirable for the ACT.

2.2 The terms of reference require an understanding of the term 'human rights'. What does it mean to seek to protect a person's or group's human rights? Scholars have long debated this issue. Drawing on the work of the eighteenth-century philosopher Immanual Kant, who argued that individuals should be seen as ends in themselves, some regard certain rights as inherent in every person, an essential element of human dignity. By contrast, utilitarian philosophers have often argued against the notion of inherent or inalienable human rights based on human dignity. They tend to give great weight to the interests of the majority and rely on a democratically elected legislature to express those interests and to determine for itself what rights should be protected.

2.3 The Consultative Committee found it useful to adopt a definition of human rights as *the conditions necessary for people to live lives of dignity and value*.[1] They are those rights that generally speaking ought to be removed from the agenda of short-term political decision-making.[2] Lives of dignity and value are, of course, lived in particular social circumstances and the precise understanding of a specific right may change over time and according to social conditions. Moreover, few rights can ever be regarded as absolute. One individual's rights will often need to be balanced against those of other individuals and those of the community.

2.4 The question of whether a bill of rights is appropriate for the ACT can only be properly answered in relation to a *specific model* of a bill of rights. A philosophical acceptance of the simple idea of a bill of rights does not take a society very far. The variety of forms that have been tried and tested in various jurisdictions, particularly during the twentieth century, show how broad and encompassing the term 'bill of rights' can be.

2.5 From the submissions received and the Consultative Committee's consultations with the ACT community, it was clear that people's understandings of the term 'bill of rights' varied greatly, as did their perceptions about the appropriateness of different forms of bills of rights. Some people had strongly negative views about an entrenched bill of rights, but saw great value in a statutory bill of rights. Others believed entrenchment was essential. Yet others noted the merit of a simple declaration, with no formal legal status.

2.6 These views were not static. For example, when the participants in the Deliberative Poll were asked, prior to the deliberations, what form of bill of rights would be best suited to the ACT, a large majority (78 %) nominated an

[1] See generally Johan Galtung, *Human Rights in Another Key* (1994).

[2] Roberto Unger, quoted in Harvard Law School Human Rights Program, *Economic and Social Rights and the Right to Health* (1995) 13.

entrenched bill. After deliberations, participants were fairly evenly split between an entrenched model, a statutory model, and a simple declaration.

2.7 We discuss various possible models of bills of rights in Chapters 3 and 4. In this Chapter we consider the broader issue of whether any changes are needed to the current mechanisms available to protect human rights in the ACT and whether some form of bill of rights could improve the lives of people living and working in the ACT.

2.8 On the one hand, the Consultative Committee has been assured that the protection of human rights in the ACT is of the highest standard. It was argued in a number of submissions that a combination of the impact of international human rights treaties, the Australian Constitution's protection of rights, Commonwealth and ACT legislation and common law principles has created a fabric of rights protection that is both comprehensive and flexible. The common theme in these submissions can be summarised by the aphorism 'If it ain't broke, don't fix it'.

2.9 For example, ACT shadow Attorney-General Bill Stefaniak, a staunch defender of the legal *status quo*, argued that:

> Our fundamental rights and freedoms are protected by constitutionally entrenched provisions, the electoral laws, laws governing such things as just terms for compulsorily acquired property, jury trial, freedom of religion, freedom of expression, freedom of association, freedom from arbitrary arrest and detention, and numerous rights covering accused persons and prisoners….

He added: 'We have an excellent system that continues to mature and adjust to changing times, as it has done for decades. We tinker with it at our peril.'[3]

2.10 Michael O'Rourke put a similar view succinctly and forcefully, writing that 'the lack of reported cases of slavery in Gungahlin and torture in Wanniassa show that there is no serious contravention of basic rights under the current regime'. He went on to say that 'core rights' —such as the equal treatment of racial minorities—were already well-protected in the ACT by 'negative' laws that prohibited certain acts by governments, corporations and individuals.[4]

2.11 The sense that the current patchwork of legislation and common law is sufficient was regularly expressed in submissions. Jean Main argued that there is 'already a considerable amount of legislation that protects people from indiscriminate actions by others'.[5] Malcolm Brandon believed that the ACT record is good, and that 'the proper way to remedy injustices is to make piecemeal reforms through the ballot box and the legislative bodies elected by the people'.[6]

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[3] Submission 101. See also submission 95 (Kerry Corke); Submission 130 (Australian Christian Lobby); Submission 7 (David de Carvalho); Submission 13 (Jeffrey Dutton).

[4] Submission 23.

[5] Submission 20.

[6] Submission 106.

2.12 On the other hand, the Consultative Committee was alerted to areas under ACT jurisdiction where protection of human rights has been weak or inadequate. The Aboriginal Justice Advisory Council of the ACT told the Consultative Committee:

> The people whose human rights are likely to be violated are members of groups often disregarded in the political processes including Aboriginal and Torres Strait Islander people, adolescent males, the unemployed, the disabled, the mentally ill, aged and infirm people. Even though it is often claimed that we are all equal, the reality of many people's lives in these categories provides a different picture.
>
> It was claimed for instance that police recruits practise their craft by targeting vulnerable groups as seen in the recent wave of arrests of young Indigenous people. Other examples of overzealous policing were when Aboriginal and Torres Strait Islander people are assembling – school activities, sporting events and even funerals have seen police attending in numbers. … Just one phone call from a member of the public advising that a number of Aborigines are assembling is enough for police attendance….[7]

2.13 In his submission, Kevin Bray stated that '[r]ecent experiences in the ACT in public health, domestic violence, mental health and aged care suggest to me that the "rights" of many victims of these "systems" are largely unprotected'. However, he went on to suggest that the quality of protection could be largely an issue of inadequate funding.[8]

2.14 The Welfare Rights and Legal Centre and Tenants' Union, ACT, told the Consultative Committee that there were a number of areas in which existing ACT laws were not sufficient to protect the most vulnerable. It identified seven principal areas of concern including: the rights of those with a disability; the rights of Indigenous Australians; the rights of refugees; the rights of women; children and young peoples' rights (it was pointed out that '[a] child cannot argue breach of rights if their eviction is the result of their parents' failure to pay rent'); issues relating to housing; and rights of prisoners.[9]

2.15 Children's rights in the ACT were an area of concern for the National Children's and Youth Law Centre. It argued that children enjoyed lesser protection against physical violence than adults, that they were subject to unreasonable strip-search provisions, and that the existing law did not provide sufficient opportunities for children to express their views freely on matters that affected them.[10]

2.16 Val Pawagi referred the Consultative Committee to the findings of the recent Gallop inquiry into government-run disability services in the ACT. Pawagi said that inquiry had 'found that the rights of people with [a] disability living in

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[7] Submission 79.

[8] Submission 9.

[9] Submission 136.

[10] Submission 19.

group houses have not been adequately or effectively protected by the policies and systems operating in the ACT'.[11]

2.17 Chris Ansted identified the harassment by police of Indigenous people and young people, and discrimination by landlords against single mothers and Indigenous people as areas of concern.[12]

2.18 The ACT Ministerial Advisory Council on Women listed a number of areas in which women were still discriminated against in the workplace in the ACT. The Council noted instances of female employees being paid less than male predecessors performing precisely the same work, of migrant women being belittled and humiliated at work, of women who tried to assert their rights being branded trouble-makers, and of pregnant women being sacked.[13]

2.19 Subtle and not-so-subtle forms of systemic discrimination were described by the Canberra Islamic Centre. The Centre said that while generally human rights were respected both at a public and private level in the ACT, there remained occasional incidents of harassment and discrimination. The majority of these went unreported as the people affected appeared to feel a sense of helplessness and believed nothing could be done to remedy the situation.[14]

2.20 Professor Peter Bailey observed that the greatest gaps in rights protection in the economic, social and cultural areas in the ACT were probably in relation to disability, mental illness, health care, Indigenous status, childhood, education, housing and the environment.[15] A submission from the Spanish Community also highlighted concerns about economic and social rights, especially among the aged.[16]

2.21 It became apparent to the Consultative Committee that one's perceptions of whether or not rights were already adequately protected in the ACT depended very much on whether one belonged to (or had much to do with) the groups most vulnerable to rights abuse—those with a limited capacity to advocate on their own behalf, those on the margins of society, and those who for some reason are alienated from conventional political processes. The ACT Discrimination Commissioner, Rosemary Follett, pointed out during a session at the November Deliberative Poll that each of us is only a heartbeat away from becoming a member of one of these marginal groups. For example, a stroke or other serious illness, a car accident or simply living a very long time could make a person part of a vulnerable minority.

2.22 Mark McMillan noted in his submission to the Consultative Committee that 'the protections that exist [in ACT law] are negative protections. That is they are there to stop someone being discriminatory, or are used to overcome societal disadvantage by some groups in our society.'[17] Generally speaking, the existing

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[11] Submission 81.

[12] Submission 140.

[13] Submission 105.

[14] Submission 84.

[15] Submission 54.

[16] Submission 38.

[17] Submission 103.

legal protections for human rights in the ACT do not act as broad statements conferring equal rights upon all. They are curbs on excessive behaviour, rather than positive statements of entitlement and equality.

2.23 We now examine in more detail the human rights protection offered in the ACT by existing international and domestic law.

International law

2.24 The international human rights system has been developed primarily since the end of the Second World War. The Charter of the UN contains the first explicit recognition in international law that an individual is entitled to the observance of fundamental rights and freedoms. Among the purposes of the UN set out in article 1 of the Charter is that of co-operation 'in promoting respect for human rights and fundamental freedoms for all'. While the Charter's provisions are couched in general language, there is no doubt that they impose a legal duty on member states to observe human rights.

2.25 The Universal Declaration of Human Rights, adopted unanimously by the General Assembly of the UN in 1948, gave shape to the undefined notion of fundamental human rights in the Charter. Although the Universal Declaration was not originally intended to be a formally binding instrument, it has developed the status of an authoritative interpretation of the Charter. Together with two binding treaties, the ICCPR and the ICESCR (both adopted by the UN in 1966), the Universal Declaration forms the so-called 'International Bill of Rights'. Quite apart from the specific treaty obligations contained in the Covenants, observance of many of the principles set out in the Universal Declaration and the Covenants is now generally considered to be required by customary international law binding all nations.

2.26 The ICESCR and the ICCPR contain a range of human rights. The rights in the Covenants are set out in Appendix 6 to this report. These rights include:

- The right to liberty and security of the person;[18]
- The right to freedom of movement;[19]
- The right of aliens not to be expelled from a country without due process;[20]
- The right to a fair trial;[21]
- The right to privacy;[22]
- The right to freedom of thought, conscience and religion;[23]
- The rights to freedom of expression, peaceful assembly and association;[24]

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[18] ICCPR, article 9.

[19] ICCPR, article 12.

[20] ICCPR, article 13.

[21] ICCPR, article 14.

[22] ICCPR, article 17.

[23] ICCPR, article 18.

- The right to vote;[25]
- The right to equality before the law and non-discrimination;[26] and
- The right of ethnic, religious or linguistic minorities to enjoy their own culture.[27]
- The right to life;[28]
- The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, or medical or scientific experimentation without consent;[29]
- The right to work and just conditions of work;[30]
- The right to form and join trade unions;[31]
- The right to social security;[32]
- The protection of the family;[33]
- The right to adequate food, clothing and housing;[34]
- The right to the highest attainable standard of health;[35]
- The right to education;[36]
- The right to self-determination;[37] and
- The right not to be held in slavery.[38]

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[24] ICCPR, articles 19, 21 &22.

[25] ICCPR, article 25.

[26] ICCPR, article 26.

[27] ICCPR, article 27.

[28] ICCPR, article 6.

[29] ICCPR, article 7.

[30] ICESCR, articles 6 & 7.

[31] ICESCR, article 8.

[32] ICECSR, article 9.

[33] ICESCR, article 10; ICCPR, article 23.

[34] ICESCR, article 11.

[35] ICESCR, article 12.

[36] ICESCR, article 13.

[37] ICESCR and ICCPR, article 1.

[38] ICCPR, article 8.

2.27 International human rights standards are often couched in general language, but it is clear that the assertion of rights is not unlimited. Article 29 of the Universal Declaration of Human Rights specifies that limitations on rights are permissible:

> for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society.

2.28 While the Universal Declaration and the Covenants deal with human rights generally, a variety of other instruments dealing with specific areas of human rights have been adopted internationally. Some deal with particular rights (for example, the Genocide Convention of 1948, the Convention on the Elimination of All Forms of Racial Discrimination of 1965, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984), and some deal with particular categories of rights holders (for example, the Standard Minimum Rules for the Treatment of Prisoners of 1957, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, the Convention on the Rights of the Child of 1989, and the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990). Implementation of the major UN human rights treaties is monitored by a system of expert committees.

2.29 The International Labour Organisation, the United Nations Economic, Social and Cultural Organisation (UNESCO), and other specialised agencies of the UN have drafted and now administer a wide range of human rights instruments. There are also a number of significant regional human rights treaties, such as the European Convention on Human Rights of 1950, the American Convention on Human Rights of 1969, the African Charter of Human and Peoples' Rights of 1982, and the Arab Charter on Human Rights of 1994. International judicial or quasi-judicial bodies of differing structures and jurisdictions supervise compliance with the regional treaties. There is no regional human rights treaty applicable to Australia.

2.30 The international legal system thus offers broad coverage of human rights. Australia is a party to all the major UN human rights treaties. Some submissions received by the Consultative Committee suggested that because Australia is a party to these conventions, the international system provides adequate coverage of human rights in the ACT. However, a long-standing principle of the Australian legal system holds that international law does not affect domestic law unless the former has been specifically incorporated into Australian law through legislation or in a court decision.[39]

2.31 The Federal Court's decision in *Nulyarimma v Thompson*[40] in 1999 highlights the limits of Australian law in this respect. The central issue in that case was whether a prohibition on genocide was part of Australian law. Although Australia had ratified the Convention on Genocide in 1949, no legislation had been enacted to give it domestic force. The plaintiff in *Nulyarimma* argued that the prohibition of genocide was a norm of customary international law and, as

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[39] *Kioa v West* (1985) 159 CLR 550, 570.

[40] (1999) 165 ALR 621.

such, should be considered a principle of Australian law. This argument was rejected by a majority of the Federal Court bench, which regarded the principles of customary international law as outside the Australian legal system.[41]

2.32 The Commonwealth government has enacted legislation to give some effect to certain of the international human rights treaties to which Australia is a party. For example, the *Racial Discrimination Act 1975* (Cth) implements many of the provisions of the UN Convention on the Elimination of All Forms of Racial Discrimination. The *Sex Discrimination Act 1984* (Cth) was designed to implement some of Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women, although it contains significant exemptions in relation to various acts performed under statutory authority, the work of charities, religious, voluntary and sporting bodies, orders of industrial tribunals, and combat duties in the defence forces.

2.33 Many international human rights norms have not yet been incorporated into Australian law. For example the rights set out in the ICESCR have not been implemented in any explicit way. The ICCPR is attached as a schedule to the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) but that legislation gives very limited effect to the rights contained in the treaty.

2.34 The Human Rights and Equal Opportunity Commission (HREOC) is empowered to examine Commonwealth legislation for consistency with certain international human rights standards designated in the legislation, including those contained in the ICCPR, and to report its findings to the Commonwealth Attorney-General. But while the Attorney-General is required to table HREOC's reports in Parliament, the government is not required to take any steps to remedy the identified human rights issues and has rarely done so in practice.

2.35 HREOC has the power to conciliate disputes over certain internationally defined human rights, but it has no adjudicative power to determine a dispute if conciliation fails. It may also intervene in judicial proceedings where certain human rights are in issue, with leave of the court.[42] Despite HREOC's limited functions with respect to international human rights norms, it has succeeded in raising the consciousness of many Australians on these issues. HREOC does not, however, provide an adequate safety net for human rights, either in Commonwealth or ACT law. Its legislation does not fulfil the obligations imposed by article 2 of the ICCPR that states parties 'take the necessary steps … to adopt such legislative or other measures as may be necessary to give effect to the rights recognised' in the ICCPR. Article 2 also requires Australia to 'ensure' that any person who has suffered a violation of her or his ICCPR rights 'shall have an effective remedy'.

2.36 Australian courts have shown occasional interest in international human rights law. For example, members of the High Court in *Mabo v Queensland (no 2)*

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[41] The prohibition on genocide is now part of Australian law through the operation of the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

[42] See, however, *Australian Human Rights Commission Legislation Amendment Bill 2003* (Cth) which would make HREOC's power of intervention subject to the approval of the Attorney-General.

emphasised the significance of international law in the development of the common law. Justice Brennan said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[43]

2.37 Justice Brennan argued that if a common law doctrine was based on an outdated notion of international law that breached international human rights standards (such as the Australian land tenure system built on the international legal principle of *terra nullius*), the common law could lose its legitimacy. For this reason, the High Court in *Mabo* developed a new notion of native title that recognised Indigenous rights in land.

2.38 The Australian High Court has endorsed the doctrine that statutes should be interpreted in accordance with international law unless Parliament clearly indicates a contrary intention.[44] This principle of statutory construction has a long history in British courts and is based on the presumption that Parliament will seek to legislate consistently with international law where possible. In 1995 in *Minister for Immigration and Ethnic Affairs v Teoh* Chief Justice Mason and Justice Deane stated that 'if the language of the legislation is susceptible of a construction which is consistent with [international law], then that construction should prevail.'[45] This principle, in theory, allows human rights principles to influence the interpretation of legislation. In practice, however, Australian statutory interpretation has not accorded great weight to international law.

2.39 The High Court indeed appears to be moving towards a narrower formulation of the statutory construction principle. In *Plaintiff S157/2002 v Commonwealth of Australia* Chief Justice Gleeson stated that the rule applied only 'where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention' and where the legislation is ambiguous. [46] The Chief Justice went on, however, to say:

> [C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. As Lord Hoffman recently pointed out in the United Kingdom, for Parliament squarely to confront

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[43] (1992) 175 CLR 1, 42.

[44] *Polites v Commonwealth* (1945) 70 CLR 60.

[45] (1995) 183 CLR 273.

[46] *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 (judgment of 4 February 2003) at para 27.

such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.[47]

2.40 The *Teoh* case articulated a specific role for treaties in administrative law. At issue in *Teoh* was the status of the UN Convention on the Rights of the Child, a treaty ratified by Australia but not specifically incorporated into Australian law. A majority of the Court held that entry into a treaty by Australia created a legitimate expectation that the government would take treaty provisions into account, whether or not the treaty had been implemented in Australian law. In other words, administrative decision-makers should consider all relevant treaties to which Australia was a party in reaching their decisions and, if decision-makers proposed to make a decision inconsistent with a treaty obligation, they should allow people affected by the decision to make submissions on this point.

2.41 Chief Justice Mason and Justice Deane said that the influence of international legal principles on the common law would depend on factors such as the nature and purpose of the international legal norm, its degree of international acceptance and its relationship with existing principles of domestic law. Although the Court emphasised the need for a cautious approach to the use of international treaties in developing the common law, the *Teoh* decision to require the decision-maker to turn her or his mind to the Convention obligations (but not necessarily to give them precedence) was very controversial. Attempts have since been made to legislate to overturn the decision, although so far unsuccessfully.

2.42 The international system offers various mechanisms for monitoring implementation of human rights standards. In 1991 and 1993 Australia accepted the right of individuals in Australia to complain directly to three of the UN treaty-monitoring bodies (the Human Rights Committee under the ICCPR,[48] the Committee on the Elimination of Racial Discrimination under the Convention on the Elimination of all Forms of Racial Discrimination,[49] and the Committee against Torture under the Convention Against Torture)[50] about violations of treaty obligations. The right to make an individual communication or complaint at the international level can only be exercised when all domestic legal avenues for redress have been exhausted. This requirement ensures that the international system cannot be used in a frivolous way. It can only be invoked where Australian law offers no adequate remedy for a violation of an internationally recognised right.

2.43 Direct recourse to the international human rights system is limited in a number of ways. First, the UN complaint system is very slow and cumbersome. The human rights treaty monitoring committees all operate part-time and are over-worked and under-resourced. It can take up to four years for the merits of a complaint to be addressed. Communications are in the form of written arguments from the complainant that are then responded to by the country

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[47] Para 28 (footnotes omitted).

[48] Optional Protocol to the ICCPR 1966.

[49] Convention on the Elimination of All Forms of Racial Discrimination 1965, article 14.

[50] Convention against Torture 1984, article 22.

concerned. The committees do not have the opportunity to hear from the parties or their advocates in person. Further, the outcome of the UN committee system's consideration of a complaint is the adoption of 'views' on whether or not an internationally-recognised right has been breached. While these views constitute an authoritative interpretation of the treaties, there is little formal pressure on governments to accept interpretations adverse to their perceived interests.[51]

2.44 Recourse to the international human rights complaint system as a primary method of protecting human rights in Australia is far from ideal. The determination of such issues should take place in Australia, by Australians. This could be achieved if the international standards were directly incorporated in Australian law.

2.45 The international law of human rights thus does not operate directly in Australian law and has been implemented only in a partial way. It does not currently provide adequate protection for breaches of human rights in the ACT.

The Australian Constitution

2.46 While there is no formal catalogue of rights contained in the Australian Constitution, there are a number of provisions that can be argued to have implications for human rights. Commonwealth acquisition of property must be on just terms[52] and the Commonwealth cannot conscript people to provide medical services.[53] The establishment of a federal judicial system in Chapter III of the Constitution can be seen in theory as a commitment to the rule of law, preventing the executive branch of government from acting outside the law.

2.47 The Constitution contains three explicit references to the rights of people. Section 80 sets out a citizen's right to a jury trial in the state where an offence took place, when charged on indictment for an offence under Commonwealth law; section 116 denies the Commonwealth Parliament (but not state Parliaments) the power to legislate to establish a religion, or to impose any religious observance, or to prohibit the free exercise of any religion, or to require a religious test as a qualification for public office; and section 117 protects residents of one state from discrimination by another state on the basis of residence.

2.48 The High Court's interpretation of these provisions has tended to be very limited. In practice they have offered little protection to human rights.[54] In any event, ACT residents do not enjoy even the rather sparse protection conferred by the Constitution. In *Kruger v. Commonwealth*,[55] a case involving an ordinance of the Northern Territory that authorised the removal of Aboriginal

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[51] For a detailed critique of the UN human rights system see Philip Alston & James Crawford eds, *The Future of UN Human Rights Treaty Monitoring* (2000) and Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (2001), available at www.bayefsky.com.

[52] Section 51 (xxxi).

[53] Section 51 (xxiiiA).

[54] See generally George Williams, *Human Rights under the Australian Constitution* (1999).

[55] (1997) 190 CLR 1.

children from their families, the High Court doubted whether the guarantee of section 116 of the Constitution inhibited the Commonwealth's power to legislate with respect to the territories. Another decision, *Bernasconi,* has made it clear that the limited right to trial by jury in section 80 of the Constitution does not apply to residents of the territories.[56] The constitutional requirement that Commonwealth acquisitions of property must be on just terms[57] has been held to apply in the Northern Territory, however.[58] The *Kruger* and *Bernasconi* cases highlight gaps in the protection of human rights of ACT residents compared to the protection (albeit scant) offered to residents of the Australian states.

2.49 George Williams, Megan Davis and Vanessa Bosnjak of the Gilbert & Tobin Centre of Public Law at the University of New South Wales pointed out to the Consultative Committee that:

> ACT residents are second-class citizens under the Constitution. While people living in the States get the benefit of a few rights in the Constitution, this is often denied to people living in the ACT. For example, section 92 only protects 'trade, commerce and intercourse *among the states*' while section 117 only protects a '*resident in any State*' where he or she is 'subject in any other State to any disability or discrimination.' Territorians also lack the same voting rights in referendums, with their votes counted only towards the national vote and not for the separate State count.[59]

These limitations on the rights of ACT residents could of course only be removed by constitutional amendment.

2.50 In a series of cases in the 1990s, the High Court suggested that some rights could be implied into the Australian Constitution. These included freedom of political communication[60] and a right to legal equality.[61] The extent of such rights is unclear however and their existence remains controversial.

2.51 On balance, the Australian Constitution offers little protection of human rights. Its coverage of rights is haphazard and these rights are available only in very limited contexts.

Commonwealth legislation

2.52 The most general piece of Commonwealth legislation relevant to human rights is the *Human Rights and Equal Opportunity Act 1986* (Cth), whose limitations have been already discussed. Discrimination on three distinct bases is

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[56] *R v. Bernasconi* (1915) 19 CLR 629.

[57] Section 51 (xxxi).

[58] *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 147 ALR 42. Compare *Teori Tau v Commonwealth* (1969) 119 CLR 564.

[59] Submission 71.

[60] *Nationwide News Pty Ltd v Wills* (1992) 177CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

[61] *Leeth v Commonwealth* (1992) 174 CLR 455.

prohibited in the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), and the *Disability Discrimination Act 1992* (Cth). Other federal human rights legislation includes the *Privacy Act 1988* (Cth) and the *Human Rights (Sexual Conduct) Act 1994* (Cth). While these laws offer remedies for some violations of human rights, they are limited in their application and implementation in various ways.

2.53 Commonwealth legislation does not provide a comprehensive system of protection of human rights. For example, no law sets out the rights of persons accused of a criminal offence,[62] nor protects the right to liberty and security of the person.[63] Economic, social and cultural rights such as the right to health[64] are affected by many laws, but are not *protected* in federal legislation.

The English Magna Carta 1215 and Bill of Rights 1689

2.54 The English Magna Carta was a document that settled a dispute between the King and warring barons in 1215, limiting the King's autocratic power and setting out some elementary rights that influenced the development of rights in the common law. It established, for example, the principle that no one, including the King or a lawmaker, is above the law, some property rights, and the right to a fair and timely trial.

2.55 The English Bill of Rights of 1689, which the colonies of Australia inherited through their adoption of Imperial statutes, remains in force in the ACT to the extent that it has not been repealed by other ACT laws. The Bill of Rights, intended to prevent William and Mary from repeating James II's disregard of Parliament, curbed the power of the royal prerogative. It sets out some basic principles of common law and has informed both case law and legislation. The English Bill of Rights is sometimes said to have a similar status to constitutional law, but it does not affect the validity of later law, and so can be altered or repealed by it. Because it was made by a revolutionary Parliament, and not properly enacted, the Bill is not an ordinary law. Instead, it remains a statement of political principle against which actions of the executive, the judiciary and the legislature may be measured.

2.56 Justice McHugh of the High Court has pointed out that:

> Any legislature acting within the powers allotted to it by the Constitution is entitled to legislate in total disregard of the Magna Carta and the Bill of Rights, as is the United Kingdom Parliament. … They are not constitutional documents in the sense that the Australian Constitution and the United States Constitution are. … They are political ideals which most citizens would hope that Parliaments would follow but if Parliaments do not follow them, the remedy is the ballot box because we do not have a Bill of Rights in this country.[65]

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[62] ICCPR, article 14.

[63] ICCPR, article 9.

[64] ICESCR, article 12.

[65] *Essenberg v The Queen* B54/1999 (22 June 2000).

2.57 The 1689 Bill of Rights established such basic legal principles as freedom of election, freedom of speech, accountability for and regulation of the raising and expenditure of public money, and the superiority of Parliament over the executive. It is sometimes invoked as the source for the rule of law in relation to trials. While many of the provisions of the Bill have been superseded by contemporary legislation, these basic principles are still considered to remain as fundamental tenets of law, even where there is legislation. Consequently there has been reluctance to eliminate it completely from the statute books.

2.58 On the other hand, the Bill of Rights also contains various outmoded and discriminatory provisions. It mirrors the anti-Catholic bias of its era, for example confining the right to bear arms for defence to Protestants. It has been described as 'the only Bill of Rights in history which had more to offer the rulers than the ruled.'[66] Moreover, the highly specific terms of the 1689 Bill of Rights reduce both its symbolic and practical force in the ACT.

ACT legislation

2.59 Various ACT laws deal with aspects of human rights.

2.60 The primary vehicle for protection of human rights in the ACT is the *Discrimination Act 1991* (ACT). The *Discrimination Act* makes discrimination on any of the following grounds unlawful: sex, sexuality, transsexuality, marital status, status as a parent or carer, pregnancy, race, religious or political conviction, impairment, or association with a person identified by reference to any of those attributes.

2.61 The Act applies in the areas of work, education, access to premises, goods, services and facilities, accommodation, clubs, and requests for information. It also makes sexual harassment and racial vilification unlawful. Complaints may be made to the Discrimination Commissioner. Complaints are investigated and where possible conciliated. Appeals may be made to the Discrimination Tribunal, which can make binding orders dealing with discrimination.

2.62 The ACT Human Rights Office is an independent office established under the *Discrimination Act 1991*. The office is headed by the ACT Discrimination Commissioner, whose role and functions include:

- Promoting the objectives of the Act, undertaking research, developing educational and other programs to improve community understanding and acceptance of, and compliance with, the Act;
- Reviewing Territory laws (and, when requested, examining proposed laws) for consistency with the Act, reporting to the Minister on the results of these reviews and advising on matters relevant to the operation of the Act; and
- Investigating complaints to determine whether the complaint can be dealt with under the Act; and (if the complaint can be dealt with and the Commissioner does not decline it) deciding whether conciliation between the parties is reasonable. If the Commissioner declines to accept a

[66] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 77.

complaint or decides it cannot be dealt with by conciliation, the complainant may appeal to the Discrimination Tribunal.

2.63 While some people the Consultative Committee spoke to saw this legislation as a significant protection of their rights, it should be recognised that:

- It covers only a specific list of circumstances and grounds of discrimination;[67]
- Section 30 of the *Discrimination Act 1991* exempts any action taken under an ACT enactment from being dealt with under the Act, effectively insulating the government from the *Discrimination Act,* with no requirement for accountability for discriminatory legislation by the Government. While this section was intended to be a transitional provision, it has remained in force;
- It contributes to a culture in which human rights are perceived to be only about eradicating discrimination on particular grounds rather than a broader set of conditions necessary for a life of dignity and value.

2.64 The Consultative Committee did not have the resources to conduct a human rights audit of all ACT legislation. Through its consultations the Committee has become aware, however, of particular laws or omissions in legislation that arguably breach human rights standards. These include:

- The *Remand Centres Act 1976* (ACT) removes the right of detainees to exercise autonomy over their own medical care, even where their decisions do not affect the running of the Centres (arguably a breach of the right of detained persons to treatment with humanity);[68]
- The *Testamentary Guardianship Act 1984* (ACT) denies the father of an illegitimate child the right to appoint a guardian for the child in his will (arguably a breach of the right to protection of the family[69] and the right to non-discrimination);[70]
- The law regulating undercover policing arguably violates the right to privacy[71] in a number of respects. While prevention of crime/disorder and law enforcement justify intrusions into private lives, it is unclear that ACT law meets relevant international human rights standards. Significantly there are gaps in our regulatory system for electronic surveillance: the *Listening Device Act 1992* (ACT) restricts the use of listening devices, but excludes newer forms of technology such as mini-cams and vehicle tracking. Also there are no civil remedies for persons who have been unlawfully targeted by electronic surveillance.

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[67] Eg Dr Helen Watchirs drew the Committee's attention to gaps in the legislation with respect to people with HIV/AIDS (submission 144).

[68] ICCPR, article 10

[69] ICCPR, articles 23, 24.

[70] ICCPR, article 26.

[71] ICCPR, article 17.

- There is no law imposing limits on covert physical surveillance of suspects. Under the present law, the movement and activities of persons can be monitored for an unlimited time, without police establishing to an independent person or tribunal reasonable suspicion of criminal activity.[72]
- Numerous legislative provisions discriminate against *de facto* and same-sex partners. The ACT government has released a discussion paper in relation to the elimination of discriminatory provisions. Amendment of legislation is currently under way.

2.65 The Consultative Committee notes that concern about the protection of human rights in the ACT also rests on the manner in which discretion is exercised by officials under otherwise acceptable legislation. For example the *Public Health Act 1997* (ACT) gives the Chief Health Officer broad powers of investigation, search and seizure, detention and treatment. *The Mental Health (Treatment and Care) Act 1991* (ACT) also gives wide powers to the Chief Psychiatrist to order involuntary detention and treatment of people under a treatment order.[73] Human rights may be breached in the exercise of a wide discretion without legal remedies being available to deal with the breach.

2.66 During its consultations the Committee constantly encountered individuals and groups who were deeply disillusioned by their contact with the ACT bureaucracy. Many of them thought that even where the existing laws and regulations were perfectly adequate, the administration of those rules by government agencies had been *ad hoc*, partial, inconsistent and unfair. Some believed they had been branded as 'trouble-makers' or as vexatious for pursuing what they believed to be justice.

The scrutiny of draft legislation process

2.67 Shadow ACT Attorney-General Bill Stefaniak MLA brought the attention of the Consultative Committee to the work of the Legislative Assembly's Standing Committee on Legal Affairs. The Standing Committee takes rights into account when it performs the duties of a scrutiny of Bills and subordinate legislation committee. The Standing Committee examines all Bills and subordinate legislation presented to the Assembly. It is required to do so in a non-partisan manner and it does not comment on the policy aspects of the legislation.[74] The Legislative Assembly approved the adoption of the Standing Committee's new Terms of Reference on 11 December 2001. These are set out in Chapter 4 below.

2.68 Mr Stefaniak has argued that the scrutiny function of the Standing Committee provides appropriate protection for human rights in the ACT. While the Consultative Committee acknowledges the value of the legislative scrutiny function in promoting human rights, it does not consider that scrutiny alone is

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[72] Submission 131 (KJM) emphasised this issue.

[73] Lisa Bell told the Committee of human rights concerns with actions taken under this legislation: Submission 93.

[74] The Committee's reports can be found at http://www.legassembly.act.gov.au/committees/committees.asp?action=reports&committee=31&session={19%2F11%2F2002+10%3A04%3A18+AM.

adequate. A significant limitation of the Standing Committee's terms of reference is that they do not contain a definition of what constitutes the 'rights and liberties' the Committee is required to consider. The Standing Committee is left to decide for itself the rights and liberties it will refer to.[75] The terms of reference do not require that adequate time be allowed for public comment. Nor do they establish a procedure to ensure that adequate publicity is given to reports.

Common law

2.69 The Australian common law is part of the patchwork of protection for human rights in the ACT. In a speech arguing against an Australian Bill of Rights in June 2002, the Commonwealth Attorney-General, the Hon. Daryl Williams QC, MP, AM, gave examples of common law cases that had protected human rights in Australia.[76] These included *Mabo*[77] (developing the common law to recognise native title) and *Dietrich v R*[78] (identifying a common law right to a fair trial).

2.70 A number of the written submissions to the Consultative Committee also highlighted the role the common law plays in safeguarding rights. Brett Goyne for example argued that '[w]e have done very well under a common law system and I believe that we actually enjoy our rights better under common law'. He compared Australia favourably to the United States, where a bill of rights had, he said, failed to deliver an adequate public health system or streets free of gun crime.[79] Kerry Corke also suggested that the common law offered adequate protection for human rights, writing that the common law 'sets the rules of the community in those areas where statutory law is silent'.[80] Eric Frith regarded the values of the common law as the framework upon which Australia has developed and prospered.[81]

2.71 Overall, however, little evidence was presented to the Consultative Committee to support the notion that the common law plays a major role in defending human rights in the ACT. The common law can be altered at will by the legislature and does not provide a solid or complete basis for the protection of human rights. Indeed the common law is often given credit for showing much greater concern with individual rights than is the case. The common law

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[75] Compare the *Legislative Standards Act 1992* (Qld), section 4, which sets out basic rights to be protected in legislation. The Legal, Constitutional and Administrative Review Committee of the Queensland Legislative Assembly has produce a document, *Queenslanders' Basic Rights* (1988), available at http://www.parliament.qld.gov.au/comdocs/legalrev/Queenslanders'%20Basic%20Rights%20handbook%20-%20long%20version.PDF which details rights such as those in the ICCPR and ICESCR. This is a further guide for the scrutiny of Bills.

[76] Available at http://www.gtcentre.unsw.edu.au/Conference-Papers-Bill-of-Rights-2002.html.

[77] See para 2.36 above.

[78] (1992) 177 CLR 292.

[79] Submission 51.

[80] Submission 95.

[81] Submission 83.

traditionally has provided some remedies to deal with aspects of a fair trial, personal freedom and reputation and property rights, but it does not offer protection to many fundamental human rights.[82]

2.72 The Consultative Committee notes that the adoption of a bill of rights would not result in the complete displacement of the common law in the ACT. The existing common law would remain to complement and supplement legislation. Future common law would continue to develop also, though it would obviously be influenced by the existence of a bill of rights.

Adequacy of existing law to protect human rights in the ACT

2.73 From this brief overview of the various sources of law that regulate life in the ACT, it is clear that there is no comprehensive protection of human rights. The Consultative Committee notes that there are particular rules and principles that are designed to enhance human rights, but it believes that protection is not comprehensive, sufficient or transparent.

2.74 The Consultative Committee believes that the absence of a comprehensive and accessible statement of rights could be particularly significant in the ACT. Our particular form of government renders the ACT legislative process vulnerable to human rights concerns.

2.75 In the ACT the shape and complexion of government is strongly determined by the size of the Legislative Assembly (and the number of Members of the Legislative Assembly per electorate) and the Hare Clark voting system used in Territory elections. These factors, along with the unicameral nature of the legislature, have combined to create a situation where the ACT has been run by a minority government since self-government in 1989. Often, the balance of power in the Legislative Assembly has been held by one or two people. Political deals made to ensure the support of these politicians may lead to the enactment of legislation that has had the potential to undermine human rights. An ACT bill of rights could constitute a baseline for political negotiations. At the very least, it would prompt public debate about human rights.

An accessible statement of community values

2.76 Even if it were possible to argue that a combination of international, constitutional, Commonwealth, territorial and common law provided adequate coverage for human rights in the ACT, the fragmented nature of the coverage would remain a serious barrier to the development of a human rights-conscious culture. It would require considerable legal expertise to piece together the relevant law from the patchwork of protection now available.

2.77 To the extent that the rights of ACT residents exist, they are scattered through thousands of pages of legislation and of case law. The rights of ACT citizens are no more 'self-evident' than they are 'inalienable'. Few individuals could possibly be confident of what their rights really are. Equally, few of the

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[82] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 36-37; John Doyle & Belinda Wells, 'How far can the common law go towards protecting human rights?' in Philip Aston ed., *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999) 17.

officials and bureaucrats administering ACT law and managing government programs could be confident that their decisions were not breaching rights. Under the present system, there is no compelling reason for those making or administering the laws of the territory to turn their minds to human rights as they go about their business. By and large, human rights are not on the political, legal or social radar.

2.78 The ACT branch of the International Committee of Jurists wrote, 'it is legitimate to ask whether the citizen knows and understands the basis for their rights and freedoms. The enactment … of a Bill of Rights enables all to see clearly the basis of their community rights and obligations.'[83] This sentiment was echoed in a number of submissions received by the Consultative Committee. The ACT Council of Social Services suggested that a single document could be the 'foundation for a more socially aware and actively engaged citizenry.'[84]

2.79 In a similar vein, Beth Morris argued that:

> A Bill of Rights sends an important message about society's values. A Bill of Rights outlines the standards we expect from government and each other. We all like to think that Australians believe in a 'fair go' for everyone. At the moment this 'fair go' is in many ways dependent on who you are and the political mood of the day. This is not good enough…. I for one want to know that I live in a society where genocide is a crime, and where internationally recognised human rights such as in the ICCPR and ICESCR are understood and actively promoted by the rest of the community and those that govern it.[85]

2.80 Val Pawagi stated:

> For me, the beauty of having a Bill of Rights is that I would be able to go to a single legal document to establish what my rights are as a citizen of the ACT. At present, I am unable to do this. So for the average Canberran, the task of looking for the very protections that the legal system currently affords would be appreciably daunting, akin to finding a needle in a haystack.[86]

2.81 ACT Policing also supported a bill of rights that would provide an 'overarching philosophical framework governing community interactions.'[87]

2.82 A bill of rights would help ACT residents think of themselves (and each other) as holders of rights—distinct and identifiable rights. Individuals would carry this awareness with them in their everyday dealings with their elected representatives and with the bureaucracy that administers ACT government programs and policies and with other members of the community. A bill of rights would become a template against which the performance of government

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[83] Submission 67.

[84] Submission 89.

[85] Submission 73.

[86] Submission 81.

[87] Submission 94.

and the behaviour of public agencies could be measured by the people—and, importantly, against which government and agencies could measure themselves.

2.83 The Consultative Committee notes that this function of a bill of rights fits well with the ACT government policy for sustainability in the ACT's future, *People, Place, Prosperity.*[88] The policy emphasises the need to ensure equity within and between generations by recognising that 'all people have a right to reach their full potential and lead productive lives in an inclusive and tolerant society'.[89]

2.84 While public attention will always tend to focus on conflict—the disputes that end up in the courts or on the front page of the newspaper—much of the real value of a bill of rights lies in the cultural change that takes place beyond the public gaze, in the backrooms where bureaucratic practices are reformed and legislation is scrutinised to ensure compliance with human rights. A successful bill of rights should permeate a community's bureaucratic and civic culture so that breaches of rights become less frequent. As Francesca Klug has said:

> In essence a Bill of Rights represents a vision of democracy in which content matters as much as form; in which the election of a government is not an open mandate to usher in any policy regardless of its effect on individual or minority rights; in which a vote every five years is not the only right to which all individuals … can lay claim ….[90]

2.85 From the experience in other countries it is clear that a bill of rights can have considerable impact on the exercise of power by governments and public authorities. In New Zealand, for example, the police quickly moved to reform their practices following the introduction of the *Bill of Rights Act* in 1990 and to educate the police force about human rights.[91]

2.86 A number of submissions to the Consultative Committee argued that structural issues needed to be addressed in the ACT if a bill of rights was to have any chance of making a real change to the exercise of public administration. For example, in a meeting with the Committee, the Sustainable Rural Land Group urged a clear separation of policy, regulation and enforcement.

2.87 It must also be pointed out that a number of submissions made to the Consultative Committee claimed that under-resourcing of the mechanisms available to redress the abuse of human rights was seriously undermining what limited human rights protection currently existed. The question of adequate resources will undoubtedly remain pertinent, with or without a bill of rights.

2.88 The Consultative Committee acknowledges that the existence of a bill of rights alone would be insufficient to bring about a significant change in the ACT's culture of respect and observance of rights. As Professor Tom Campbell noted,

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[88] Available at http://www.sustainability.act.gov.au.

[89] *Ibid* 13.

[90] *Reinventing Community* (1996) available at http://www.charter88.org.uk/pubs/reinven/reincomm.html.

[91] Hon EW Thomas, 'A Bill of Rights: The New Zealand Experience' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002).

having a bill of rights is no guarantee that it will be observed.[92] Such change would require political will at the highest level. It would mean devoting resources to educating those who administer government programs, from the agency chiefs right through to the newest recruits. It would mean making education a formal, permanent part of each agency's corporate plan. In essence, it would mean building a public sector where a 'rights-respecting culture' would imbue decision-making at every level. While a bill of rights cannot of itself create a human rights culture, it is clear that without such a document a consciousness of rights will never routinely inform the processes of government.

2.89 Just as importantly, education would need to occur in the classrooms, where young people would be first taught to regard themselves and each other as holders of rights, and in the community, where that status would need to be reinforced and restated throughout an individual's lifetime. The Consultative Committee believes that the introduction of a bill of rights must be accompanied by a commitment—and a plan—to see cultural change implemented across government agencies, and a commitment to a long-term program of community education and awareness-raising. As the International Commission of Jurists noted:

> [A] clear form of words setting out the basic rights and obligations of citizens would be of great benefit in leading to a better informed community, and a community that valued both their own rights and the rights of others.[93]

The issue of education is discussed further in Chapter 3.

Should the ACT 'go it alone'?

2.90 The ACT is a jurisdictional unit inside a federal state and has limited legislative powers. The *Self-Government Act 1989* (Cth) gives the ACT jurisdiction over particular matters, but under section 122 of the Australian Constitution, the Commonwealth government has the power to override any ACT laws. For example, when it overturned the Northern Territory's euthanasia law in 1997, the Commonwealth effectively prevented the ACT from enacting similar legislation of its own.[94]

2.91 In its consultations, the Consultative Committee heard concerns expressed that the adoption of an ACT bill of rights would be of limited value either because the ACT is such a small jurisdiction or because the Commonwealth government might move to override its provisions.[95] It was argued by some that it would be better to await an Australian bill of rights.

2.92 'Why are you wasting taxpayers' money investigating a bill of rights for the ACT? A bill of rights is a federal matter', wrote Tony Jones.[96] Laurayne

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[92] Submission 121.

[93] Submission 69.

[94] *Euthanasia Laws Act 1997* (Cth).

[95] Eg submission 113 (Siegfried Wagner).

[96] Submission 58.

Bowler similarly thought that limits on the ACT's legislative powers meant a bill of rights was better addressed nationally.[97] The Consultative Committee agrees that an Australian bill of rights applicable in all jurisdictions would provide the best protection for human rights. It would allow consistent coverage of rights across Australia. However, in the current federal political climate, such a development is most unlikely. The Commonwealth Attorney-General, the Hon. Daryl Williams AM, QC, MP, has recently said that he is 'convinced that there is no need for a Bill of Rights in Australia' and that proponents of such a development are suffering from 'constitutional cringe'.[98] The Australian Democrats and the Labor Shadow Attorney-General, Robert McClelland MP, have expressed interest in some form of bill of rights,[99] but the matter is not being actively pursued.

2.93 Given the lack of likelihood of a federal bill of rights in the immediate future, the Consultative Committee believes there is considerable value in the ACT adopting some form of a bill of rights. It is possible for such a law to co-exist with an eventual Commonwealth bill of rights as, for example, the bills of rights of all fifty of the states of the United States co-exist with the national constitution.

2.94 An ACT bill of rights could not, of course, directly affect Commonwealth or state agencies or action and would have direct impact only on areas of ACT law. However, the ACT has often been in the forefront of legislative reform for Australia. Apart from better protecting human rights in the ACT, a possible outcome of the ACT adoption of a bill of rights would be to encourage other jurisdictions to investigate this initiative.

2.95 The strong traditions of self-government in the ACT indicate that it is unlikely that the Commonwealth government would move to override any ACT bill of rights. The Prime Minister, the Hon. John Howard MP, has defended the right of the Northern Territory to breach international human rights standards in the case of mandatory sentencing laws on the basis of that it was up to the Territory to decide such matters for itself.[100] On the same analysis, the ACT's democratically elected government would be able to *enhance* the protection of human rights in areas of its legislative power.

2.96 The possibility of the Commonwealth overriding an ACT bill of rights would also be minimised if the ACT committed itself to safeguard rights that Australia itself was already under an international obligation to protect. At international law, treaty obligations fall on the federal entity rather than directly on each unit of a federal state, but a federal country has the duty to ensure that its units comply with international commitments. The Consultative Committee notes however that the ACT does not have jurisdiction over all the rights set out in international human rights treaties.

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[97] Submission 97.

[98] Speech, 21 June 2002, available at http://www.gtcentre.unsw.edu.au/Conference-Papers-Bill-of-Rights-2002.html.

[99] See the speeches of Senator Brian Greig and the Robert McClelland MP, 21 June 2002, available at http://www.gtcentre.unsw.edu.au/Conference-Papers-Bill-of-Rights-2002.html.

[100] *The Canberra Times* 19 February 2000, 1.

Is a bill of rights consistent with democratic governance in the ACT?

2.97 The Consultative Committee heard a number of objections about the effect an ACT bill of rights might have on the Territory's democratic processes. For example, some people making submissions to the Consultative Committee believed that bills of rights, by their nature, tended to elevate the rights of criminals. George McLintock argued strongly that the right to be protected against the criminal and anti-social activities of others ought to take precedence over attempts by 'criminals and their lawyers' to avoid the consequences of their actions.[101]

2.98 Others were convinced that a bill of rights was not about according everyone *equal* rights, but according special rights to minorities, to the detriment of the majority. H Morris wrote that 'the only people to benefit from such a Bill seem to be aggressive minority groups. A Bill of Rights would subject our society to the values of such groups' and effectively legislate against the right of everyone else to hold their own, differing values.[102]

2.99 Some critics of an ACT bill of rights were prepared to accept the adoption of a non-binding declaration on rights as a symbolic statement, as long as it did not have any impact on legislative processes. For example, Frank McKone argued that '[a] Declaration of the Legislative Assembly, though presumably having less formal legislative weight than entrenchment or ordinary statute, may well have greater moral persuasive effect.'[103]

2.100 The ACT Division of the Young Liberal Movement was concerned about the role of the judiciary in any bill of rights: 'If a Bill of Rights were to deliver some or all policy decisions to the judiciary it would represent a serious dilution of democracy'. It added:

> While parliaments by no means have a monopoly on wisdom, or a perfect record in terms of policy development, the institution is designed with the facilities to expose policy debate to public scrutiny.[104]

2.101 Professor John McMillan argued against giving more power to judges, pointing out that:

> Few politicians individually make decisions, and none make decisions that have conclusive force. Political power is exercised through a forum and a process …. By contrast, judges can make individual decisions that have conclusive force, subject only to oversight by an appeals court ….[105]

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[101] Submission 43.

[102] Submission 102.

[103] Submission 22.

[104] Submission 92. See also submission 26 (NSW Council of Churches).

[105] Submission 125.

Bruce Taggart voiced similar concerns about a bill of rights, arguing that it would give an unelected judiciary a blank cheque to determine the content of rights.[106]

2.102 Two interesting proposals for rights protection that bypassed the judiciary were presented to the Consultative Committee. Professor George Winterton suggested a system of pre-enactment review of legislation by a non-judicial council, along the lines of the French *Conseil Constitutionel*.[107] The ACT Rights Council (whose membership might be retired judges and constitutional experts) would examine proposed legislation against an agreed set of rights. If the Rights Council concluded that the draft law would violate specific rights, the offending provisions would lapse unless the Legislative Assembly approved them by a two-thirds majority.[108]

2.103 Professor Tom Campbell proposed a 'Democratic Bill of Rights'.[109] This would involve the entrenchment of a Declaration of Rights and Freedoms covering a broad range of economic, social and cultural rights as well as civil and political rights. A Human Rights Committee of the Legislative Assembly would be responsible for scrutinising all proposed legislation to ensure that it complied with the Declaration. The Declaration would not be enforceable by the courts. An independent Human Rights Commission would investigate human rights complaints.

2.104 Other correspondents were less persuaded of the superiority of legislative sovereignty in the area of human rights and argued that it was necessary for the legislature to be kept in strict check by the judiciary. Such a model would require that a bill of rights be entrenched through the procedures set out in the *Self-Government Act 1989* (Cth). For example, Michael Antrum, President of the Lawyers' Reform Association (NSW), argued that 'for a bill of rights to mean something, it must be clothed in some armour.'[110] The ACT Ministerial Advisory Council of Women agreed, writing that '[n]othing less than entrenched legislation will adequately protect human rights.'[111] The Canberra Islamic Centre also supported an entrenched bill of rights.[112]

2.105 Some submissions to the Consultative Committee recommended a statutory bill of rights. Gavan Griffith QC, AO said: 'My preference would be to enact the Bill as an ordinary statute but with the provision that it would require specific enactment in contrary terms to override the general provisions of the Bill [an over-ride clause]'.[113] Such a course would not be seen as particularly radical, he wrote, but would definitely be in the public good.

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[106] Submission 82.

[107] Submission 31.

[108] See also George Winterton, 'An Australian Rights Council' 24 *University of New South Wales Law Journal* (2001) 792.

[109] Submission 121.

[110] Submission 70.

[111] Submission 105.

[112] Submission 84. See also submission 115 (HJ Grant) and 63 (Wayne Francisco).

[113] Submission 29.

2.106 A number of people suggested that the ACT steer a cautious, middle course—beginning modestly, with a statutory bill of rights and moving to an entrenched model if and when the community was comfortable with the idea. For example, Paul Kildea stated: 'I believe it would be best, initially, to introduce a moderate Bill of Rights. This would give the public an opportunity to become accustomed to it.'[114] Similarly, the Canberra Chapter of the International Commission of Jurists wrote:

> The Legislative Assembly, by enacting a Bill of Rights in statutory form, will retain the ability to amend or indeed repeal a Bill of Rights. It is to be hoped that, after an appropriate period, the benefits of a Bill of Rights will be seen to justify the entrenchment of the Bill of Rights by way of referendum. But that is an argument for the future.[115]

2.107 Similar views were advanced by the National Children's and Youth Law Centre, which wrote: 'We prefer a gradualist approach, with an ordinary statute to start with but with a planned progression towards an entrenched Charter of Rights and Freedoms.'[116] Michael Wellham also suggested that '[a] Bill of Rights could be legislated at first … and entrenched later following a referendum after a set trial period.'[117]

2.108 In a recent article, Wojciech Sadurski has argued that we can only take a position on the appropriate roles of the judiciary, the legislature and the executive in protecting human rights in particular situations.[118] He has cautioned against taking abstract or 'in-principle' positions on the value or danger of judicial review in protecting rights and has urged context-sensitive inquiries. With this lesson in mind, the Consultative Committee turns in Chapter 3 to examine how systems of rights protection have worked in practice in comparable legal systems.

Summary

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

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[114] Submission 91.

[115] Submission 69.

[116] Submission 19.

[117] Submission 74.

[118] 'Judicial Review and the Protection of Constitutional Rights' 22 *Oxford Journal of Legal Studies* (2002) 275.

Recommendations

Recommendation 1

The Consultative Committee recommends the adoption of a bill of rights in the ACT.

Recommendation 2

Apart from its legal significance, there is cultural and symbolic value in having a single, accessible statement of the rights applicable in the ACT, supported by a community-wide education campaign. This value would be further enhanced by the attachment to the legislation of a short, simply-written preamble that sets out in plain English the purpose of the law.

3. WHAT FORM SHOULD A BILL OF RIGHTS TAKE?

3.1 The Consultative Committee analysed a number of existing models of bills of rights from countries with similar legal systems to Australia's. Perhaps because of the visibility and prominence of North American culture in Australia, many of the people who contributed to the Consultative Committee's consultations tended to associate the idea of a bill of rights with the United States Bill of Rights. The Consultative Committee found in its consultations that many people were unaware of the range of other, more recent models adopted by countries including Canada, New Zealand, South Africa and the United Kingdom. In this Chapter we sketch the major features of these models and identify the elements that may be appropriate in an ACT bill of rights.

The United States Bill of Rights

3.2 The United States Constitution, adopted in 1789, contained few references to rights, on the assumption that existing state bills of rights would be adequate protection. A campaign led by the anti-Federalists to insert a bill of rights in the Constitution in order to curb federal power over individuals was eventually successful in 1791. The first ten amendments to the United States Constitution set out a range of individual rights, from the right to freedom of speech and religion,[1] to the right to keep and bear arms,[2] the right to due process in criminal trials[3] and the right to be free from cruel and unusual punishment.[4] Later amendments also include rights provisions, for example the prohibition of racial discrimination[5] and sex discrimination[6] with respect to the right to vote.

3.3 The rights contained in the amendments to the United States Constitution are expressed in absolute terms. There is no reference to limitations on rights nor to the need to balance competing claims of rights. The United States rights also do not include many now protected in international law. For example there is no explicit general right to non-discrimination on the basis of sex or sexuality and no reference to economic or cultural rights.

3.4 In the United States constitutional system, the Supreme Court has the power to declare invalid any federal or state law that is inconsistent with the Bill of Rights. The United States model thus accords final say on the interpretation of generally-expressed rights to the judiciary. This has led to a highly politicised judicial appointment process and the judiciary is regularly criticised for usurping legislative functions in the area of rights protection.[7]

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[1] First Amendment, United States Constitution.

[2] Second Amendment, United States Constitution.

[3] Fifth & Sixth Amendments, United States Constitution.

[4] Eighth Amendment, United States Constitution.

[5] Fifteenth Amendment, United States Constitution.

[6] Nineteenth Amendment, United States Constitution.

[7] Eg Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia* (1998).

3.5 Over the past 200 years, there have been many controversial decisions made under the United States Bill of Rights. One issue has been the appropriate modern interpretation of rights guarantees adopted two centuries ago and the Supreme Court has been attacked from all sides as either too conservative or too progressive in its decisions. In the *Dred Scott* case in 1857, the Supreme Court held that slave-owning was protected by the Bill of Rights.[8] In *Brown v Board of Education* almost a hundred years later, the Supreme Court interpreted the Bill of Rights to require strong measures for the desegregation of schools.[9]

3.6 There is much debate about how well the United States Bill of Rights has protected human rights in practice. For example, a recent study of the Supreme Court challenges the popular image of the Court as the champion of the oppressed. It points out that in the United States context, judicial attitudes to rights often lag behind those of the legislature.[10]

The Canadian Charter of Rights and Freedoms 1982

3.7 For almost a hundred years, the Canadian Constitution, the British North America Act of 1867, contained no system of human rights protection. In 1960 Prime Minister Diefenbaker introduced legislation to create a statutory bill of rights. The legislation was largely a result of concern about the expansion of executive power and the influence of the international human rights movement.

3.8 The 1960 *Bill of Rights* set out a catalogue of civil and political rights, including rights to due process of law, equality before the law and equal protection and freedom of speech and religion. The rights were to be used in the interpretation of federal legislation, but not the legislation of the Canadian provinces. The *Bill of Rights* also authorised the Minister for Justice to examine all proposed legislation for consistency with the rights set out and to report any inconsistency to the Canadian House of Commons. In the 22 years of the Bill's life, such a report was made only once. The *Bill of Rights* allowed two major exemptions to its terms: a federal statute could expressly declare that it was to operate notwithstanding the *Bill of Rights*; and the *Canadian War Measures Act* was exempted from the scope of the *Bill of Rights*.

3.9 The Canadian *Bill of Rights* had little practical force. Thirty cases involving the legislation came before the Canadian Supreme Court in 22 years. Only once was a federal statute declared inoperative under its terms.[11] It was held that the *Bill of Rights* was only relevant in cases of ambiguous legislation. If the legislation in question clearly and expressly violated human rights, the *Bill of Rights* could not be invoked as it must be taken to have been parliament's will to breach human rights.[12]

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[8] *Dred Scott v Sanford* 60 US (19 Howard) 393 (1857).

[9] 347 US 483 (1954).

[10] Mark Tushnet, *Taking the Constitution away from the Courts* (1999).

[11] *R v Drybones* [1970] SCR 282.

[12] *Attorney-General v Lavell* [1974] SCR 1349.

3.10 In 1982, the Canadian Constitution was patriated through the United Kingdom Parliament's adoption of the *Canada Act*. At the same time, due to a campaign led by Prime Minister Pierre Trudeau, a Charter of Rights and Freedoms was inserted into the Constitution.

3.11 The Charter sets out various categories of rights drawn from national and international sources: fundamental freedoms including conscience and religion, thought, expression and association; democratic rights (the right to vote, the maximum duration of legislatures and their minimum annual meeting times); mobility rights; legal rights (procedural rights in criminal matters and the right to an interpreter in all proceedings); official language rights and the educational rights of minority language groups. The Charter also affirms existing aboriginal and treaty rights of the Indian, Inuit and Métis peoples.

3.12 The Charter rights are enforceable by the courts, which can grant such remedies for infringement as they consider appropriate and just. Because of the Charter's constitutional status, any law inconsistent with the Charter has no force or effect.

3.13 The Canadian Charter contains two provisions that qualify the rights it protects. First, the rights and freedoms it contains are subject 'to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[13] The Canadian Supreme Court has developed an extensive jurisprudence on the meaning of section 1. For example, in *R v Oakes* the Court stated that the government must prove that 'the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom'.[14]

3.14 The second limitation on the scope of the Canadian Charter, inserted at the last minute as the price of the provinces' agreement to the Charter, allows any Canadian legislature to exclude legislation from most of the Charter's operation by express declaration for (renewable) five-year periods.[15] This 'notwithstanding' clause has been invoked by the provinces on several occasions,[16] but not so far by the federal government. The notwithstanding clause allows a Canadian legislature to have the final say on the protection of

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[13] Section 1.

[14] [1986] 1 SCR 103.

[15] Section 33.

[16] The Quebec government initially used section 33 to qualify all its existing and new laws until 1985 as a protest against the adoption of the Charter. There are also cases where the use of section 33 was considered but abandoned. For example, in March 1998 the government of Alberta introduced a draft law that would have limited the damages payable to victims of an earlier government sponsored eugenics scheme. The Bill included a notwithstanding clause so that it could not be challenged under the Canadian Charter. Strong negative public reaction to the use of the clause led to the Bill being withdrawn within a day. See Andrew Butler, 'Judicial review, human rights and democracy' in Grant Huscroft & Paul Rishworth eds, *Litigating Rights: Perspectives from Domestic and International Law* (2002) 47, 69-70.

rights while at the same time constraining the legislature in a moral and political sense by requiring explicit override of human rights. It requires politicians to accept the responsibility of overriding human rights.[17]

3.15 Some observers have described the Canadian Charter as based on a 'dialogue' model of rights protection. It has been argued that in practice judicial interpretation of the Charter rarely defeats the objectives of the legislature. Rather, judicial decisions affect issues of process, enforcement and standards.[18] In other words, the effect of the Charter is to avoid 'a contest of political and judicial wills' and instead to encourage:

> [A]n on-going multi-layered constitutional conversation with Parliament and between Parliament and the courts on the scope and meaning of fundamental human rights and the importance and justification of legislative objectives when these conflict with rights.[19]

3.16 It has been said of the Canadian Charter of Rights and Freedoms that:

> In so far as the sifting of legal choices is the sifting of policy values, judges, in interpreting the law, do consider and always have considered, in addition to logic and precedent, the values or policy implications their legal conclusions represent. All the Charter did was to allow public policy to come out of the judicial closet and participate more openly in the policy partnerships which courts and legislatures have, in reality, been parties to for centuries.[20]

3.17 Some critics however have rejected the notion that the Canadian system allows a serious dialogue between the three branches of government. They argue that the judicial power to invalidate legislation ultimately makes relations between politicians and the judiciary in Canada less of a dialogue and more of a dictation test.[21]

3.18 Twenty years after the adoption of the Charter, there is broad public acceptance of its value in public life. A recent national poll found that 90% of Canadians regarded the Charter as important to their sense of national identity, indeed more important overall than the national anthem or the flag.[22] The Canadian

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[17] *Ibid* 69.

[18] Leighton McDonald, 'Rights, "dialogue" and democratic objections to judicial review' (seminar paper presented on 27 November 2002 in the ANU's Centre for International and Public Law's Bill of Rights seminar series).

[19] Janet Hiebert, 'Why must a Bill of Rights be a contest of political wills?' 10 *Public Law Review* (1999) 22. The dialogue metaphor has been much discussed in Canada. See Peter Hogg & Alison Bushell, 'The Charter dialogue between courts and legislatures (or perhaps the Charter of Rights isn't such a bad thing after all)' 35 *Osgoode Hall Law Journal* (1997) 75; Christopher P Manfredi & James B Kelly, 'Six degrees of dialogue: A response to Hogg and Bushell' 37 *Osgoode Hall Law Journal* (1999) 513; Kent Roach, 'Constitutional and common law dialogues between the Supreme Court and Canadian Legislatures' 80 *Canadian Bar Review* (2001) 481.

[20] NSW Parliament Standing Committee on Law and Justice, *Report on a NSW Bill of Rights* (2001) para 5.67, quoting the submission of Justice Paul Stein.

[21] Eg James Allen, 'Rights, paternalism, constitutions and judges' in Grant Huscroft & Paul Rishworth eds, *Litigating Rights: Perspectives from Domestic and International Law* (2002) 29, 45.

[22] Centre for Research and Information on Canada, *The Charter: Dividing or uniting Canadians?* (2002) available at http://www.cric.ca/pdf/cahiers/cricpapers_april2002.pdf.

Supreme Court's jurisprudence has differed from that of the United States in some areas—for example in its development of the right to equality as a substantive right and not just a right to equal treatment.[23] Other decisions have followed controversial United States decisions—such as the extension of the right of freedom of expression to invalidate prohibitions on anti-Semitic hate speech[24] and prohibitions on tobacco advertising.[25]

The New Zealand *Bill of Rights Act* 1990

3.19 New Zealand adopted a statutory bill of rights in 1990, after an attempt to introduce a constitutional bill of rights failed.[26] The *Bill of Rights Act* covers a range of civil and political rights, largely modelled on international law guarantees. In some areas it provides more detailed statements of rights than can be found in international law— for example with respect to the rights applicable in cases of search, arrest and detention. Borrowing the language of section 1 of the Canadian Charter, the rights are made subject 'only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[27] The rights apply to acts done by the legislative, executive and judicial branches of the New Zealand government and persons performing a public function.[28]

3.20 The major enforcement mechanism of the New Zealand *Bill of Rights Act* is its requirement that courts must where possible interpret legislation to be consistent with the designated rights and freedoms.[29] The courts have no power to invalidate any law that is inconsistent with these rights or to declare it impliedly repealed by the *Bill of Rights Act*.[30] The New Zealand government thus is not constrained from enacting legislation inconsistent with the designated rights and freedoms but it is required to inform Parliament on the introduction of such a law.[31] Government procedures now also require that all draft legislation presented to Cabinet be certified as complying with the *Bill of Rights*.[32]

3.21 Unlike the United Kingdom *Human Rights Act*, the New Zealand *Bill of Rights Act* does not contain any formal mechanism by which judges can declare laws to be incompatible with the *Bill of Rights Act*. There have been some signs of the judicial development of such a procedure. In *R v Poumako*[33] Justice Thomas made a formal declaration that a statute violated a right in the *Bill of*

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[23] *Andrews v Law Society (British Columbia)* [1989] 1 SCR 143.

[24] *R v Zundel* [1992] 2 SCR 731.

[25] *McDonald v Canada* [1995] 3 SCR 199.

[26] *A Bill of Rights for New Zealand* (White Paper 1985).

[27] Section 5.

[28] Section 3.

[29] Section 6.

[30] Section 4.

[31] Section 7.

[32] *Cabinet Office Manual* (Wellington 1996).

[33] [2000] 2 NZLR 695.

Rights Act and that the violation could not be justified under section 5 as a reasonable limit in a free and democratic society. However, the Court of Appeal has declined to endorse this development.[34]

3.22 The New Zealand *Bill of Rights Act* makes no reference to remedies for actions undertaken on an erroneous interpretation of legislation. Initially, an exclusionary rule of evidence was developed by the courts to remedy violation of rights of criminal procedure, unless the violations were inconsequential.[35] In 2002, the Court of Appeal rejected the exclusionary rule and endorsed a discretionary approach that permits all relevant factors to be weighed in deciding whether or not evidence collected in breach of the *Bill of Rights Act* should be excluded.[36]

3.23 The Court of Appeal has also decided that compensation may be awarded if rights are breached. In *Baigent's Case*[37] the Court awarded compensation to a woman whose house was damaged in a mistaken police raid that was in violation of the *Bill of Rights Act*. This was a public law remedy against the Crown for breach of the legislation. Although fears were expressed that this case would lead to a flood of cases seeking monetary damages, there have in fact been very few awards since.[38]

3.24 The tidal wave of litigation predicted by opponents of the New Zealand *Bill of Rights* has not eventuated. While there was an initial spike in the number of cases citing the Bill, as administrative and legislative reforms have responded to human rights concerns, so the number of cases has dropped away.[39]

3.25 Although there has been criticism of the weakness of the enforcement procedures under the *Bill of Rights Act*,[40] it is widely agreed that the *Bill of Rights Act* has increased the attention to human rights in the political process in New Zealand. It has been noted that:

> Bill of Rights claims are now a relatively frequent feature of the [parliamentary] select committee process, and on occasion select committees have quizzed departmental officials on issues of Bill of Rights consistency. In addition, the Bill of Rights is slowly entering public discussion of topical issues and bringing a new dimension to the shaping of public policy choices (and at a much earlier stage of that process than previously).[41]

3.26 A former member of the New Zealand Court of Appeal has said:

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[34] *R v Pora* [2001] 2 NZLR 37.

[35] *R v Goodwin (no 2)* [1993] 2 NZLR 390.

[36] *R v Shaheed* [2002] 2 NZLR 377.

[37] *Simpson v Attorney-General* [1994] 3 NZLR 667.

[38] Hon EW Thomas, 'A Bill of Rights: The New Zealand Experience' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002).

[39] *Ibid*.

[40] Eg Andrew Butler, 'Judicial review, human rights and democracy' in Grant Huscroft & Paul Rishworth eds, *Litigating Rights: Perspectives from Domestic and International Law* (2002) 47.

[41] *Ibid* 51.

> The Bill of Rights has been woven into the fabric of New Zealand law and New Zealand society. It is certain that no politician today would be heard to suggest that the Bill of Rights should be repealed. Political acquiescence of this kind is a sure indication that the Bill of Rights is seen by the New Zealand public to be worth retaining for the protection of their fundamental rights and freedoms.[42]

The South African Bill of Rights 1996

3.27 The South African Constitution of 1996 replaced an interim Constitution that came into force in 1994. The Constitution was drafted over two years by the newly elected multi-racial parliament and it involved extensive public consultation. Like the interim Constitution, it included a Bill of Rights whose provisions may be restricted (following the Canadian Charter) only by limitations that are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[43] The South African Bill of Rights applies to all law and to all the organs of state and directly in private relations.[44]

3.28 The South African Bill of Rights is striking for its broad coverage of rights. It includes the standard civil and political rights as well as economic and social rights such as access to housing, health care, food, water and security. It also includes rights such as that to a healthy environment and also property rights.

3.29 The Bill of Rights is interpreted by the South African Constitutional Court, which has the power to invalidate legislation that is inconsistent with the Bill of Rights.[45] Major decisions under the Bill of Rights include the requirement that immigration law treat same-sex partners of permanent South African residents in the same way as spouses.[46] Another case, *Makwanyane*, decided under the interim Constitution, declared the death penalty unconstitutional because it violated human dignity, the right to life, the right not to be punished cruelly and inhumanely and the right to equal protection of the law.[47] The South African Constitutional Court's decisions on constitutional economic and social rights are discussed in Chapter 5.

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[42] Hon EW Thomas, 'A Bill of Rights: The New Zealand Experience' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002).

[43] Section 36.

[44] Section 8.

[45] For a survey of some major cases on the right to equality and non-discrimination see Penelope Andrews, 'The South African Bill of Rights: Lessons for Australia' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002).

[46] *The National Coalition for Gay and Lesbian Equality v Minister for Home Affairs* [2000] (2) SA 1 available at http://www.concourt.gov.za/files/natcoal/natcoal.pdf.

[47] 6 BCLR (1995) 665.

The United Kingdom *Human Rights Act 1998*

3.30 The *Human Rights Act 1998* came into operation on 3 October 2000.[48] Until that time the most useful legal mechanism for the protection of human rights in the United Kingdom was the capacity of individuals to bring cases before the European Court of Human Rights under the European Convention on Human Rights of 1950 (ECHR). By the end of the 1990s, the United Kingdom had been found in breach of the Convention in almost 70 cases.

3.31 The *Human Rights Act* gives the ECHR considerable legal status although it does not directly incorporate it into English law. The *Human Rights Act* defines 'Convention rights' as the rights set out in the ECHR, the rights to property, education and free elections set out in the First Protocol to the ECHR and the abolition of the death penalty and the provision for the death penalty in times of war contained in the Sixth Protocol to the ECHR. The Act employs a range of mechanisms to import the international standards into national law.

3.32 First, it requires that all primary legislation (statutes) and subordinate legislation (regulations made under statutes) are, so far as is possible, to be read and put into effect in a way that is compatible with the ECHR.[49] There has been much debate about the meaning of the word 'possible' in section 3.[50] One judicial approach has been to argue that, unless a statute clearly provides a limit on the ECHR rights, it should be possible to interpret a law compatibly with the ECHR even if the resulting interpretation is 'linguistically strained'.[51] A different approach is to argue that, before judges rewrite legislation under section 3, they should look at the statute's meaning and purpose as a whole to ascertain whether it can be read compatibly with the ECHR rights.[52] This latter approach appears now to be the most influential in decisions under the *Human Rights Act*.[53]

3.33 Second, if courts find primary legislation incapable of being interpreted to be compatible with the ECHR, they have no power to invalidate the statute.[54] Instead, courts may make a 'Declaration of Incompatibility' with respect to the legislation.[55] The Declaration 'does not affect the validity, continuing operation or enforcement of the provision'.[56] It is also not binding on the parties to the proceedings.[57]

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[48] The Act came into operation in Scotland in 1999 under the scheme of devolution.

[49] Sections 3(1) and 3 (2) (a).

[50] Francesca Klug, 'Comparative Perspectives on Bills of Rights: The UK experience' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002).

[51] *R v A* [2002] 1 AC 45 (per Lord Steyn).

[52] *Ibid* (per Lord Hope).

[53] Eg *Mathews v Ministry of Defence* [2002] 3 All ER 513; *R v Shayler* [2002] 2 WLR 754.

[54] Section 4.

[55] Section 4.

[56] Section 4(6)(a).

[57] Section 4(6)(b).

3.34 The idea is that a formal Declaration of Incompatibility will place pressure on Parliament to amend or at least closely scrutinise and reconsider the legislation. Indeed, if a Declaration of Incompatibility is made, the government has the power to make a remedial order, using a fast-track procedure to amend the legislation if there are 'compelling reasons to do so'.[58] The relevant Minister can make 'such amendments to the legislation as he considers necessary to remove the incompatibility'.[59] A remedial order can operate retrospectively and be flexible enough to make different provision for different cases.

3.35 It has been said that the Declaration of Incompatibility mechanism combined with the possibility of remedial orders establishes a dialogue between the judiciary, Parliament and the executive about the scope and nature of human rights and that the tripartite structure creates a space for the public to also participate in the debate about rights.[60]

3.36 Third, subordinate or delegated legislation, which is adopted by the executive rather than the legislature, is treated differently to primary legislation under the *Human Rights Act*. Courts can simply refuse to give effect to incompatible subordinate legislation unless the offending provision is required by the parent statute.[61]

3.37 Fourth, all public authorities (including courts and tribunals but excluding Parliament) must act in a way that is compatible with the ECHR except if they are precluded from doing so by legislation.[62] Public authorities are defined to include 'any person certain of whose functions are functions of a public nature'[63] when their activities are of a public nature.[64] This would include a privately-run prison or an employment agency administering a government program. The requirement that courts in particular are bound to act consistently as far as possible with the ECHR has allowed the development of the common law to pay greater heed to human rights.

3.38 A person can bring an action to enforce the duty to act compatibly with the ECHR.[65] 'Just and appropriate' remedies can be granted for breach of this duty, but monetary compensation can be awarded only where no other remedy is appropriate.[66]

3.39 Fifth, under the *Human Rights Act*, a Minister introducing legislation into Parliament is required to make a statement either that the proposed law is

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[58] Section 10 (2).

[59] The Second Schedule to the *Human Rights Act* sets out the procedures for making remedial orders.

[60] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 191.

[61] Section 3 (2) (c).

[62] Section 6.

[63] Section 6 (3).

[64] Section 6 (5).

[65] Section 7.

[66] Section 8.

compatible with the Convention rights[67] or that no statement of compatibility can be made but that the government nevertheless intends to proceed with the law.[68] This provision operates to some extent in the same way as the 'notwithstanding' clause of the Canadian Charter although, unlike Canadian courts, United Kingdom courts are unable to overturn a statute. A formal acknowledgement of incompatibility by Parliament will necessarily limit the courts' scope in interpreting legislation under section 3, although it is possible that a court could decide that the statute in question does not in fact breach the *Human Rights Act*.

3.40 The interpretation of the ECHR by the European Commission and Court of Human Rights in Strasbourg must be taken into account by United Kingdom courts.[69] A case can still be taken from United Kingdom courts to the European Court of Human Rights in Strasbourg. Remedial orders may be made in respect of legislation found incompatible with the ECHR by the European Court of Human Rights after the *Human Rights Act* came into force.[70]

3.41 The *Human Rights Act* is carefully designed to avoid encroaching directly on the traditional principle of parliamentary sovereignty. Indeed Parliament itself is not bound to act compatibly with the ECHR.[71] A Joint Committee on Human Rights has been established by the United Kingdom Parliament. It scrutinises new legislation for compliance with the *Human Rights Act*. It has been very active, publishing 31 reports as at 30 April 2003, and has been successful in persuading the government to amend draft legislation to improve the protection of human rights.[72]

3.42 In the two years of its operation, the *Human Rights Act* has had a significant impact on the legal culture of the United Kingdom. For example, a Scots court decision found that temporary sheriffs did not constitute 'independent and impartial tribunals' in dealing with criminal matters, as required by the ECHR.[73] This is because of their limited security of tenure and the fact that they are not subject to legally enforceable requirements of impartiality and independence as are permanent sheriffs.[74] In its first Declaration of Incompatibility of legislation made in March 2001 the English High Court held that provisions of the *Mental Health Act 1983* were incompatible with the ECHR because they required detained patients to prove that they were no longer mentally ill before a tribunal

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[67] Section 19 (1) (a).

[68] Section 19 (1) (b).

[69] Section 2 (1).

[70] Section 10 (1) (b).

[71] Section 6 (4).

[72] See the Committee's web page at http://www.parliament.uk/commons/selcom/hrhome.htm.

[73] Article 6(1) provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

[74] *Starrs v Ruxton* [2000] SLT 42. This is despite the actual practice of independence and impartiality. Lord Prosser (at para 10 of his judgment) stated that 'a practice is no substitute for a right.'

could order their release.[75] This reversal of the onus of proof breached the right to liberty and security of the person.

3.43 By 30 April 2003, 13 Declarations of Incompatibility have been made under the *Human Rights Act*, although not all remain in place after appeals.[76] The remedial order procedure has been used once to amend the *Mental Health Act 1983* in the case referred to in the preceding paragraph, to change the burden of proof for continued detention from the patient to the detaining authority.[77] Another remedial order has been foreshadowed to amend a law allowing the Home Secretary to set the minimum term to be served by convicted murderers. The amendments will create statutory principles for judges to fix minimum prison sentences for murderers.[78]

3.44 The *Human Rights Act* came into operation two years after its adoption in order to allow the government and the public sector to prepare for its impact. Manuals have been prepared on the operation of the Act, including a manual for public servants about the impact of the *Human Rights Act* on their work – an indication of the significant changes necessary to administrative operations.[79]

3.45 The Lord Chancellor's Department in the United Kingdom closely monitors the impact of the *Human Rights Act* on the court system. The most recent published figures indicate that human rights points are made in courts of all levels, but that the *Human Rights Act* has not markedly increased the number of cases brought nor increased the hearing time of cases. In criminal cases in the higher courts, the number of cases raising human rights points fell from 11.1 % in the first quarter after the Act came into force to 6.2 % in the third quarter.[80] While these are of course only early trends, they suggest that the introduction of the legislation has not caused the litigation explosion predicted by the *Human Rights Act*'s opponents.

3.46 Statistics also indicate that the United Kingdom courts have been relatively cautious in their use of the *Human Rights Act*. By November 2002, of 297 actions brought under the *Human Rights Act*, 56 had been upheld.[81]

3.47 The Lord Chancellor has said of the first two years of the *Human Rights Act*'s operation:

> The Act represents one small manageable step for our Courts; but it is a major leap for our constitution and our culture. It has transformed our system of law into one of positive rights, responsibilities and freedoms, where before we had the freedom to do what was not prohibited. … [I]t

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[75] *R (on the application of H) v Mental Health Tribunal (North & East London Region)* [2002] QB 1.

[76] Francesca Klug, 'Comparative Perspectives on Bills of Rights: The UK experience' (paper delivered at ANU Comparative Bills of Rights conference, National Museum of Australia, Canberra, 18 December 2002); information updated 7 May 2003.

[77] See generally United Kingdom Parliament, Joint Committee on Human Rights, Seventh Report, *Making of Remedial Orders* (17 December 2001).

[78] *R (Anderson v Taylor) v Secretary of State for the Home Department* [2002] UK HL 46.

[79] Available at http://www.lcd.gov.uk/hract/guidlist.htm.

[80] Available at www.humanrights.gov.uk.

[81] Search results from Butterworths' Casebase Online program, 16 November 2002.

> has moved public decision-making in this country up a gear, by harnessing it to a set of fundamental standards. And it has breathed new life into the relationship between Parliament, Government and the Judiciary, so that all three are working together to ensure that a culture of respect for human rights becomes embedded across the whole of our society.[82]

Lessons for the ACT

3.48 The Consultative Committee acknowledges the force of Dr Max Spry's observation that rights are protected through many mechanisms and that a bill of rights is at best only one such avenue.[83] Dr Spry pointed for example to the often neglected role of the media in protecting human rights. The experience of other countries demonstrates that a bill of rights will not resolve all human rights concerns or address basic problems of social justice. It can, however, be a mechanism that ensures human rights are put on the agenda of public decision-making.

3.49 While the Consultative Committee received a wealth of interesting suggestions about the appropriate form of a bill of rights, no consensus emerged over the course of its consultations. As the ACT Council of Social Services noted: 'Opinion within the ACT community appears divided, and even within the ACTCOSS constituency, there is some disquiet about the final form a Bill would take.' 'What is not in question,' the ACT Council of Social Services went on to say, 'is the fact that there is a need for some form of statement of the rights and responsibilities of ACT citizens.'[84]

3.50 In the context of the ACT, the Consultative Committee considers that a model that preserves a balance between the legislature, the executive and the judiciary in relation to the protection of rights is preferable to one that defers almost completely to the legislature and the executive (as in the current Australian legal system) or one that allows the judiciary effectively to trump the legislature and to invalidate laws (as in the United States Bill of Rights).

3.51 The Consultative Committee is persuaded that the protection of rights will be best achieved if the three branches of government – the legislature, the executive and the judiciary – can have an ongoing and public dialogue about rights. If the debate is a public one, the community can also engage with it. This means that the courts will not become the arena in which the debate about protection of rights is concentrated. An ACT bill of rights needs to focus debate but not to stifle dissenting opinion; it should encourage creative solutions to human rights issues rather than lead to proscriptive or prescriptive orders. As the 2001 New South Wales Inquiry into a Bill of Rights noted about the Canadian experience with its Charter of Rights and Freedoms, access to rights for formerly disadvantaged groups has been achieved in that country *without* the

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[82] Lord Irvine of Lairg, 'The Human Rights Act Two Years On: An Analysis' Durham University, 1 November 2002, available at http://www.lcd.gov.uk/speeches/2002/lc011102.htm.

[83] Submission 44.

[84] Submission 89.

need to take complaints to the courts. The mere existence of a legal avenue of redress has brought about changes in institutional culture.[85]

3.52 The United Kingdom's Lord Chancellor, Lord Irvine of Lairg, has pointed out that under the United Kingdom's *Human Rights Act*, a court's role is not to make policy, but rather to balance the human rights of citizens with policies established by the legislature, giving due deference to the legislature's capacity to develop policy.[86]

3.53 The Consultative Committee believes that a culture of dialogue about human rights, in which views are respectfully aired, respectfully heard and respectfully responded to, will only emerge if there is an awareness, from the outset, of what it is that the community seeks to achieve by the introduction of a bill of rights. The Deliberative Poll commissioned by the Consultative Committee proved that some peoples' views and assumptions can alter if they have access to information and debate.

3.54 The Consultative Committee notes that the UN Human Rights Committee has criticised both the New Zealand *Bill of Rights Act* and the United Kingdom *Human Rights Act* as inadequate methods of implementation of the ICCPR. The perceived inadequacy stems from the fact that neither law repeals inconsistent legislation and neither has higher status than ordinary legislation.[87] The Consultative Committee considers that the Human Rights Committee's analysis is a rather formalistic one and fails to comprehend the practical force of the New Zealand and United Kingdom laws. In defending the New Zealand *Bill of Rights Act*, Janet McLean has suggested that:

> The focus should not be on what powers the courts have but what effect their decisions have in terms of administrative and legislative action and response…A supreme bill of rights is neither necessary nor sufficient for a healthy human rights culture. Relying too much on courts may ultimately undermine rather than affirm human rights.[88]

McLean goes on to say that 'I would not wish for a system in which matters are removed from the legislative agenda and that only courts can talk about'.[89] The Consultative Committee endorses this approach.

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[85] NSW Parliament Standing Committee on Law and Justice, *Report on a NSW Bill of Rights* (2001) para 5.15. The bureaucracy undertook reviews of all existing legislation and regulations for compliance with relevant human rights standards, proposals are scrutinized by experts in the Charter, and permanent changes have been made to the way in which policy proposals reach Cabinet, with the resolution of human rights issues prior to proposals becoming legislation. *The Impact of the Human Rights Act: Lessons from Canada and New Zealand*, Constitution Unit, School of Public Policy, University College, London, May 1999 (London) UK.

[86] Lord Irvine of Lairg, 'The Human Rights Act Two Years On: An Analysis' Durham University, 1 November 2002, available at http://www.lcd.gov.uk/speeches/2002/lc011102.htm.

[87] Concluding Observations of the Human Rights Committee: New Zealand 3/10/1995 ccR/C79/Add 47; A/50/40 para 176. Concluding Observations of the Human Rights Committee: United Kingdom 3/10/1995, A/50/40 paras 416 and 427.

[88] Janet McLean, 'Legislative invalidation, human rights protection and s4 of the New Zealand Bill of Rights Act' [2001] *New Zealand Law Review* 421, 448.

[89] *Ibid*.

3.55 The model recommended by the Consultative Committee, and detailed in Chapter 4 of this Report, is a statutory bill of rights, providing that:

- The aim of the legislation is to create a dialogue about the best way to protect rights in the ACT between all branches of government;
- All draft legislation introduced into the Legislative Assembly be accompanied by a Statement of Compatibility with designated human rights. Legislation may include an explicit recognition that the law is being enacted notwithstanding its potential to breach identified human rights;[90]
- The terms of reference of the ACT Legislative Assembly Standing Committee on Legal Affairs should include the bill of rights;
- ACT courts and tribunals should interpret all laws they administer so far as possible to be consistent with human rights;
- The ACT Supreme Court may issue a Declaration of Incompatibility if it cannot interpret legislation to be consistent with the Act. The Declaration of Incompatibility must be tabled in the Legislative Assembly and the Legislative Assembly must consider it promptly and make a formal response, although it can decide to take no action to amend the law in question;
- The Supreme Court should be empowered to invalidate subordinate legislation, which is made directly by the executive without legislative approval; and
- All ACT public authorities (including any person who performs some functions of a public nature, when they are so acting, but excluding the Legislative Assembly) are required to act consistently with the Act and appropriate relief should be awarded for breach of this duty.

These features are explained in more detail in Chapter 4.

3.56 Because of the small size of the ACT Legislative Assembly and its unicameral system, the Consultative Committee does not consider it necessary to provide for remedial orders allowing 'fast-tracking' of legislative reform in response to a Declaration of Incompatibility (along the lines of section 10 of the United Kingdom *Human Rights Act*). The requirement that the government formally report on its response to any Declaration of Incompatibility allows for accountability and rapid legislative amendment if necessary.

3.57 The Consultative Committee believes the title 'Human Rights Act' is more appropriate than 'bill of rights'. The term 'Human Rights Act' captures the essence of the legislation better than the generic term. It also does not carry the historical baggage of the term 'bill of rights', which is so strongly identified with the United States Bill of Rights and has an implication of a stand-off between the judicial and political sphere over the protection of rights.

3.58 The Consultative Committee is aware that there is concern that an ACT bill of rights will cause a flood of unmeritorious litigation.[91] The experience of other

[90] See submission 79 (ACT Aboriginal Justice Advisory Council).

[91] Eg submission 27 (Glenn Pure).

countries indicates that this fear is not borne out in practice. For example, as noted above, statistics on the impact of the *Human Rights Act 1998* (UK) indicate neither a substantial change in the number of cases brought nor a lengthening of the hearing time of cases. Some submissions referred to the 'litigation culture' of the United States as if this was a product of the Bill of Rights. However, as Dr Bede Harris pointed out, most law suits filed in the United States are civil damages claims rather than actions under the Bill of Rights.[92]

3.59 In any event, as Dr Harris noted in his detailed submission:

> The flaw in this [litigation culture] argument is that, taken to its logical conclusion, it invites one to deny the very existence of the rule of law. After all, if it is a bad thing for people to go to court to assert their rights, why have any rules limiting the government at all? Why subject the government to law, and why not move back to the pre-Magna Carta era, when the word of the monarch was law with no right of redress in the courts? One only has to voice the argument to realise that at best it is facile, and at worst could be used to justify the abrogation of the constitutional order.[93]

Review of the *Human Rights Act*

3.60 The adoption of a *Human Rights Act* should be seen as a starting point for the better protection of human rights in the ACT rather than an end point. Indeed, many of the arguments against a bill of rights—that it 'fossilises' rights, for example, or that it binds future generations to the public morality of the past—lose their force if we view a bill of rights as a document capable of renewal and restatement. There is no doubt that a society's perceptions of rights evolve over time. New issues will emerge to confront the ACT community of the future. It may also be that over time a piece of legislation, no matter how carefully designed, needs refining once it has been in operation.

3.61 As Pierre Huetter wrote in his submission, while consistency in the sentiments embodied by a bill of rights is paramount, flexibility in application is crucial.[94] Bev Armstrong also argued that '[w]e should ensure that the rights we bequeath to our heirs … are flexible enough to change as our country and society evolves in the future.'[95]

3.62 The ACT Council of Social Services suggested that 'any declaration of rights and responsibilities must also include a process of regular review to ensure it remains relevant'.[96] In the same vein, George Williams, Megan Davis and Vanessa Bosnjak of the Gilbert and Tobin Centre of Public Law at the University of New South Wales proposed a review of an ACT bill of rights after five years, and ten-yearly reviews thereafter, to check the effectiveness of the

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[92] Submission 18. See also submission 148 (Australian Lawyers for Human Rights).

[93] Submission 18.

[94] Submission 124.

[95] Submission 41.

[96] Submission 89. Paul Highmore also supported this approach (submission 134).

legislation and to examine the need for expansion or the insertion of further remedies.[97] Bruce Taggart, although opposed to an ACT bill of rights, also endorsed the idea of a review after a short period based on a statistical analysis of the costs and value of the legislation.[98]

Education campaign

3.63 The need for a well-designed and resourced educational campaign about the protection of human rights was highlighted in the Committee's consultations.[99] This is central to the creation of a rights-respecting culture in the ACT. A six-month period between the enactment of the *Human Rights Act* and its coming into force would allow an education campaign to begin.

3.64 The ACT Human Rights Education Association informed the Consultative Committee of two valuable initiatives to promote human rights education.[100] These were the Citizenship of Humanity project and the Human Rights Schools project. The Citizenship of Humanity project is based on children in the final year of primary school discussing human rights ideas and receiving a special certificate. The ACT Human Rights Schools Project involves school students depicting their understanding of human rights issues in an artistic form.

3.65 Another way of ensuring ongoing, community-wide education about human rights would be to require ACT government departments to include a section on compliance with the *Human Rights Act* in their annual reports. This is discussed further in Chapter 4.

3.66 Public awareness of the legislation is one thing. Access to the legislation is quite another.[101] The Canadian government has funded organisations to bring test cases under the Canadian Charter for the benefit of less-privileged groups. The ACT Women's Legal Centre drew the Committee's attention to the Women's Legal Education and Action Fund (LEAF) which has been very influential in using the Canadian Charter to protect women's rights.[102] Tamar Hopkins of the Welfare Rights and Legal Centre proposed the creation of a Human Rights Community Legal Centre.[103]

3.67 The experience of the United Kingdom has been that judicial education with respect to human rights law is also important.[104] The Committee notes that an ACT *Human Rights Act* would also place renewed focus on the processes by

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[97] Submission 71.

[98] Submission 82.

[99] Eg submission 103 (Mark McMillan); Submission 75 (ACT Human Rights Education Association).

[100] Submission 75.

[101] Kerrie Tucker MLA raised with the Committee her concerns over legislative proposals to allow cost orders against lawyers who proceeded with claims that were found to have 'no reasonable prospects of success' (submission 99).

[102] Submission 142.

[103] Submission 136.

[104] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 33.

which judges are recruited. Indeed, a concern about the introduction of a bill of rights voiced by the ACT Women's Legal Centre was giving more power to a judiciary that is 'predominantly white, Anglo-Saxon, heterosexual and male'.[105]

Summary

Based on an examination of bills of rights in other jurisdictions, the Committee believes an ACT *Human Rights Act* should encourage a dialogue among the branches of government and the community about the protection of human rights, rather than create a judicial or legislative monologue on rights. The ACT *Human Rights Act* should include mechanisms to allow legislative scrutiny of draft legislation in light of specific human rights standards, as well as interpretation of legislation to be compatible as far as possible with these human rights. It should also include human rights scrutiny of public decision-making. The legislation should be subject to regular review to ensure that it continues to reflect the ACT community's evolving understanding of human rights.

Recommendation 3

The Consultative Committee recommends that an ACT bill of rights should be in statutory form and should aim to create a dialogue about rights protection between all branches of government.

Recommendation 4

The ACT bill of rights should be titled the *Human Rights Act*.

Recommendation 5

The Consultative Committee recommends that the operation of the ACT *Human Rights Act* be comprehensively reviewed after five years in order to identify its benefits and problems. Public participation should be encouraged in this process. At that stage, the success of the 'dialogue' model could be assessed and consideration could be given to amending the legislation.

The review should include the following issues:

The effectiveness of the legislation in protecting rights;

Whether other civil, political, economic, social and cultural rights should be included in the legislation;

The effectiveness of the legislation in protecting Indigenous rights;

Whether specific Indigenous rights should be included in the legislation; and

Whether a 'dialogue' model of rights protection is working or whether entrenchment of the *Human Rights Act*, or any other option, is preferable.

[105] Submission 142.

Recommendation 6

The Consultative Committee recommends that the introduction of the *Human Rights Act* should be accompanied by a broad, ongoing education program that brings its passage to the attention of the public sector and the ACT community.

Recommendation 7

The Committee recommends that the government consider methods of ensuring that costs do not deter access to the *Human Rights Act*.

Recommendation 8

The Committee recommends that the *Human Rights Act* come into force after a six-month period to allow the legislature, executive and judiciary to have time to prepare for its operation.

4. WHAT EFFECT WOULD A *HUMAN RIGHTS ACT* HAVE ON LEGISLATIVE, EXECUTIVE AND JUDICIAL POWERS?

4.1 The Consultative Committee's terms of reference require it to consider how an ACT bill of rights would affect the existing relationships between the three branches of government in the ACT. All legislation affects the distribution of power between the legislature, the judiciary and the executive in some way. For example, when it passes criminal sentencing legislation, the legislature may limit the discretion of the judiciary and empower the executive in relation to issues such as parole or mandatory minimum sentencing.

4.2 The ACT *Human Rights Act* will inevitably affect the distribution of power between the three arms of government. If the ACT legislature enacts the *Human Rights Act*, it will be directing the executive and the judiciary to conduct their business in a particular way. The Consultative Committee considers that this is both a necessary and a desirable consequence of the implementation of a bill of rights, although it is important to appreciate the limited nature of the change proposed.

4.3 As noted in Chapter 2, some of the public submissions and comments made during the Consultative Committee's consultation process objected to a redistribution of power that allowed the judiciary to invalidate acts of the legislature. It was argued that the legislature is accountable to the people of the ACT through the democratic process and should be the final decision-maker on human rights issues.

4.4 On the other hand, the consultation process also disclosed that many people believe that the judiciary should have a role in the enforcement of human rights because judges are perceived as less swayed by immediate political agendas.

A 'dialogue' model

4.5 The Consultative Committee believes that both views can and should be accommodated in the ACT *Human Rights Act*. The Consultative Committee was impressed by the concept of creating a dialogue, or, more prosaically, 'institutional interaction'[1] on human rights issues between the three arms of government and the community. However the dialogue proposed is not an open-ended one and, after debate, the legislature is assigned the 'last say' in relation to human rights issues. To create a dialogue, the judiciary should not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the *Human Rights Act*. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms to the *Human Rights Act*. The model proposed allows the judiciary to invalidate acts of the executive, including subordinate legislation, but preserves

[1] Leighton McDonald, 'Rights, "dialogue" and democratic objections to judicial review' (seminar paper presented on 27 November 2002 in the ANU's Centre for International and Public Law's Bill of Rights seminar series).

the ability of the legislature to reinstate such acts by passing authorising legislation.

4.6 The concept of a dialogue in governance is not new. A dialogue already occurs between the legislature and the judiciary, and to a lesser extent, the executive. This is a feature of many constitutional systems, even those where the judiciary has the 'last say' on rights issues. The judiciary frequently comments upon the adequacy of legislation or is critical of the actions of the executive. The legislature responds to judicial decisions by amending legislation or administrative practices. This response can be an implicit rejection of the judicial decision. Often these exchanges can be marked by an uncertainty among all parties on the permissible and appropriate extent of comment that can be made.

4.7 The ACT *Human Rights Act* would give a statutory framework to this dialogue or interaction as it relates to human rights issues. It would define the appropriate roles and responsibilities of each of the arms of government and enable them to interact in a clearly defined manner while preserving the principle of mutual respect. The *Human Rights Act* would not erode the independence of the judiciary. Instead, it would ensure that the three arms of government continue to work together constructively to better protect human rights. Although the *Human Rights Act* primarily addresses the three branches of government, it also creates the possibility of community involvement in the human rights dialogue through greater awareness of the issues.

4.8 The major features of the ACT *Human Rights Act* should include:

- Effective pre-enactment scrutiny of all legislation;
- An interpretive clause to ensure that legislation and the common law shall be interpreted as far as possible in a way that is compatible with the *Human Rights Act*;
- The ability of the Supreme Court, when considering legislation, to make a Declaration of Incompatibility with the *Human Rights Act*;
- The ability of the Supreme Court to invalidate subordinate or delegated legislation that is incompatible with human rights;
- An obligation on all bodies performing public functions (except the Legislative Assembly) to act in a way that is compatible with the *Human Rights Act* unless incompatible conduct is required by legislation;
- Effective remedies for a breach of the *Human Rights Act*, including a limited power of the Court to award damages;
- Standing for any aggrieved person to enforce rights under the *Human Rights Act*;
- An obligation on government departments to report on their implementation of the *Human Rights Act* in their annual reports; and
- The creation of an office of an ACT Human Rights Commissioner to provide an independent monitor of the operations of the *Human Rights Act*.

4.9 The Consultative Committee believes that these features will combine to produce an appropriate balance between the legislature, the executive and the judiciary in relation to human rights issues.

Pre-enactment scrutiny

4.10 In order to work effectively, the *Human Rights Act* requires the executive and the legislature to have access to reliable, accurate and independent legal advice. This advice should be provided prior to the passage of legislation so that the executive and the legislature are fully aware of human rights issues when developing and considering legislation.

4.11 Pre-enactment scrutiny will not guarantee that the legislation is not in breach of the *Human Rights Act.* It will not always be possible to identify a potential breach from the general words of legislation. Legislation needs to be applied to real-life situations before its implications can be fully identified. Legislation also cannot always control the way in which discretion is exercised by the executive. However, pre-enactment scrutiny can play a valuable role in the protection regime established under the *Human Rights Act*. The Consultative Committee considers that two forms of pre-enactment scrutiny are necessary.

Statement of Compatibility

4.12 The *Human Rights Act* should require the Attorney-General, upon presentation of a Bill in the Legislative Assembly, to table a statement that the Bill is compatible with the *Human Rights Act* or that it is incompatible, and, if so, in what respects. All non-government Bills should be referred to the Attorney-General after presentation for the preparation and tabling of a Statement of Compatibility prior to passage.

4.13 The 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*. For example, such a statement would explain if a right protected by the *Human Rights Act* is limited by the Bill in reliance upon the reasonable limits clause (discussed below).

4.14 The Statement of Compatibility sketched here is not fail-safe. The nature of the legislature is such that amendments will be moved in the Legislative Assembly that cannot be the subject of detailed advice. The proposed model must be flexible enough to accommodate this. In these circumstances, the other safeguards will come into play, such as the ability to seek a Declaration of Incompatibility from the Supreme Court.

4.15 The Statement of Compatibility should be viewed as one source of expert advice. Ideally, it should not be the only advice available to the legislature. The Attorney-General is a member of the government and of Cabinet. The Attorney-General occupies a special position within government and Cabinet and is expected to exercise independent judgment in relation to issues such as legal advice. This convention would apply to any Statement of Compatibility made by the Attorney-General.

4.16 The Attorney-General is part of the executive which works to the government and is charged with implementing the government's program. To this extent, the Attorney-General's advice may not be seen as completely independent. In a small government such as the ACT, where Ministers hold multiple portfolios, this perception is heightened.

4.17 Under the *Human Rights Act*, then, the advice of the Attorney-General should not be taken as determinative. The legislature or the judiciary may take a different view, particularly in relation to issues such as the breadth of the limitation authorised by the reasonable limits clause. Indeed in New Zealand, the legislature has proceeded to pass a Bill that the Attorney-General had stated was incompatible with the *Bill of Rights Act*.[2]

4.18 Section 7 of the New Zealand *Bill of Rights Act* requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with the rights and freedoms protected in the Act. The Parliamentary Counsel's office provides all Bills to the Ministry of Justice to be reviewed by a senior officer who reports to the Attorney-General and the Chief Parliamentary Counsel. In the event that a report is made under section 7, the advice, including the underlying advice, is generally made publicly available.[3] The Consultative Committee believes that this procedure could be applied in the ACT to safeguard the independence of the Attorney-General's advice.

Standing Committee on Legal Affairs

4.19 In addition to the Attorney-General's Statement of Compatibility, the legislature should also have a role in pre-enactment scrutiny. The advantage of this procedure, provided it is properly resourced, is the provision of advice to the legislature by a body that is completely independent from the executive.

4.20 The United Kingdom legislature has established a Joint Committee on Human Rights charged with scrutinising all legislation after introduction and prior to passage, to consider compliance with the *Human Rights Act*. The New Zealand legislature has not established such a procedure and this is acknowledged as a weakness in the protection provided under the New Zealand *Bill of Rights Act*.[4]

4.21 The ACT Legislative Assembly has established a Standing Committee on Legal Affairs that performs the duties of a scrutiny of Bills and subordinate legislation committee. The current terms of reference of the Committee are as follows:

(1) The Standing Committee on Legal Affairs (when performing the duties of a scrutiny of bills and subordinate legislation committee) shall:

(a) consider whether any instrument of a legislative nature made under an Act which is subject to disallowance and or disapproval by the Assembly (including a regulation, rule or by-law):

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[2] Judith Potter & Richard Elkins, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective' 12 *Journal of Judicial Administration* (2002) 85, 92.

[3] Michael Taggart, 'Tugging on Superman's Cape: Lessons from experience with the New Zealand Bill of Rights Act 1990' [1998] *Public Law* 266, 271.

[4] *Ibid* 273.

(i) is in accord with the general objects of the Act under which it is made;

(ii) unduly trespasses on rights previously established by law;

(iii) makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or

(iv) contains matter which in the opinion of the committee should properly be dealt with in an Act of the Legislative Assembly;

(b) consider whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee.

(c) consider whether the clauses of Bills introduced into the Assembly:

(i) unduly trespass on personal rights and liberties;

(ii) make rights, liberties and/or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties and/or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

4.22 The Standing Committee on Legal Affairs already considers a number of 'rights' issues.[5] The Consultative Committee notes that the Standing Committee does comment on human rights and international law issues from time to time. Rather than duplicate the work of the existing Committee, particularly given the size of the ACT Legislative Assembly, the Consultative Committee considers that the terms of reference of the Standing Committee on Legal Affairs could be redrafted to require it to consider whether or not a Bill complies with the *Human Rights Act*. In order to be effective, the Standing Committee would need to be properly resourced to provide such advice.

Interpretive clause

4.23 The *Human Rights Act* should provide that legislation, subordinate legislation and the common law must, as far as possible, be read and given effect to in a way that is compatible with human rights. This clause is directed to the courts and tribunals when interpreting legislation.

4.24 The Consultative Committee recognises that the interpretive clause allows judges and tribunal members to interpret the law to ensure compliance with the *Human Rights Act*. However, this is a limited power and the *Human Rights Act* should not permit the rewriting of legislation. The interpretive clause requires interpretation that is compatible with human rights only so far as it is possible to do so.[6]

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[5] See the discussion in Chapter 2.

[6] See the discussion of section 3 of the *Human Rights Act* 1998 (UK) in Chapter 3 at para 3.32.

4.25 The interpretive clause in the New Zealand *Bill of Rights Act* has been described as effectively a

> restatement of the common law method of interpretation, whereby Parliament is presumed to have legislated consistently with fundamental rights and freedoms and the courts strive to read enactments consistently with those freedoms.[7]

4.26 The courts are used to reading procedural protection into legislative gaps, including the right to a lawyer, the right of access to the courts, the right to freedom from self-incrimination and the right to be protected from unreasonable search and seizure.[8] The ACT *Human Rights Act* should provide a list of what the legislature states those rights and freedoms must include. Experience elsewhere is that the interpretive clause has been a powerful instrument in the protection of human rights. For example, requiring courts and tribunals to interpret the common law to be consistent with human rights has allowed the development of the common law.

4.27 One example of the development of the common law in light of human rights standards in the United Kingdom is the modification of the common law test of fairness in administrative decision-making to take account of human rights standards. The common law rule required demonstration of a 'real danger' of bias in a decision-maker. The test was altered, using human rights jurisprudence, to whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, that a tribunal was biased.[9] This decision has had implications for the composition of administrative decision-making bodies such as local authority 'complaints panels' against decisions on elderly persons' financial contributions to residential care costs,[10] and public house licensing decisions.[11]

4.28 The proposed *ACT Human Rights Act* allows the legislature to state expressly that the *Human Rights Act* does not apply to particular statutory provisions. This would preclude an interpretation of the law that made it consistent with human rights.

Declaration of Incompatibility

4.29 The Consultative Committee believes that the *Human Rights Act* can be a valuable tool to protect human rights without the need for the Supreme Court to be empowered to invalidate legislation. Instead, if the Supreme Court is satisfied that a provision of legislation is incompatible with the *Human Rights Act*, or that it cannot be interpreted in a way that is compatible with the *Human*

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[7] Judith Potter & Richard Elkins, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective' 12 *Journal of Judicial Administration* (2002) 85, 91

[8] Janet McLean, 'Legislative invalidation, human rights protection and s4 of the New Zealand Bill of Rights Act' [2001] *New Zealand Law Review* 421, 431.

[9] *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700.

[10] *R (Beeson) v Dorset County Council & Secretary of State for Health* [2002] HRLR 15.

[11] *R v Preston Crown Court, ex parte Chief Constable of Lancashire & another* [2002] 1 WLR 1332.

Rights Act, it may make a Declaration of Incompatibility. The power to issue such declarations should reside in the Supreme Court.

4.30 The Declaration of Incompatibility is then brought to the attention of the legislature. The final decision on whether or not to act upon the declaration is a matter for the legislature. The legislature must face the political consequences of acting, or failing to act, to bring legislation into line with the *Human Rights Act*. The Consultative Committee considers that, in our democratic system, the legislature is in the best position to assess and respond to the needs of the ACT community on human rights issues. It is a sphere in which the general population can express their opinions through lobbying members of the legislature.

4.31 The Declaration of Incompatibility process gives a new role to the judiciary. The Supreme Court is to review legislation and may declare it to be incompatible with the *Human Rights Act*. A Declaration of Incompatibility has no effect on the legality of the legislation or any actions taken under it. A Declaration of Incompatibility will, however, have the effect of invalidating subordinate legislation, unless the subordinate legislation is mandated by its parent legislation. The *Human Rights Act* should provide that the Attorney-General be given notice of a proceeding where a Declaration of Incompatibility might be made and be allowed to intervene in the proceedings.

4.32 Section 4 of the United Kingdom's *Human Rights Act* provides for a 'declaration of incompatibility' similar to that which is being proposed for the ACT. Thirteen declarations of incompatibility have been made since the United Kingdom *Human Rights Act* commenced on 2 October 2000. As noted in Chapter 3, the first declaration of incompatibility was issued in *R(H) v Mental Health Review Tribunal (North and East London Region)*.[12] A provision in the *Mental Health Act 1983* (UK), which placed the burden of proving that continued detention for treatment for mental illness was no longer justified on the patient, was held to be incompatible with the right to liberty under the ECHR. Parliament responded by quickly amending the affected provisions to bring them into line with the Convention.

4.33 A non-binding judicial declaration has been criticised by some as weak, particularly when compared to the Canadian and United States models where the courts may overrule legislation found to be in breach of their bills of rights.[13] The Consultative Committee notes this criticism but believes that a Declaration of Incompatibility is a sufficiently strong and appropriate enforcement mechanism to underpin the dialogue approach of the ACT *Human Rights Act*. Human rights issues may involve complex questions about morality and the allocation of public resources. For example, protection of the right to health in particular circumstances will require an intricate balancing of interests. Should medical resources be confined to those who will most benefit from them or should they be available to all? These are questions that should properly be

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[12] [2002] QB 1.

[13] Eg Andrew Butler, 'Judicial review, human rights and democracy' in Grant Huscroft & Paul Rishworth eds, *Litigating Rights: Perspectives from Domestic and International Law* (2002) 47, 52-54.

finally resolved by the legislature, with the assistance and the advice of the judiciary.

4.34 The Consultative Committee recognises that there may be times when the legislature will choose not to amend legislation to bring it into conformity with the *Human Rights Act*. A political decision not to conform with the *Human Rights Act* will however require an explanation from the legislature to the electorate and will mean that the elected representatives deal with the consequences of public opinion.

4.35 A Declaration of Incompatibility may not provide immediate relief for the party who brought the proceedings. Unless and until the legislature acts in response to the declaration, that individual will continue to be subject to the incompatible legislation. The Consultative Committee believes that this is a necessary consequence of the dialogue model proposed.

4.36 The Consultative Committee also recommends that consideration be given to imposing an additional requirement on the legislature in relation to a Declaration of Incompatibility. Once made, the Declaration should be submitted to the Attorney-General and the legislature should be given six months to respond to it. The response should indicate whether or not the legislation will be amended to bring it into line with the court's decision on the meaning of the *Human Rights Act*. The response could be by way of a debate in the Assembly.

4.37 The express requirement for a legislative response has not been included in any other similar legislation. In the Consultative Committee's view, it is a valuable refinement of the idea of dialogue between the arms of government. It offers the advantage of ensuring that rights issues highlighted in a Declaration of Incompatibility cannot be ignored by the legislature, or put in the 'too-hard' basket.

4.38 The dialogue model of rights protection gives the legislature a privileged role, but it must not become a monologue. The model will only work if the legislature believes itself obliged to participate in a conversation about human rights and recognises its duty to the community to explain its actions.

Subordinate legislation

4.39 Subordinate (or delegated) legislation is made by the executive branch of government. It is usually styled as 'rules' or 'regulations'. Subordinate legislation typically provides for detailed implementation of statutes that are adopted by the legislature. The legislature does not itself expressly approve subordinate legislation although the Legislative Assembly may disallow such legislation. The Consultative Committee recommends that subordinate legislation that cannot be interpreted in a manner that is compatible with the *Human Rights Act* should become invalid, unless the relevant primary legislation requires the subordinate legislation to breach the *Human Rights Act*.

Reasonable limits clause

4.40 Most human rights exist in potential conflict with each other and have to be qualified or limited to protect the rights of others or the common good.[14] International human rights law recognises that human rights can be limited where the public interest or the rights of others demands this. For example, article 29(2) of the Universal Declaration of Human Rights provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

4.41 Article 4 of the ICESCR states that:

> [T]he State may subject [economic, social and cultural] rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

4.42 Thus, international law provides that freedom of speech should be protected to the extent that it does not permit racial vilification[15] and that it may be limited to respect the rights and reputations of others and for protection of national security, public order, public health and morals.[16] And the right of trade unions to function freely is made subject to limitations prescribed by law that are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.[17]

4.43 The Consultative Committee notes that certain human rights are considered so basic that no derogation is permitted from their terms. For example, the ICCPR specifies that the right to life, the right to be free from torture, the right not to be held in slavery, the right not to be imprisoned for inability to fulfil a contractual obligation, the right to non-retrospectivity of criminal offences, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion are non-derogable in any circumstances.[18]

4.44 Subject to this principle of non-derogation from certain rights, the Consultative Committee recommends that the ACT *Human Rights Act* should include an express 'reasonable limits' clause, acknowledging that limits may be imposed on the human rights protected by the *Human Rights Act*. Section 1 of the Canadian Charter of Rights and Freedoms and section 5 of the New Zealand *Bill of Rights Act* provide useful models of such a clause. Those sections state that the Charter and the *Bill of Rights Act* respectively guarantee the rights and

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[14] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 149.

[15] ICCPR, article 20.

[16] ICCPR article 19.3.

[17] ICESCR article 8.1 (c).

[18] ICCPR, article 4.

freedoms they set out 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

4.45 The reasonable limits clause requires the legislature or the executive to demonstrate that legislation or subordinate legislation that limits rights protected by the *Human Rights Act* is justified in a democratic society. The idea of justification of legislation in human rights terms is central to the ACT *Human Rights Act*, as it is in New Zealand and the United Kingdom.[19] A reasonable limits clause ensures that any derogation from the ACT *Human Rights Act* is expressly justified and subjected to scrutiny. The conduct of an institutional dialogue about rights is almost as important as the end result in building a rights-respecting culture. The debate should commence at the time a legislative policy is initially proposed, continue when it is discussed in Cabinet and throughout the process of introduction and consideration in the legislature.

4.46 The reasonable limits clause will protect a legislative provision apparently inconsistent with the rights protected in the *Human Rights Act* from being the subject of a Declaration of Incompatibility, provided the provision is a limitation that can be characterised as reasonable and justifiable. Although the legislature may claim the protection of the reasonable limits clause when enacting new legislation, the judiciary will have the final decision on whether or not a provision is properly characterised in this way. This decision will involve an assessment of whether or not a particular limitation is an acceptable restriction on a right protected by the *Human Rights Act.*

4.47 The Supreme Court of Canada has held that laws will be justified under the reasonable limits clause in the Canadian Charter of Rights and Freedoms where they pursue an important objective, are rationally connected with that objective, impair that right no more than necessary and do not have a disproportionately severe effect on the persons to whom the law applies.[20] Legislation will be invalidated if the court believes there is a less rights-restrictive means available of achieving the objective – in other words where the legislature has used 'a sledgehammer to crack a nut'.[21]

4.48 An example of the operation of a reasonable limits clause under the New Zealand *Bill of Rights Act* is the successful bid to restrict the right to freedom of expression through the prohibition on the publication of material that could identify the victim of a sexual offence.[22]

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[19] Janet McLean, 'Legislative invalidation, human rights protection and s4 of the New Zealand Bill of Rights Act' [2001] *New Zealand Law Review* 421, 439

[20] Peter W Hogg and Alison A Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journa*l 75, 84-85

[21] Leighton McDonald, 'Rights, "dialogue" and democratic objections to judicial review' (seminar paper presented on 27 November 2002 in the ANU's Centre for International and Public Law's Bill of Rights seminar series).

[22] *TV3 Network Services Ltd v R* [1993] 3 NZLR 421 (CA). Compare *R v A* [2002] 1 AC 45, where the House of Lords interpreted a 'rape shield' law (designed to protect an alleged victim of rape from having to reveal details of her sexual history in open court) in light of the right of defendants to a fair trial. The effect of the interpretation was to remove the legislation's apparently general bar on a

4.49 A submission from the Cyclists' Rights Action Group provides an example of where a reasonable limits clause might be in issue in the ACT.[23] The Cyclists' Rights Action Group has argued that requiring cyclists to wear helmets in public places violates the right not to be forced to participate in medical or scientific experimentation[24] and the right to non-discrimination.[25] A reasonable limits clause would allow these rights to be balanced against community interests in health and safety.

4.50 There will inevitably be different views on the application of a reasonable limits clause. For example, the New Zealand Attorney-General noted under the New Zealand equivalent of a Statement of Compatibility that particular amendments to the *Transport Act 1962* (NZ), which authorised police to stop and breath test any motorist, unreasonably limited the right to freedom of movement protected by the New Zealand *Bill of Rights Act*. Parliament went on to enact the amendments in spite of the Attorney-General's views. It has been said of this decision that:

> It should not be assumed that this meant the legislation was necessarily inconsistent with the [New Zealand *Bill of Rights Act*]; more likely, it simply reflects differing views amongst legislators as to the reasonableness of the proposed statutory limit on the right.[26]

4.51 Chapter 5 of this Report recommends that the ACT *Human Rights Act* protect the human rights set out in the ICESCR and the ICCPR. The Consultative Committee recognises that many of the rights protected by the ICCPR and the ICESCR are already subject to limitations. For example, article 18.3 of the ICCPR provides:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

4.52 The limitation permitted by the proposed reasonable limits clause is not intended to extend the specific limitations already permitted in the ICCPR or the ICESCR. The specific limitations included in the *Human Rights Act* should be read as particular examples of the general limitations clause. The limitations clause ensures that the concept of reasonable justification in a democratic society, an important feature of the dialogue model proposed, applies to the rights protected by the ACT *Human Rights Act*. The draft legislation, included in Appendix 4, contains alternative models of a reasonable limits clause.

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defendant's reliance on the alleged victim's sexual history and to leave this issue to the discretion of the trial judge.

[23] Submission 78.

[24] ICCPR, article 7.

[25] ICCPR, article 26.

[26] Judith Potter & Richard Elkins, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective' 12 *Journal of Judicial Administration* (2002) 85, 92.

Bodies performing public functions to be covered by the *Human Rights Act*

Bodies covered

4.53 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 but the Legislative Assembly itself should be excluded from the definition of 'public authority' because the legislature retains the power to act inconsistently with human rights. The *Human Rights Act* should also regulate non-government bodies to the extent that they are exercising a public function. For example, if government engages a community organisation to provide a community health program such as a needle exchange facility, the community organisation will be covered by the *Human Rights Act* in delivering that program. As a consequence, the *Human Rights Act* will reach beyond government into the community sector, charitable organisations, certain associations incorporated under the *Associations Incorporation Act 1991* (ACT) and into the private sector if and when these bodies perform public functions.

4.54 The *Human Rights Act* should not apply to the courts as public authorities although it will apply to tribunals. However, ACT courts and tribunals are required to interpret all law, including the common law, consistently with human rights under the draft *Human Rights Act.* In the United Kingdom a provision that includes the courts in the definition of a public authority has allowed the courts to render the common law compatible with human rights in private law matters. For example, *Venables and Thompson v News Group Newspapers Ltd*[27] was an action in the tort of breach of confidence in which an injunction was sought to protect the identity and whereabouts of accused persons about to be released from prison after serving a sentence for the brutal murder of a child. Dame Elizabeth Butler-Sloss held that United Kingdom courts are under a positive obligation to protect the rights of individuals when adjudicating upon existing common law causes of action.[28] In this case, the Court extended the domestic law of breach of confidence to grant the injunction sought in order to protect the applicants from serious and possible irreparable harm in violation of articles 2 and 3 of the ECHR. The Consultative Committee believes that the requirement that all law be interpreted to be consistent with human rights will allow the common law to be developed in light of international standards.

Should the Act bind corporations as well as government and its agents?

4.55 Traditionally, human rights law has focused on how the actions of governments have affected the lives of individual people—and, to a lesser extent, groups of people. The task of guaranteeing human rights has been seen as a task for government, and by and large the activities of corporations have been deemed beyond the scope of human rights law.

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[27] [2001] 2 WLR 1038.

[28] [2001] 2 WLR 1038 at 1049.

4.56 This conventional approach is changing—but slowly. Evidence of human rights abuses by corporations in relation to labour practices (intimidation of workers who join unions, for example) health, welfare and privacy (secret video surveillance of employees for example) have encouraged consideration of whether corporations ought to be bound by human rights guarentees in the same way as governments are bound.

4.57 This is particularly pertinent in societies such as ours, where large-scale outsourcing has meant that private corporations are increasingly performing work that was once the sole province of governments—up to and including administering government programs. It is also relevant at a time when governments are calling for the corporate sector to contribute more to community development and community welfare.

4.58 Internationally there have been a number of attempts in recent years to consider the application of human rights law to corporations. In 1999 the European Parliament adopted a resolution encouraging corporations doing business in developing nations to develop a code of conduct that would require them to respect basic human rights.[29] In 2000 a working group of the United Nations Subcommission on the Promotion and Protection of Human Rights prepared a draft code of conduct for trans-national corporations.[30] And in September 2000 the Australian Democrats introduced into the Commonwealth Parliament the *Corporate Code of Conduct Bill*, which would have imposed human rights, employment and environmental standards on Australian corporations employing more than 100 people in a foreign country.

4.59 The Consultative Committee believes that while this is an area of significant interest, a more minimalist approach should be taken in the ACT in the first instance, and that an ACT *Human Rights Act* ought to bind only those private companies acting as direct agents of government. Of course, the requirement on courts and tribunals to interpret legislation and the common law to be consistent with human rights will affect corporate practices. The question of whether corporations and other private actors ought to be specifically bound by the Act could be revisited during the five-year review.

Conduct covered

4.60 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. An act should include a failure to act or an omission. For example, a health service that fails to conduct a vaccination campaign against childhood measles that has been proven to protect lives and improve the standard of public health could be in breach of the *Human Rights Act* in the same way that a health service that delivered a defective vaccination program could be under current law. 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.

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[29] Minutes (EN) A4-508/98 15 January 1999.

[30] UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1.

4.61 Experience in the United Kingdom suggests that the ACT *Human Rights Act* could have a significant impact in making actions of public authorities subject to human rights scrutiny. Some examples from the United Kingdom are given below.[31] The Consultative Committee notes however that the legal and political context of the ACT is different in many respects from that of the United Kingdom and these examples may not be replicated under an ACT *Human Rights Act*.

4.62 In the area of mental health services:

- As described above, a legislative provision that placed the burden of proving that continued detention for treatment for mental illness was no longer justified on the patient, was held to be incompatible with the right to liberty.[32] Parliament responded by quickly amending the affected provisions to bring them into line with the ECHR;
- The protection provided to detained patients subjected to compulsory treatment against their will has been enhanced, including the right to cross-examine medical witnesses in life-threatening cases, and the disclosure to patients of doctors' reasons for seeking to administer treatment;[33]
- The administrative procedures of Mental Health Review Tribunals have been improved. Repeated adjournments of hearings, resulting in part from under-staffing and under-funding, have been held to breach the right to liberty, which requires speedy determination of the lawfulness of detention.[34] A blanket policy of listing applications for review of detention for a fixed period after receipt of the patient's application was also held to breach the right to liberty. Instead, the individual circumstances of each patient and the preparedness of the parties involved for the hearing should be considered and an earlier hearing granted where circumstances permit.[35]

4.63 In the area of prison policy:

- A blanket policy of excluding prisoners from their cells when conducting searches through their correspondence was held to be a breach of the right to privacy. Searches were held to be acceptable in principle, in pursuit of the legitimate goal of prison security, but prison officers now had to consider the risks involved in each prisoner's case in allowing her or him to remain present during searches;[36]
- A rule requiring compulsory removal of all babies from imprisoned mothers at 18 months old, without the flexibility to accommodate

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[31] These examples are drawn from a document prepared by Claire O'Brien, Researcher, Human Rights Act Research Project, Centre for the Study of Human Rights, London School of Economics (November 2002).

[32] *R (H) v Mental Health Review Tribunal (North and East London Region)* [2002] QBD 1; [2001] 3 WLR 512.

[33] *R (Wooder) v Feggetter & Mental Health Act Commission* [2002] 3 WLR 591.

[34] *R (KB and six others) v MHRT and Secretary of State for Health* [2002] ACD 85.

[35] *R (C) v MHRT London South & South West Region* [2002] 1 WLR 176.

[36] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433.

particular infants' circumstances, was held to be a breach of the right to family life. Instead, to meet the test of reasonableness, and also to fulfil the policy objective of protecting the welfare of the child, greater flexibility was required in applying the policy. This would ensure minimal interference with each individual baby's welfare, while accounting for restrictions on the mother's right to family life incidental to her imprisonment;[37]

- A blanket policy that telephone calls could be made only to recognised numbers, and not to media organisations, unless in exceptional circumstances, was held to be a breach of the prisoner's right to freedom of expression. This was because the prison authorities could put necessary safeguards in place, such as call monitoring or requesting assurances as to the content of the calls, to address security concerns and minimise interference with protected rights;[38]
- The adequacy of health care in prison was assessed against the rights to life, privacy and family life, and protection against inhuman and degrading treatment;[39]
- A decision to place a young Arab inmate in a cell with a person on remand for racist offences with a history of racist and violent behaviour resulted in the young inmate being murdered by his cell-mate. Internal and coronial inquiries were inconclusive in relation to the role of prison authorities. The High Court granted a declaration that an independent, public investigation, with the victim's family legally represented and provided with the relevant material to enable cross-examination of principal witnesses, was required to satisfy the procedural aspect of the state's obligation to ensure protection of the right to life.[40] The Court of Appeal subsequently overturned the decision. However, the Prison Service responded by introducing a new policy to improve procedures for assessing and recording the level of risk presented to prisoners by a cell-sharing situation. The risk assessment form has been amended, to allow pooling of information between operational and care staff, to identify high-risk factors such as racist, homophobic or highly violent tendencies;[41]
- The United Kingdom Prison Service has also initiated policy change without waiting for an adverse court decision. The Prison Service has issued a new policy establishing guidelines for prison governors in responding to prisoners who wish to set up, participate in, or become members of prisoners' representative associations, in light of the right of freedom of association guaranteed in article 11 of the ECHR. The guidelines emphasise

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[37] *R v Secretary of State for the Home Department, ex parte P; R v Secretary of State for the Home Department, ex parte Q* [2001] 2 FLR 383; [2001] 1 WLR 2002.

[38] *R v Home Secretary ex parte Hirst* [2002] EWCA Civ 602.

[39] [2001] Lloyds Med Rep 478; [2001] UKHRR 1399.

[40] *R (Amin) & R (Middleton) v Secretary of State for the Home Department* [2002] 3 WLR 505; [2002] 4 All ER 336.

[41] UK Prison Service Instruction 26/2002 Cell Sharing Risk Assessment.

the need to take into account local prison conditions in decisions on activities and resources allowed to such groups.

4.64 In the area of the coronial system:

- The adequacy of the coronial system must now be assessed against the right to life. Family members of a young man who committed suicide in prison while mentally ill alleged that lack of proper supervision had led or contributed to his death. They sought a broader inquiry into the circumstances of the death than had been permitted at the inquest. In response, the Court of Appeal overturned legal precedent in relation to when a coroner can offer a verdict of 'neglect' to an inquest jury. Lord Woolf held that the *Human Rights Act* allowed re-interpretation of the Coroners Rules, so that a coroner should offer a neglect verdict where, in his or her judgment, that verdict could reduce the replication of the circumstances that led to the death.[42] The Home Office is conducting a review of the coronial system.

4.65 In the area of the justice system:

- The United Kingdom Association of Chief Police Officers (ACPO) established a Human Rights Working Group to review its recommended policies and training, with the aim of giving effect to human rights at all levels of the service. ACPO developed national human rights training packages, and a strategy for auditing human rights-compliance of policies. The Home Office also launched a re-draft of the Codes of Practice under the *Police and Criminal Evidence Act 1984*, which govern the exercise of police powers of custody, stop and search, arrest procedures, identification and police interviews;
- The use of temporary sheriffs appointed on terms of one year only by the Lord Advocate of Scotland, who was also a member of the executive and responsible for the conduct of criminal prosecutions, was held not to constitute the independent and impartial tribunal required by the right to a fair trial.[43] The Appeal Court found the ECHR standards were breached because a well-informed observer would think a temporary sheriff might not be independent, given the potential of hopes of career advancement to influence his or her decision-making. In the Court's opinion, the removal of judges from their posts through operation of ministerial policy, rather than statute, could no longer be tenable: it was fundamental that human rights were enforceable at law, and not dependent on political factors;
- Mandatory life sentences imposed under the *Crime (Sentences) Act 1997* (UK) following conviction for a second serious offence were interpreted in light of the *Human Rights Act*. The Court held that this permitted a court to substitute a different sentence than a life sentence, where evidence showed the absence of the risk the 'two strikes and you're out' policy was

[42] *R (Middleton) v Secretary of State for the Home Department* [2003] 3 WLR 505; [2002] 4 All ER 336.

[43] *Starrs v Ruxton* [2000] SLT 42.

designed to address namely, the need to protect the public from dangerous offenders.[44]

- A requirement under the *Road Traffic Act 1988* (UK) to reveal who was driving the car at the time of an alleged offence was held not to be a breach of the right against self-incrimination or to a fair trial. The Privy Council found that these rights are not absolute and need only be effectively safeguarded in proceedings overall;[45]
- The ability of a court to make adverse comment about the guilt of an acquitted defendant as justification for refusal of an award of costs, even where acquittal turned on a technicality, has been removed as it has been held to be inconsistent with the right to a fair trial. Amendments have been made to the *Practice Direction (Costs in Criminal Proceedings)*;
- The Home Secretary's continuing role in fixing sentencing penalties and deciding on a release date for prisoners subject to mandatory life sentences has been held to be a breach of the right to a fair trial. The House of Lords stated that the right to a fair trial extended with equal force to both conviction and sentencing.[46]

4.66 Experience elsewhere suggests bills of rights have a significant impact on the criminal law, particularly in so far as police are required to act in conformity with the bill of rights. The ability of the ACT to require its police force to act consistently with the proposed ACT *Human Rights Act* is unclear because of the unusual relationship between the ACT government and the police force. Policing services in the ACT are provided by ACT Policing which is part of the Australian Federal Police (AFP) under a purchase agreement with the ACT government. The AFP is a Commonwealth agency established under Commonwealth legislation whose officers draw their powers primarily from Commonwealth legislation. The Consultative Committee notes, however, that ACT Policing's submission supported a bill of rights that was designed 'to promote … a culture of tolerance and respect, provide the community with a charter of principles to aspire to and allow for proper public debate when a conflict of rights arises.'[47]

4.67 In the area of family services:

- A child conceived by artificial insemination by donor sperm was held to be entitled to information from the United Kingdom Department of Health and the Human Fertilisation and Embryology Authority. It was held that the right to respect for private and family life meant that everyone should be able to establish details of their identity, including through information about their biological parents;[48]

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[44] *R v Offen* [2001] 2 All ER 154; [2001] Crim LR 63.

[45] *Brown v Procurator Fiscal (Dunfermline) & A-G for Scotland* [2001] 2 All ER 97 (Privy Council, 5 December 2000).

[46] *Stafford v UK* [2002] UKHL 46.

[47] Submission 94.

[48] *Rose v Secretary of State for Health and Human Fertilisation and Embryology Authority* [2002] 2 FLR 962.

- A father was entitled to conduct a paternity test against the wishes of the mother of the child because the right to private and family life was held to include a sense of having knowledge of one's identity, including paternity;[49]
- Public authorities must now take steps to inform both biological parents, including a natural father without parental responsibility, of an adoption application, even where the mother has sought not to disclose the father's identity to the authorities, unless there are good reasons for not doing so;[50]
- A local authority policy of paying lower benefits to foster carers who were family members of the child concerned was held to be a breach of the local authority's duty to take all positive steps to ensure that a child could live with his or her family;[51]
- The Court of Appeal read into new provisions of the *Children Act 1989* (UK) an ongoing role for the courts in supervising and monitoring achievements under local authority care plans for children subject to full care orders, in pursuit of the protection of the child's right to family life.[52] The House of Lords overturned the decision.[53] However, following the judgment, the government amended the *Children Act 1989* to introduce 'Independent Reviewing Officers'. These officers had a duty to review a local authority's progress in implementing court-approved care plans, and to take action if failure to put measures contained in a care plan into effect jeopardised a child's human rights.[54]

4.68 In the area of privacy:

- The practice of selling the electoral register to commercial concerns, without allowing electors to object to their inclusion on the register, was held to be a breach of the right to privacy and the right to vote;[55]
- Press campaigns against individuals have been held, in light of the right to privacy, to amount to harassment under the *Harassment Act 1997*. For example, a black police officer, who complained about racist remarks by fellow officers concerning an asylum seeker, was identified and subjected to a campaign of critical articles by *The Sun* newspaper after disciplinary proceedings were conducted against the officers. Race hate mail followed and the officer was forced to leave her job;[56]

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[49] *Re T (Child)* [2001] 2 FLR 1190.

[50] *In Re H (a child)(adoption:disclosure); In re G (a child)(adoption disclosure)* [2001] 1 FLT 646.

[51] *R (L & others) v Manchester City Council; R (R & another) v Manchester City Council* [2002] 1 FLR 43; [2002] ACD 284.

[52] *The Children Act case* [2001] 2 FLT 582.

[53] *Re S(FC) In Re S and others In Re W and others (First Appeal) (FC) In Re W and Others (Second Appeal) Conjoined Appeals* [2002] 2 WLR 720; [2002] 2 All ER 192.

[54] *Adoption and Children Act 2002* (UK).

[55] *R v Wakefield Metropolitan Council & Secretary of State for the Home Department ex parte Beetson Rohertson* [2002] 2 WLR 889.

[56] *Thomas v News Group Newspapers Ltd.* [2002] EMLR 4.

- An injunction against the *Sunday People* newspaper was granted in relation to photographs of a BBC presenter taken at a brothel. It was held that the publication would breach the presenter's right to privacy and was not in the public interest. In contrast, publication of the article without photographs was permitted because the Court held that the claimant's role as a children's presenter, and his respectable image, meant that there was an element of public interest in publication of the information;[57]
- An injunction against a tabloid newspaper was eventually refused in relation to a story by two women about extra-marital affairs involving a professional footballer. The Court of Appeal held that the footballer's right to privacy had to be balanced against the women's right to freedom of expression.[58]

4.69 In the area of housing:

- It has been held that there is a positive duty on local authorities to maintain the condition of public housing stock to avoid infringing human rights. The duty to ensure respect for the right to home and family life was breached by letting out properties unfit for human habitation or prejudicial to health;[59]
- Criteria for the status of a 'nearest relative' of a detained mental-health patient that differentiated between heterosexual and same-sex *de facto* partners were held to be a breach of the right to privacy;[60]
- The denial of a homosexual partner's right to succeed to a statutory tenancy on the death of his partner, when that right would not have been denied to a heterosexual partner, was held to be a breach of the rights to privacy and non-discrimination.[61]

4.70 In the area of religious belief:

- The right to freedom of thought, conscience and religion has been held to require parents' religious beliefs to be given due weight in considering parents' applications on their child's behalf for entry to a particular school;[62]
- The same right allowed a humanist to have her husband's ashes removed from a consecrated plot in which they had been placed in error;[63]
- The right did not, however, permit an attempt by head teachers, teachers and parents of children at Christian schools to seek the reintroduction of

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[57] [2002] EMLR 22.

[58] *A v B Plc & Another* [2002] 3 WLR 542.

[59] *Lee v Leeds City Council; Ratcliffe and others v Sandwell MBC* [2002] 1 WLR 488.

[60] *R (SG) v Liverpool CC & Health SecretaryAppln*. CO 1220/02 (21 Oct 2002).

[61] *Medoza v Ghaidan* [2001] EWCA Civ 1533.

[62] *R v Newham London Borough Council ex parte K* 9 Feb 2002 QBD (Collins J).

[63] *Re Crawley Green Road Cemetery Luton*, St Albans Consistory Court, 2 Dec 2000.

physical chastisement, in the face of a clear Parliamentary intention to abolish corporal punishment in all schools.[64]

4.71 In the area of freedom of expression:

- An exclusion order against the leader of the Nation of Islam was held not to be a breach of the right to freedom of expression because the decision struck a fair balance between freedom of expression and the legitimate aim of the prevention of public disorder;[65]
- The conviction of an anti-'star wars' protestor under the *Public Order Act 1986* (UK) for insulting behaviour toward United States service personnel (allegedly caused by standing on a defaced United States flag outside a United States air base) was overturned because the trial judge failed to adequately address the reasonableness of the restriction on the protestor's right to freedom of expression.[66]

Remedies for incompatibility with the *Human Rights Act*

4.72 The ACT *Human Rights Act* provides a number of different avenues for a person who seeks to raise human rights concerns. In some cases, it will be sufficient for a court or tribunal's attention to be drawn to the human rights in the schedule to the *Human Rights Act* and for the relevant legislative or common law provision to be interpreted so it is compatible with human rights if it is possible to do so. In other cases, a person or entity may seek a Declaration of Incompatibility in the Supreme Court, either in a separate proceeding or as part of any other proceeding that may be before the Supreme Court. While the Declaration of Incompatibility will not secure a specific personal remedy, it may be the appropriate vehicle for raising a human rights concern.

4.73 There may also be circumstances where a proceeding may be taken against a public authority that has engaged in an unlawful act or conduct in relation to human rights. In these cases, the rights protected by the *Human Rights Act* should be accompanied by appropriate remedies. The Consultative Committee recommends that the ACT *Human Rights Act* should follow the model of the United Kingdom's *Human Rights Act* (rather than the model of the New Zealand *Bill of Rights Act*) and contain an express remedies clause.[67]

4.74 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

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[64] *Williamson & others v secretary of State for Education and Employment* [2002] 1 FLR 493.

[65] *R v Home Secretary ex parte Farrakhan* [2002] 2 WLR 481.

[66] *R v Percy* [2002] ACD 154; [2002] Crim LR 835.

[67] Section 8, *Human Rights Act* (UK).

apology be made. Another remedy the Supreme Court could order under the *Human Rights Act* would be the exclusion of evidence obtained in breach of human rights.

4.75 The Consultative Committee recommends that, in considering claims of unlawful acts or conduct under the *Human Rights Act*, the Supreme Court should be confined to its existing remedial jurisdiction. Those alleging a breach must commence an action in the Supreme Court in accordance with existing Supreme Court practice and procedure.

4.76 The experience under the United Kingdom and New Zealand legislation is that the damages for breach of human rights are calculated in accordance with private law notions of compensation. For example, as noted in Chapter 3, in *Simpson v Attorney-Genera*l *(Baigent's Case)*, a majority of the New Zealand Court of Appeal held that a breach of the *Bill of Rights Act* gave rise to a cause of action in public law that lay directly against the Crown and could attract a remedy in the form of an award of monetary compensation.[68] Sir Robin Cooke, President of the Court, observed that: 'In addition to any physical damage, intangible damage such as distress and injured feelings may be compensated for.'[69]

4.77 In the United Kingdom, a severely disabled, wheelchair-bound woman, who suffered from incontinence and diabetes was housed in inappropriate and inadequately-adapted local authority accommodation (in effect being confined to the ground-floor lounge) for 20 months after a Social Services Care Plan had stated that she needed urgently to move to a suitable adapted property. The Court held that, after a Care Plan had been produced, the local authority was under a duty to take positive steps to enable claimants and their families to lead as normal a life as possible, and secure the disabled person's physical integrity and human dignity. As the local authority had failed to take any steps to this end, the Court decided that an award of damages was necessary to afford 'just satisfaction' for a violation of the right to privacy and family life and that there was no reason why the level of award should not be comparable to the level available in tort. An award was made at the top end of the available range, for £10,000.[70]

4.78 The Consultative Committee recommends that the ACT *Human Rights Act* should not encourage the Court to make substantial pecuniary damages payments as the primary remedy for a contravention of human rights. Damages should only be awarded if other remedies have been considered and the Court considers that those remedies are not sufficient to provide an effective remedy in relation to the human rights that have been infringed by a public authority. The Consultative Committee believes that the focus of *Human Rights Act* remedies should be to change behaviour and prevent future breaches. This is consistent with the dialogue model on which the legislation is based and will more effectively build a culture of respect for human rights in the ACT.

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[68] [1994] 3 NZLR 667.

[69] [1994] 3 NZLR 667 at 678.

[70] *R v Enfield London Borough Council, ex parte Bernard* [2002] EWHC 2282 Admin.

Standing

4.79 The Consultative Committee recommends that there be no special standing provision in relation to a person seeking a Declaration of Incompatibility or raising an issue of interpretation of the *Human Rights Act*.

4.80 In relation to acts of public authorities, the Consultative Committee proposes that the standing provision in the *Human Rights Act* allow an aggrieved person to bring an action alleging a public authority has engaged in an unlawful act or conduct. This will mean that a person relying on the *Human Rights Act* must have an interest beyond that of a member of the general public and beyond that of a person simply holding a belief that a particular type of conduct should be prevented or a particular law observed.[71] However, the interest in the issue does not need to be a pecuniary or property interest.[72] This approach is consistent with the proposed focus on changing behaviour and building a rights culture.

4.81 The Act should also provide for a person to be able to commence a proceeding against a public authority on behalf of another person who is otherwise unable to commence a proceeding themselves. At the same time, it should be noted that the Consultative Committee recommends in Chapter 5 that only the rights of natural persons can be considered under the *Human Rights Act.*

Intervention in human rights proceedings

4.82 The Attorney-General has special responsibilities in relation to legislation and its compatibility with human rights. Where the interpretation of the *Human Rights Act* is in issue, the Attorney-General should have the right to intervene in the proceedings if the Attorney-General considers it appropriate. Where a party seeks a Declaration of Incompatibility or commences proceedings against a public authority, it may be appropriate for the Attorney-General to participate in the proceedings. The Consultative Committee considers that the Attorney-General should be notified of any proceedings in a court or tribunal which raise a human rights issue and should have an automatic right to intervene in those proceedings.

4.83 The Consultative Committee also considers that it may be appropriate for the Human Rights Commissioner or third parties to be granted leave to intervene in any proceeding involving a human rights issue on such terms and conditions that the court or tribunal considers appropriate. The role of the Human Rights Commissioner and third parties may assist to inform the court or tribunal about relevant international jurisprudence in relation to the human rights.

Annual reports of government departments

4.84 A major aim of the *Human Rights Act* is to create an institutional awareness of human rights. The executive branch of government is a crucial player in this regard. In order to allow effective monitoring of the progress of the executive, the Consultative Committee recommends that ACT government departments be required to report on how they have implemented the *Human Rights Act* in their annual reports.

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[71] *Re Control Investments Pty Ltd v Australian Broadcasting Tribunal (no 1)* (1980) 3 ALD 74, 79.

[72] *Re Davnar Pty Ltd v Minister for Community Services* (1987) 11 ALD 511.

Human Rights Commissioner

4.85 In order to maintain the momentum necessary to build a human rights culture in the ACT, the *Human Rights Act* should establish the office of a Human Rights Commissioner, with statutory independence.[73] Experience has shown that the enthusiasm of governments for human rights will wax and wane. To ensure that the protection of human rights established by the *Human Rights Act* is maintained, it is necessary to have a body outside government to ensure the effective operation of the *Human Rights Act*. The United Kingdom has not yet created a Human Rights Commission and this is regarded as a serious weakness.[74] The Joint Committee on Human Rights of the United Kingdom Parliament has, however, recently recommended that such an independent body should be established in the United Kingdom.[75]

4.86 As part of the process of implementing the *Human Rights Act*, all existing ACT legislation and policy should be reviewed by the executive to ensure that it complies with the *Human Rights Act*. This review is essential preparation for the commencement of the *Human Rights Act* and was undertaken over an eighteen-month period in the United Kingdom.[76] The real impact of the *Human Rights Act* is not expected to result from a handful of court cases, but from the wholesale change in approach by public authorities and those exercising public functions.

4.87 While the review of ACT law is an executive responsibility, the Consultative Committee considers that it is also important for an independent statutory officer such as a Human Rights Commissioner to be required to assess and report upon the adequacy of the review. The process of review will be ongoing, as new law and policy is developed. The Human Rights Commissioner should continue to assess and report upon new ACT law and policy and its compliance with the *Human Rights Act.*

4.88 Where a body performing a public function is found to be in breach of the *Human Rights Act*, it will be incumbent upon all bodies, particularly public authorities, to examine the decision and consider whether it has implications for the performance of other public functions. The impact of one decision will almost invariably extend beyond the particular set of facts that gave rise to it. The Human Rights Commissioner, who stands at arm's length from government, would be in an ideal position to determine whether public authorities have responded appropriately to findings of inconsistency and altered their practices accordingly.

4.89 The main functions of the Human Rights Commissioner should be:

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[73] Submission 121 (Professor Tom Campbell) made useful proposals for such a position.

[74] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdoms' New Bill of Rights*, (2000) 27.

[75] United Kingdom Parliament, Joint Committee on Human Rights, *The Case for a Human Rights Commission* (Sixth Report, 2002-2003 Session, 19 March 2003) available at http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/67/67.pdf.

[76] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdoms' New Bill of Rights* (2000) 27.

- To promote an understanding and acceptance of, and compliance with, the *Human Rights Act*;
- To undertake research, and develop educational and other programs, for the purpose of promoting the objects of the *Human Rights Act*;
- To assess and report upon the review of ACT law and policy in order to identify any inconsistency with the *Human Rights Act*, and to report to the legislature annually on the results of the review; and
- To report annually to the legislature about any matter relevant to the operation of the *Human Rights Act* including the extent of compliance with the *Human Rights Act.*

4.90 These functions largely mirror the functions of the ACT Discrimination Commissioner under section 111 of the *Discrimination Act 1991* (ACT). As there is no need for the functions of the Human Rights Commissioner to be vested in a stand-alone body, and there is no conflict between the duties of the Discrimination Commissioner and the Human Rights Commissioner, the Consultative Committee recommends that, subject to the provision of additional resources, the Discrimination Commissioner also be appointed as the Human Rights Commissioner.

Summary

The ACT *Human Rights Act* should involve the legislature, executive and judiciary in a dialogue about the best way to protect human rights in the Territory. That process should involve scrutiny of all new legislation and examination of all existing legislation to ensure its compliance with the Act.

While leaving the 'final say' on human rights with the legislature, the *Human Rights Act* should require that all ACT laws are interpreted as far as possible to be consistent with human rights. The Supreme Court should have the capacity to make a Declaration of Incompatibility in relation to any ACT legislation, and the ability to invalidate subordinate legislation and to deal with the actions of public authorities that are incompatible with human rights.

Effective remedies ought to be available for breaches of the *Human Rights Act* (including a limited right to damages).

In order to create a culture of human rights observance right across government, departments and agencies should be required to report on their implementation of the *Human Rights Act* in their annual reports.

The creation of an office of an ACT Human Rights Commissioner would establish an independent monitor of the operations of the *Human Rights Act*.

Recommendation 9

The Consultative Committee recommends an ACT *Human Rights Act* providing for:

- Effective pre-enactment scrutiny of all legislation;
- An interpretive clause to ensure that all ACT laws (including the common law) are interpreted as far as possible in a way that is compatible with the *Human Rights Act*;
- The ability of the Supreme Court, when considering legislation, to make a Declaration of Incompatibility with the *Human Rights Act*;
- The ability of the Supreme Court to invalidate subordinate legislation that is incompatible with human rights unless the Act authorising the subordinate legislation prevents removal of the incompatibility;
- The capacity for the legislature to place reasonable limits on rights contained in the *Human Rights Act* to such an extent as can be justified in an open and democratic society;
- An obligation on all bodies performing public functions (except the Legislative Assembly) to act in a way that is compatible with *the Human Rights Act* unless incompatible conduct is required by legislation;
- Effective remedies for a breach of the *Human Rights Act*, including a limited right to damages;
- Standing for any aggrieved person to enforce rights under the *Human Rights Act*;
- An obligation on government departments to report on their implementation of the *Human Rights Act* in their annual reports; and
- The creation of an office of an ACT Human Rights Commissioner to provide an independent monitor of the operations of the *Human Rights Act*.

5. WHAT RIGHTS SHOULD BE PROTECTED BY THE *HUMAN RIGHTS ACT*?

5.1 The Bill of Rights Consultative Committee's final term of reference requires consideration of the type of rights to be included in an ACT bill of rights. The question of what rights can or should be included under the umbrella term 'human rights' has been extensively debated in international law over many decades.

5.2 It is sometimes argued that the term 'human rights' should only cover civil and political rights: rights such as the right to freedom of speech, to vote and to non-discrimination. Others argue that the term should be broadened to include economic, social and cultural rights, such as the right to work, the right to education, and the right to health. 'Collective' rights, rights that can only be meaningfully claimed by a group, such as the right to self-determination, are also championed by some, as are so-called 'third-wave' rights, such as the right to a clean environment. Every point along this spectrum of argument was reflected during the course of the Consultative Committee's consultations.

5.3 There were those who recommended a 'minimalist' approach to rights—the protection of just a handful of civil and political rights, along the lines of the New Zealand *Bill of Rights Act*.[1] Often, those opposed to the extension of a bill of rights to cover economic, social, cultural and even third-wave rights believed that the listing of such rights would dilute the worth of truly 'basic' rights. For example, the ACT Jewish Community argued that the insertion of 'human needs' (such as the right to shelter) into a bill of rights would not result in the elevation of that need into a 'right'. Instead, it would result in the degradation of all rights to the lowest common denominator.[2]

5.4 Referring to such 'third-wave' rights as the right to a safe environment, Kerry Corke argued that:

> [I]t is a misnomer to call these sorts of things 'rights'. They are laudable goals, breach of which may lead to national and international criticism. However, they are hardly statements that should be regarded as something capable of conferring a 'right'.[3]

5.5 On the other hand, the Consultative Committee heard from individuals and groups who considered the protection of economic, social and cultural rights to be as significant as civil and political rights. The ACT Council of Social Services argued strongly for the inclusion of economic and social rights. It contended that to limit the listed rights to political and civil rights (the right to vote, for example) would lead to cynicism, and the belief that the government was interested only in token gestures.[4] The ACT Spanish community also

[1] Eg Submission 91 (Paul Kildea).

[2] Submission 86.

[3] Submission 95.

[4] Submission 89.

supported the inclusion of economic and social rights.[5] Professor Peter Bailey encouraged the inclusion of a broad range of rights, including 'third-wave' rights.[6]

5.6 YWCA Canberra's submission strongly supported incorporating rights beyond those listed in the ICESCR and the ICCPR. It challenged the government to look further afield, for example at international treaties of the International Labour Organisation and the various UN conventions dealing with such matters as prostitution and exploitation, nationality and family responsibilities.[7]

5.7 A number of submissions argued for specific recognition of the rights of homosexuals and people with a transgendered identity, since these were not thought to be well-protected by the ICCPR.[8] The rights of victims of crime were proposed as a special category,[9] as were the rights of migrants and asylum seekers.[10] Peter Lowe argued for a right to have factual information about government.[11] Ian Hirst supported a right to be involved in planning decisions.[12]

5.8 Others believed a bill of rights ought to make specific mention of the circumstances and rights of those with mental illnesses[13] and those caught up in the criminal justice system. As Prisoners Aid ACT argued, 'precisely because prisoners are deprived of their liberty and other rights such as free communication with others, it is important to spell out their basic entitlements.'[14]

5.9 The ACT Women's Legal Service referred to the value of specifying particular economic and social rights for women.[15] Dr Judy Lattas argued more broadly for a 'sexed' catalogue of rights that would recognise specific harms that women sustain.[16]

5.10 The Consultative Committee was also urged to adopt a broader definition of rights that would include rights to a clean environment. For example, the Australian Centre for Environmental Law told the Consultative Committee that pollution may prove one of the most significant threats to the realisation of basic human rights—including the right to life and security of the person.[17]

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[5] Submission 38. See also submission 40 (Domenic Mico).

[6] Submission 54.

[7] Submission 141.

[8] Eg Submission 118 (Jason Söderblom, Secretary of the ACT Human Rights Education Association).

[9] Submission 127.

[10] Submission 138.

[11] Submission 129.

[12] Submission 146.

[13] Submission 72 (Linette Bone, Consumer Consultant, Mental Health ACT).

[14] Submission 126.

[15] Submission 142.

[16] Submission 133.

[17] Submission 60.

And the ACT Environmental Defenders' Office argued that there was a growing recognition in multilateral and regional international law and policy that human rights and responsibilities and environmental protection were interdependent.[18] Gösta Lyngå also endorsed the inclusion of a right to a healthy environment.[19]

A general or particular set of rights?

5.11 Some participants in the Deliberative Poll in November 2002 argued that it was important for the ACT to develop its own particular set of rights appropriate to the Territory. This approach was taken in the exposure draft of a bill of rights prepared in 1994 by Attorney-General Terry Connolly MLA. The rights spelled out in the Connolly exposure draft were divided into several groups:

- Fundamental freedoms—freedom of thought, conscience and religion, freedom of expression, freedom of peaceful assembly and freedom of association;
- Democratic rights—the right to vote and be elected to the ACT Legislative Assembly, the right to a secret ballot, equal suffrage and the right to engage in political activity;
- Legal rights—the right to life, liberty and security, the right to freedom from torture and unreasonable search and seizure, the right to a fair and public hearing, the right to consult and instruct a lawyer and the right to trial by jury;
- The rights to education, equality before the law and freedom from discrimination;
- The rights of Indigenous people to maintain and develop their cultural identities and relationship with the land, the right to be consulted on matters affecting them, and the right to determine their own priorities for cultural development;
- The right to privacy; and
- The rights of a child to parents, shelter, health care and recreation, the right of a child not to be neglected or exposed to unreasonable risk, and the right of a child to voice an opinion about his or her life, and for that opinion to be given weight.

5.12 The Consultative Committee acknowledges the value of developing a set of rights that would be of particular relevance to the ACT community. However it recommends against this course of action for the *Human Rights Act*, at least in the first instance. As noted in Chapter 3 of this report, the ACT would be the first federal unit in Australia to adopt a bill of rights. Its legislative powers are more restricted even than those of the Australian states, and the Commonwealth has broad powers of intervention in ACT affairs. If the ACT were to legislate to implement human rights treaties to which Australia was already a party, there could be little political or legal objection. The five-year review of the *Human*

[18] Submission 61.

[19] Submission 88.

Rights Act recommended by the Consultative Committee would be an appropriate occasion for such issues to be debated.

Implementing international human rights

5.13 The Consultative Committee proposes that the ACT *Human Rights Act* implement the rights set out in the two major UN human rights treaties, the ICCPR and the ICESCR, to which Australia is a party, in so far as the ACT has legislative power to do so. The Covenant rights are set out in Appendix 6. They include:

- The right to self-determination;[20]
- The right to work and just conditions of work;[21]
- The protection of the family;[22]
- The right to adequate food, clothing and housing;[23]
- The right to health;[24]
- The right to education;[25]
- The right to life;[26]
- The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment;[27]
- The right to liberty and security of the person;[28]
- The right to a fair trial;[29]
- The right to privacy;[30]
- The right to freedom of movement;[31]
- The right to freedom of thought, conscience and religion;[32]
- The rights to freedom of expression, peaceful assembly and association;[33]

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[20] ICESCR and ICCPR, article 1.

[21] ICESCR, articles 6 & 7.

[22] ICESCR, article 10; ICCPR, article 23.

[23] ICESCR, article 11.

[24] ICESCR, article 12.

[25] ICESCR, article 13.

[26] ICCPR, article 6.

[27] ICCPR, article 7.

[28] ICCPR, article 9.

[29] ICCPR, article 14.

[30] ICCPR, article 17.

[31] ICCPR, article 12.

[32] ICCPR, article 18.

- The right to vote;[34]
- The right to equality before the law and non-discrimination;[35] and
- The right of ethnic, religious or linguistic minorities to enjoy their own culture.[36]

5.14 The Consultative Committee recognises that some of the rights contained in the two Covenants are not within the power of the ACT legislature to protect. For example:

- The right to form and join trade unions;[37]
- The right to social security;[38]
- Rights in relation to marriage and children;[39] and
- The right of an alien not to be expelled from a country without due legal process.[40]

The Consultative Committee recommends that these rights be excluded from the rights protected by the *Human Rights Act*.

5.15 The rights in the two Covenants are expressed in general terms. Incorporating the rights into ACT law requires some modification of the language used in the ICCPR and ICESCR. In some instances, the provisions of the Covenants highlight particular ways in which the rights should be observed. For example article 7(a) - (d) of the ICESCR sets out particular examples of 'just and favourable conditions of work'. The Committee considers that these provisions serve to illustrate the general right of everyone to just and favourable conditions of work and it is not necessary to incorporate specific examples in the *Human Rights Act*. In other cases, such as article 14(3) of the ICCPR, it is appropriate to incorporate specific features of the right to a fair trial in criminal proceedings. In translating the rights and freedoms into the ACT *Human Rights Act* the Committee considers it appropriate to modify the way in which the rights have been expressed in the Covenants so they may operate effectively in the ACT. Appendix 6 contains a comparison between the provisions of the ICESCR and the ICCPR and the proposed *Human Rights Act*.

5.16 As noted in Chapter 4, some rights contain in-built limitations on their scope. The language of article 21 of the ICCPR is typical. It states that restrictions may be placed on the right of peaceful assembly if they are:

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[33] ICCPR, articles 19, 21 & 22.

[34] ICCPR, article 25.

[35] ICCPR, article 26.

[36] ICCPR, article 27.

[37] ICESCR, article 8.

[38] ICESCR, article 9.

[39] ICESCR, article 10(1) and ICCPR article 23(2) and (3).

[40] ICCPR, article 13.

> imposed in conformity with the law and … are necessary in a democratic society in the interests of national security or public safety, public order …, the protection of public health or morals or the protection of rights and freedoms of others.

5.17 The Consultative Committee notes that the catalogue of rights set out in the ICESCR and ICCPR has some gaps. There is, for example, no specific reference to the rights of Indigenous peoples. Freedom of sexual preference is not specifically recognised. The rights are drafted using masculine pronouns. However, the rights in the Covenants have been interpreted and developed since their formulation to remain relevant to modern life. They have not been frozen in meaning since their adoption in 1966.

5.18 The rights in the Covenants are cast in relatively broad terms, although they are no broader than many concepts already in regular use in Australian law. The proposed *Human Rights Act* contains a dictionary which defines some of the terms used in ICCPR and ICESCR by reference to existing concepts and terms used in the *Legislation Act 2001* and other ACT laws.

5.19 To the extent that the provisions of ICCPR and ICESCR are incorporated into ACT law, these provisions should be construed as far as appropriate consistently with the way in which these rights have been applied internationally. There are various sources available to assist in the interpretation of the rights. The institutions primarily responsible for the interpretation of the Covenants are two expert treaty-monitoring bodies. The Human Rights Committee, established by article 28 of the ICCPR, has created a considerable jurisprudence on the meaning of particular articles of the ICCPR. The Committee on Economic, Social and Cultural Rights, established by the UN's Economic and Social Council,[41] has performed a similar function for the ICESCR. Much of this jurisprudence is contained in General Comments adopted by these Committees. Appendix 5 of this Report contains all the current General Comments adopted by the two Committees to provide an accessible guide to the content of the rights.

5.20 The interpretation of the Covenants is also assisted by the terms of more specialised human rights treaties, for example, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. There is considerable overlap between the major human rights treaties. For example, the right to freedom of association set out in article 22 of the ICCPR is also found in the Convention on the Elimination of All Forms of Racial Discrimination,[42] the Convention on the Elimination of All Forms of Discrimination against Women,[43] and the Convention on the Rights of the Child.[44] The right to food, clothing and shelter set out in article 11 of the ICESCR is also protected in the Convention on the Elimination of All Forms of

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[41] Resolution 1985/17.

[42] Articles 4 (b) & 5 (d) (ix).

[43] Article 14.2 (d).

[44] Article 15.

Racial Discrimination,[45] the Convention on the Elimination of All Forms of Discrimination against Women,[46] and the Convention on the Rights of the Child.[47]

5.21 There is also an extensive literature on the interpretation of the rights[48] and many court decisions from Canada, New Zealand, South Africa and the United Kingdom as well as the European Court of Human Rights and the Inter-American Court of Human Rights on comparable rights provisions. These will all be valuable sources for the interpretation of the ACT *Human Rights Act.*

5.22 While the United Kingdom *Human Rights Act* provides that decisions of the European Court and Commission on Human Rights must be taken into account in the interpretation of the legislation,[49] we do not recommend that ACT be constrained by the jurisprudence of any one institution. Rather, we would recommend that the ACT develop its own understanding of the content of rights based on a broad comparative methodology. The draft *Human Rights Act* attached to this Report confirms the accepted principle that ACT courts may have recourse to international law when interpreting legislation based on international obligations.[50] This will require familiarity with international and comparative human rights jurisprudence and, as noted in Chapter 3, human rights training should be essential for the ACT judiciary and members of the public service with responsibility for the provision of legal advice.

5.23 In addition, as noted in Chapter 4, the Consultative Committee recommends that the *Human Rights Act* contain a clause stating that human rights can be subject to reasonable limits prescribed by law that can be justified in a democratic society. This notion is part of international law.[51] It assists in addressing the nature of particular rights and the extent to which their implementation may depend on the government's available resources. It is not the purpose of the *Human Rights Act* to operate as a constraint on the legislature's and executive's policy and budgetary decisions. However, the purpose of the *Human Rights Act* is to encourage public policy and budgetary decisions to take human rights into account.

Who can claim human rights?

5.24 The rights set out in bills of rights operating in other jurisdictions apply to corporations as well as individuals. This has allowed, for example, a tobacco company to challenge successfully Canadian legislation restricting the advertising and sale of tobacco products without health warnings.[52] The rights

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[45] Article 5 (e) (iii).

[46] Articles 12 & 14.2 (h).

[47] Articles 24.2 (c) (e) & 27.3.

[48] Eg Sarah Joseph, Jenny Schultz & Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (2000).

[49] Section 2.

[50] *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 71 ALJR 381, 383 per Brennan CJ.

[51] Universal Declaration of Human Rights, article 29.

[52] *McDonald Inc v Canada* [1995] 3 SCR 199.

contained in the ICCPR and the ICESCR, however, are expressed to apply to human persons. The UN Human Rights Committee has decided that ICCPR rights may be claimed only by natural persons.[53] The Consultative Committee recommends that the *Human Rights Act* similarly apply only to the rights of human persons and not to the more general category of legal persons, such as corporations. In Chapter 4 of this Report, the Consultative Committee has recommended that a broader class of persons than direct victims of alleged human rights breaches should have standing to bring an action under the *Human Rights Act*. They should be able to do so, however, only in respect of breaches of rights of natural persons.

5.25 The Consultative Committee is aware that many people in the ACT have particular concern about the protection of the rights of children. The rights contained in the ICCPR and the ICESCR apply of course to children as well as adults. Article 24 of the ICCPR deals specifically with children:

> Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

Other specific references to children in the Covenants include the right of children not to be exploited economically or socially,[54] the right of children to healthy development,[55] the right of accused juveniles to be held separately from adults and to be brought as speedily as possible to court,[56] and the right to special treatment in criminal trials.[57]

5.26 More generally human rights law recognises the significance of parents' interests in interpreting the rights of children. Article 5 of the UN Convention on the Rights of the Child states that:

> States Parties shall respect the responsibilities, rights and duties of parents … to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of [her or his] rights.[58]

The Consultative Committee would expect that an ACT court or tribunal would draw guidance from the Convention on the Rights of the Child and any other relevant human rights treaty when interpreting the application of ICCPR and ICESCR rights to children.

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[53] Eg *SM v Barbados* (communication 502/1992) views adopted 31 March 1994.

[54] ICESCR, article 10.3.

[55] ICESCR, article 12.2 (a).

[56] ICCPR, article 10.2 & 10.3.

[57] ICCPR, article 14.4.

[58] ICECSR, article 13.3 similarly respects the liberty of parents to chose appropriate forms of schooling for their children and ICCPR, article 18.4 respects parents' rights to ensure the religious and moral education of their children is consistent with their own convictions.

The status of economic, social and cultural rights

5.27 The *Human Rights Act* proposed by the Consultative Committee would give protection to economic, social and cultural rights as well as civil and political rights. In our consultations, we heard the view that the two types of rights are fundamentally distinct. Civil and political rights are presented as negative rights in that they simply restrain government action, while economic and social rights are viewed as positive rights requiring action and expenditure.

5.28 Others reject the claim that civil and political rights have a different quality to economic and social rights. They point out that if civil and political rights are taken seriously, they are much more than just a restraint on government. For example, proper implementation of the rights to be free from torture or from discrimination (classic civil and political rights) requires positive action and expenditure, such as education, monitoring and so on.[59] The Vienna World Conference on Human Rights in 1993 accepted that the correct approach was to regard all categories of rights as universal, inter-dependent, inter-related and indivisible.[60] Australia has signalled its support for this approach.[61] The draft ACT *Human Rights Act* uses the language of the Vienna Declaration.

5.29 The distinction between the two categories of rights is thus in many ways an artificial one. If human rights are concerned with the conditions of a worthwhile human life, rights to health, to housing and to education are as integral to human dignity as the right to vote. Many of the rights in the ICESCR and ICCPR are closely entwined. For example the ICCPR protects the right to freedom of association,[62] while the ICESCR protects the right to form trade unions.[63]

5.30 The Consultative Committee believes that the ACT *Human Rights Act* would be unbalanced if it were to protect civil and political rights alone. Professor Keith Ewing has pointed out that economic and social rights allow the development of ideas and institutions of substantive equality.[64] He has criticised the United Kingdom's *Human Rights Act* for its failure to include the economic and social rights recognised by the Council of Europe's Social Charter of 1961.

5.31 Ron Chapman, in his submission to the Consultative Committee, said:

> The argument that social and economic rights do not belong in a Bill of Rights because a government with insufficient means cannot fulfil all its obligations is specious. Parliaments and governments exist to satisfy social and economic needs. That's why we create them. The extent of

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[59] Craig Scott, 'The interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenant on Human Rights' 27 *Osgoode Hall Law Journal* (1989) 769.

[60] Vienna Declaration, UN Doc. A/CONF.157/24, paragraph 5, 8 available at http://193.194.138.190/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument.

[61] Department of Foreign Affairs and Trade, *Human Rights Manual* (2nd ed. 1998) 13-14.

[62] ICCPR, article 22.

[63] ICESCR, article 8.

[64] KD Ewing, 'The Unbalanced Constitution' in Tom Campbell, KD Ewing & Adam Tomkins eds, *Sceptical Essays on Human Rights* (2001) 103, 108.

available resources merely goes to the question of the *degree or extent* to which social and economic rights can be fulfilled.[65]

5.32 The draft *Human Rights Act* attached to this Report makes clear the indivisibility of economic, social and cultural rights and civil and political rights by grouping them together in relevant categories. For example the right to be free from hunger, contained in the ICESCR,[66] is in essence an aspect of the right to life, usually categorised as a civil and political right.[67] Similarly, the right not to be held in slavery or servitude, set out in the ICCPR,[68] is closely related to the right to work, contained in the ICESCR.[69] 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.

5.33 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, the inclusion of economic and social rights in the 1996 South African Constitution was challenged as a violation of the framework principles set out in the 1994 interim Constitution. It 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.[70]

5.34 The South African Constitutional Court rejected this challenge. It did not regard the task of protecting civil and political rights as qualitatively different to that of protecting economic and social rights. The Court noted that the proper observance of civil and political rights may have similar budgetary implications to protection of the latter. It stated that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion.'[71] The duty of the government to protect social and economic rights under the 1996 South African Constitution is defined as one to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of … these rights.'[72]

5.35 Decisions of the South African Constitutional Court provide some guidance on the interpretation of economic, social and cultural rights. In *Soobramoney v Minister of Health (Kwazulu-Natal),* the Court analysed the content of the right to health.[73] Mr Soobramoney argued that a decision taken by a hospital to

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[65] Submission 119.

[66] ICESCR, article 11 (2).

[67] ICCPR, article 6.

[68] ICCPR, article 8.

[69] ICESCR, article 6.

[70] 10 BCLR (1996) 1253.

[71] 10 BCLR (1996) 1253, para 78.

[72] South African Constitution 1996, section 26 (2), section 27 (2).

[73] *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1997 (12) BCLP 1696 (CC).

restrict dialysis to acute renal patients who did not also suffer from heart disease was a breach of his right to life and to health care. In light of intense demands on the hospital's resources, the Court rejected this claim. It held that 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.'[74]

5.36 In *The Government of South Africa v Grootboom*,[75] the Constitutional Court examined the meaning of the right to housing[76] and children's right to shelter[77] in a case brought by a group of people squatting on public land in appalling conditions. It found a government program inadequate in protecting these rights. The Court argued that economic rights needed to be analysed in their historic and social context. The Constitution did not give a free-standing right to housing or shelter, but rather one that had to be read in light of South Africa's situation and resources. The Court said that the Constitution did not oblige the government to go beyond its available resources in protecting the right. The issue for the Court was rather whether the measures taken by the government to protect the rights were reasonable.

5.37 Justice Yacoob said:

> A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent. … It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the test of reasonableness.[78]

5.38 More recently, in *Minister of Health v Treatment Action Campaign* in 2002, the South African Constitutional Court examined the South African government's response to the HIV/ AIDS pandemic.[79] It was concerned specifically with the transmission of the virus from mother to child at birth. In devising a programme to deal with this type of transmission, the government restricted the availability of a drug recommended by the World Health Organisation, nevirapine, on the ground that the government needed to wait until the outcomes of various pilot programs using the drug could be assessed.

5.39 The central issue for the Court was whether the government's restriction on the availability of nevirapine breached the right to access to health care services under the South African Bill of Rights.[80] In *Treatment Action Campaign*, the Constitutional Court acknowledged that the judiciary is not 'institutionally equipped' to undertake wide-ranging factual and political inquiries to determine

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[74] Para 29.

[75] [2001] 1 SA 46.

[76] South African Constitution 1996, section 26.

[77] South African Constitution 1996, section 28 (1) (c).

[78] [2001] 1 SA 46, para 41.

[79] [2002] 5 SA 271, available at http://www.concourt.gov.za/judgments/2002/tac.pdf.

[80] Section 27(1)(a) states that '[e]veryone has the right to have access to health care services, including reproductive health care'.

how best to spend public money.[81] However, the Court also found that the South African Constitution contemplated a 'restrained and focussed role' for the courts in requiring the state to take measures to meet its constitutional obligations. It stated that '[s]uch determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets.'[82] The Court held that '[a]ll that is possible, and all that can be expected of the state, is that it *act reasonably to provide access* to the socio-economic rights.'[83]

5.40 The Court examined the reasons given by the government for restricting nevirapine, and weighed those against the drug's potential benefits. The cost of the drug was no issue as the manufacturer had agreed to provide it free of charge for five years. The Court found that the government's concerns about the efficacy of the drug, the risk of developing resistance to the drug and its safety were either unfounded or did not justify nerivapine being withheld given its potential for saving lives.[84] The Court reiterated *Grootboom*'s statement that rights need to be interpreted in their context. The relevant context in this case was that the government itself had identified HIV/AIDS as the greatest threat to public health in South Africa, but also that the state faced great demands upon its resources. Within this context, the rigidity of the government's policy as a whole was held to fail the test of reasonableness.[85]

5.41 The Court declared that the South African government's policies and measures fell short of their constitutional obligations. It ordered the government to remove the restrictions upon nevirapine in the public health sector and permit its use, and to extend counselling and testing facilities and expedite the use of nevirapine for the purpose of reducing mother-to-child transmission.[86] However, the Court also declared that the orders outlined did not prevent the government from adapting its policy in a manner consistent with the Constitution.

5.42 The UN Committee on Economic, Social and Cultural Rights has provided some guidance on the measurement of the implementation of human rights, adopting 'a broad and flexible approach' taking local legal and administrative systems into account but also providing clear indicators for action.[87] Its General Comment on the right to health, for example, identifies specific obligations required to fulfil the right.[88]

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[81] Para 37.

[82] Para 38.

[83] Para 35 (emphasis added).

[84] Paras 48-73.

[85] Para 95.

[86] Para 135.

[87] Committee on Economic, Social and Cultural Rights, General Comment 9 (1998) (set out in Appendix 5 of this Report).

[88] Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4 (2000) (set out in Appendix 5 of this Report).

5.43 A recent decision of the African Commission on Human and Peoples' Rights gives a helpful analysis of the nature of the duty to protect economic, social and cultural rights. The Ogoni people in Nigeria made a communication to the Commission under the African Charter on Human and Peoples' Rights alleging that the Nigerian government was responsible for violations of the right to health and the right to a clean environment through allowing extensive toxic waste disposal from oil exploration and exploitation.[89] The Commission stated that a government had at least four duties in relation to rights protection:

- A duty to *respect* rights, meaning refraining from interfering in the way an individual or group's resources are used to protect rights;
- A duty to *protect* beneficiaries of a right by creating and maintaining a legal framework for individuals to realise the right;
- A duty to *promote* rights, for example by raising awareness of rights;
- A duty to *fulfil* rights, subject to the condition of reasonableness, through, for example, not destroying basic food supplies or allowing the violent destruction of homes.

5.44 The principles adopted by the South African Constitutional Court, the UN Committee on Economic, Social and Cultural Rights and the African Commission in interpreting economic, social and cultural rights would be useful in ACT courts and tribunals. There are also other court decisions that provide guidance on the interpretation of such rights.[90] The Consultative Committee notes that the obligation to implement the ICESCR is different in terms to that of the ICCPR. The ICCPR states that treaty parties must undertake to ensure that people whose rights and freedoms have been violated have an effective remedy.[91] The ICESCR language is different: a treaty party 'undertakes to take steps … to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised … by all appropriate means ….'[92] The nature of the implementation obligation under the ICESCR would allow courts to take a 'restrained and focussed' approach to the interpretation of economic, social and cultural rights.

5.45 It is worth noting that the Universal Declaration of Human Rights contains both civil and political rights and social, economic and cultural rights in the one document. It was initially assumed that a single treaty translation of the Universal Declaration would be prepared and would mirror the rights the Declaration contained. By the time the drafting of the treaty started in earnest, however, the Cold War had begun. The tensions of the Cold War were manifested in the human rights area through an ideological divide between the West and the socialist bloc countries. The West generally championed the centrality of civil and political rights, and the socialist countries promoted the

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[89] ACHPR/COMM/A044/1 (27 May 2002).

[90] Eg *Dagi v BHP (No 2)* [1997] 1 VR 428; *Eldridge v. BC* [1997] 3 SCR 624; *Krishnan v Andhra Pradesh* [1993] 4 LRC 234.

[91] ICCPR, article 2.3 (a).

[92] ICESCR, article 2.1.

value of economic and social rights. The outcome of these debates was the drafting of two separate treaties -- the ICCPR and the ICESCR.

5.46 The draft *Human Rights Act* attached to this Report revives the spirit of the Universal Declaration by including both types of rights in a single document. It offers two alternative approaches to implementing the rights. 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 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. The Consultative Committee expresses a strong preference for the second alternative, as we consider it more consistent with the idea of the indivisibility of human rights.

5.47 The Consultative Committee notes that the inclusion of economic, social and cultural rights in the ACT *Human Rights Act* may prompt concerns that such rights will expose the ACT government to debilitating financial liability. For a number of reasons, the Consultative Committee considers that these fears have no basis in the proposed *Human Rights Act*. First, the draft legislation makes clear that the obligation to implement economic, social and cultural rights is not absolute, and may be limited in reasonable ways to take account of budgetary realities. The South African Constitutional Court's statement in *Grootboom* that 'It is necessary to recognise that a wide range of possible measures could be adopted' (quoted in paragraph 5.37 above) to be a reasonable rights-protecting measure underlines the discretion retained by the government. Second, the *Human Rights Act* allows the Supreme Court to consider a range of remedies for the breach of a human right, some of which have no financial implications. Finally, the draft legislation allows the Legislative Assembly, rather than the courts, to take the final decision on the reasonableness of laws and policies. Even were a particular practice or policy found to breach an economic, social or cultural right, the legislature has the power to enact legislation authorising such a policy or practice.

Indigenous rights

5.48 The terms of reference for the Consultative Committee specifically require consideration of whether Indigenous rights should be included a bill of rights. International law has been slow to develop the category of Indigenous rights. Human rights instruments drafted within the UN and the International Labour Organisation have however recognised the distinct nature of Indigenous rights,

in particular the right to self-determination and rights to traditional land, culture and language.[93]

5.49 The Consultative Committee undertook consultations with sectors of the Indigenous community in the ACT, particularly with representative groups. In addition, it received a number of submissions from Indigenous people in their personal capacity. The Consultative Committee acknowledges that the cultural protocols of consultation with Indigenous communities often require a longer period than that set down for this inquiry. It recommends that the five-year review of the *Human Rights Act* proposed in Chapter 3 should pay particular attention to the impact of the legislation on Indigenous people. The Consultative Committee however is very grateful for the efforts of key representative Indigenous groups in making submissions.

5.50 There was overwhelming support for a bill of rights in the ACT from Indigenous peoples and their representative organisations. This support derived from a sense that ACT laws did not adequately protect the rights of Indigenous people. As the Co-Chair of the ACT Journey of Healing, Ms Ricki Dargavel, told the Consultative Committee:

> [W]e have concluded that current legislation and government services do not adequately protect the rights of Indigenous Australians in the ACT, many of whom lack rights; that is, the conditions necessary for people to live lives of dignity and value.[94]

5.51 Indigenous members of the ACT community noted that '[o]ne of the difficulties of enshrining Indigenous rights in a Bill is being able to adequately define them.'[95] A submission from Mark McMillan argued that 'it is likely that some general rights would be of particular benefit to indigenous peoples. A right against discrimination on the basis of race is one such right.'[96]

5.52 Reservations were expressed about the wisdom of identifying one group within the ACT community for special treatment in relation to a bill of rights. For example Mark McMillan wrote:

> My personal view – as an Indigenous Australian – is that the articulation of Indigenous specific rights may derail the process. Instead, the principles encapsulated from CERD [the Convention on the Elimination of All Forms of Racial Discrimination] and wording such rights so that they may have salience for Indigenous Australians may be a more realistic option at this stage.[97]

Paul Kildea, among others, argued that with or without special mention, the listing of even the most general rights would have a particular benefit for Indigenous people.[98]

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[93] James Anaya, *Indigenous Peoples in International Law* (1996).

[94] Submission 143.

[95] Submission 91.

[96] Submission 91.

[97] Submission 103.

[98] Submission 91.

5.53 The case of *Kruger v The Commonwealth*,[99] involving members of the stolen generations, indicates the value of generally expressed rights for Indigenous people. The plaintiffs had claimed breaches of freedom of movement, the right to the freedom of religion, legal equality and due process. In *Kruger* the High Court failed to acknowledge the applicability of any rights claimed, but the case shows how a particularly Indigenous experience – removal from the family motivated by assimilationist policies – can be explained in terms of rights that are not specifically labelled 'Indigenous'.

5.54 Like Mark McMillan, Paul Kildea was concerned that in the face of public opposition, specific mention of Indigenous rights could be counterproductive. 'Lack of public support and understanding does not weaken the claim of indigenous rights to legal recognition,' he wrote, 'but it does make their recognition in a bill of rights problematic. … [N]ot only could their proposed inclusion sink a bill of rights altogether, but a large number of Australians would feel as if they did not have a stake in the rights regime.'[100]

5.55 The Co-Chair of the ACT Journey of Healing, Ms Ricki Dargavel, proposed that:

> Rights supported in an ACT Bill of Rights should be universal in that they apply to all residents. This is to maximise the acceptability of a Bill of Rights to the bulk of ACT citizens and because many of the rights of the most importance to Indigenous people on a day-to-day basis, derive out of our common humanity, rather than the unique situation of Indigenous Australians. For example, the rights to adequate food, shelter and means of sustenance are universal, as are the rights to good health, a good education, fair treatment before the law and respect more generally.[101]

5.56 Other submissions, however, argued for the specific inclusion of Indigenous rights—including the right to land, the right to have control of resources and determination in financial matters that come from those resources, the right to heritage and protection against genocide.[102] For example, Jason Söderblom of the ACT Human Rights Education Association argued that:

> A strong bill of rights with reference to Indigenous rights will be a step in the right direction in repairing the bruised and battered confidence of the Indigenous community and a positive step towards preventing human rights abuse.[103]

5.57 Almost all responses that were concerned with protecting Indigenous rights mentioned the need for equal access to services – particularly health, education and housing. This was seen as improving Indigenous access to mainstream services as well as ensuring that services were provided to address the particular needs of the Indigenous community. As part of this concern about access to

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[99] (1997) 190 CLR 1.

[100] Submission 91.

[101] Submission 143. See also submission 114 (Jilpia Jones).

[102] Submission 114.

[103] Submission 118.

mainstream services, reference was made to the Service Delivery Agreement between the ACT Government and the Aboriginal and Torres Strait Islander Commission (ATSIC) signed on 20 February 2002. Submissions to the Consultative Committee noted that nothing in a bill of rights should detract from that agreement; rather a bill of rights should support the principles contained in it, namely:

- Improving access to ACT government services by Aboriginal and Torres Strait Islander peoples;
- Increasing the involvement of Aboriginal people in decision-making processes;
- A commitment to improving the social, economic and cultural status of Aboriginal and Torres Strait Islander residents in the ACT;
- Endorsing policies that have an impact on Aboriginal and Torres Strait Islander Affairs in the Australian Capital Region, and that are derived from national reports such as Royal Commission into Aboriginal Deaths in Custody, the Human Rights and Equal Opportunity Commission's *Bringing them Home* report on the stolen generations, Aboriginal Health strategies and heritage and culture initiatives.

5.58 There was also strong support for the inclusion of rights for those caught up in the criminal justice system:

> [While] the number of Indigenous people being arrested and/or imprisoned in the ACT is relatively small compared to other more populous States, the rate of imprisonment is actually higher. For example, on the 30 June 2001 the rate of Indigenous people aged 10 to 17 years in juvenile detention in the ACT was 657.9 per thousand compared to a figure of 284 nationally. The recent targeting of Aboriginal people by the police sees, at the time of preparing this Submission, the highest ever number of Aboriginal detainees in the Belconnen Remand Centre.[104]

5.59 The Aboriginal Justice Advisory Committee (AJAC) of the ACT recommended the adoption of 'a more comprehensive instrument that amplifies the application of the *Discrimination Act 1991* that prohibits discrimination on the grounds of race as well as various other groups.'[105] AJAC proposed the following:

> We would advocate the adoption of a Declaration or Charter of Rights that contains a strong unequivocal statement that all humans in the ACT are created equal, that just by being born they/we have unalienable rights, but that these do not operate to invalidate attempts to remove inequality where it exists. The benefits arising from this would be two-fold:

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[104] Submission 79. See also submissions 143 (Journey of Healing ACT Inc.) and 145 (Ms Samantha Faulkner).

[105] Submission 79.

- For those who experience social disadvantage a public declaration would have a positive effect in terms of self-respect and sense of belonging; and
- For those who take their human rights for granted due to reasons of social, educational and/or economic advantage the clear message that this does not give them extra rights or take away from the rights of other groups.[106]

5.60 AJAC noted the statement by the UN Committee on the Elimination of Racial Discrimination that ensuring 'Indigenous peoples' equality and freedom provides the reason and purpose for defining the rights of Aboriginal and Torres Strait Islander people.' In particular, the UN Committee has called on countries to ensure that Indigenous peoples:

- Are not discriminated against and enjoy freedom and equality;
- Are provided with conditions allowing for sustainable economic and social development compatible with their cultural characteristics;
- Can participate in public life and give their informed consent to decisions which affect their rights and interests; and
- Can revitalise their cultural traditions and customs and preserve and practise their languages.[107]

5.61 AJAC argued that the ACT 'should likewise enshrine basic human rights in legislation containing core values and standards associated with non-discrimination, for instance, "all humans are entitled to equal benefit and protection before the law".'[108] It stated:

> [A]rguments for equality for all do not mean that we should ignore inequality where it exists or the need for special measures to ensure that outcomes are equal. Principles of equality are an aspiration and not a reality. Treating people equally or the same may in some instances be a violation of their human rights to have special circumstances recognised. … Affirmative Action programs that have as their goal equality of outcome rather than equality of opportunity should be fully permissible under the ACT Bill of Rights.[109]

5.62 In light of its consultations with Indigenous groups, the Consultative Committee considers that the ICCPR and ICESCR rights protected by the *Human Rights Act* can be interpreted to respond to the concerns of the ACT Indigenous communities. The right to self-determination and economic, social and cultural rights are of particular significance to Indigenous Australians. However, the Consultative Committee recommends that the *Human Rights Act* include a preamble that recognises the special historical context of Indigenous people in the ACT and the importance of rights protection to that sector of the Canberra

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[106] *Ibid*.

[107] Quoted in submission 79.

[108] Submission 79.

[109] Submission 79.

community. This acknowledges that the equal protection of rights in the ACT community requires considering special needs of Indigenous people.

5.63 The *Human Rights Act* should be viewed as supporting the special agreements already existing between Indigenous people and the ACT government for service delivery, land agreements and protection of other rights and development of protocols.

5.64 The Consultative Committee also recommends that the proposed review of the *ACT Human Rights Act* after five years should give particular emphasis to its effectiveness in recognising and protecting the rights of Indigenous Australians. At that time the question of the inclusion of specific Indigenous rights in the legislation should be revisited.

Rights and responsibilities

5.65 The terms of reference for the Consultative Committee require consideration of whether a statement of rights should be accompanied by a parallel statement of responsibilities. In its consultations the Consultative Committee encountered diverse understandings of this term of reference—and considerable passion in the expression of the various views.

5.66 The range of views is partly a consequence of differing understandings of the *source* of rights. Are they god-given or human-made? To paraphrase Jeremy Bentham, are those rights that are *not* laid down in law illusory, or is there such a thing as an inherent right, to which an individual has access by virtue of their humanity?[110] Do rights arise from responsibilities, or the other way around? Or is there no necessary nexus between the two?

5.67 There were those who understood the term 'responsibilities' to mean obligations to uphold or protect the rights specified in a bill of rights—in other words, responsibilities *towards the holders of those rights*. An example might be a responsibility on the part of an arresting officer to warn an accused person of their rights. Another might be a responsibility on the part of government to fund schools, in order to facilitate a right to education. Added to these duties are what Francesca Klug terms 'negative' duties: the duty *not* to deprive people of the things they have a right to.[111]

5.68 As was pointed out in a number of submissions, the mere fact that particular rights have been set out in a bill of rights implies a parallel responsibility to see that those rights are upheld. The preambles to both the ICECSR and the ICCPR indeed note that:

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

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[110] Jeremy Bentham, 'Anarchical Fallacies', reprinted in J Bowring ed., *The Works of Jeremy Bentham* (1843) 489.

[111] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 74.

5.69 Some correspondents argued that this symbiosis between rights and responsibilities rendered a separate listing of responsibilities redundant.[112] For example, Uniting Care NSW/ACT stated that:

> There are serious dangers in including detailed responsibilities for individuals in a Bill of Rights. First, citizens' responsibilities are already detailed in a plethora of legislation … from paying taxes or sending children to school …. Second, a list of individual responsibilities would shift the agenda of a Bill of Rights from protecting citizens and may give the impression that government responsibility for the human rights of their citizens is conditional rather than absolute. … Third, the source of the human rights that might be included in a Bill of Rights is clear (the international human rights instruments), but there is no equivalent statement of responsibilities.[113]

5.70 Others insisted that for society to fully comprehend the implications of a bill of rights, such obligations needed to be set out. For instance, W.E. Mickleburgh suggested a code of responsibilities would establish the necessary synergy between rights and responsibilities to allow the effective implementation of a bill of rights. Dr Mickleburgh's list of suggested responsibilities ranged from ethical obligations (to behave honestly, truthfully and justly, for example) through 'duties of care' towards children, the sick, the aged, the environment, other species and the customs beliefs and cultures of others, to the duty to resolve conflict through mediation, arbitration and other non-violent means.[114]

5.71 In a meeting with the Consultative Committee, some members of the ACT Corrections Coalition suggested that a bill of rights could include an obligation on government to clearly set out the objectives of its social policies, and to base those policies on best-available evidence. In other words, government would be required to justify its policies on social grounds, in the light of sociological data. It was further suggested that governments should be obliged to assess regularly the efficacy of policies and programs, to test whether they were meeting the government's stated objectives.

5.72 Other people thought the term of reference was asking whether the holders of rights themselves ought to be expected to shoulder certain responsibilities in return—and whether these ought to be set out in a bill of rights. An example might be the responsibility to obey the laws of the land. The idea was that individuals ought not expect rights without accepting that they also had responsibilities—to each other, and to society. As James Holland wrote in his submission, 'I do not think that one should have "rights" as defined. One achieves rights by performing obligations.'[115]

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[112] Eg submission 27 (Glenn Pure).

[113] Submission 80.

[114] Submission 65.

[115] Submission 47.

5.73 Richard Eason, Senior Minister in the New Testament House Churches in the ACT, told the Consultative Committee: 'Our rights don't come from government, they come from God, with matching responsibilities.'[116]

5.74 Over the course of the Consultative Committee's consultations it became apparent that there was considerable community disquiet about what people saw as a focus on individual rights at the expense of social responsibility, community interest and social coherence. There was a perception that conferring individual rights on people, particularly in the absence of a parallel list of responsibilities or duties, might lead to a more selfish and self-centred society. Mary Ann Glendon has described a similar anxiety about the 'hyperindividualism' associated with the United States Bill of Rights.[117]

5.75 It was further argued that the potential consequences of a focus on the individual rather than the 'tribe' could include a more litigious society and a decline in acceptance of individual responsibility for one's acts. In his submission, John Sissons listed a number of instances in which a focus on rights rather than responsibilities could work against social coherence. He wrote of children, imbued with a sense of their rights, leaving 'the decent upbringing and discipline of the parental home' to live on the street'. 'We do not need a Bill of Rights,' he wrote, '[r]ather, we need responsible Government.'[118] John Thompson argued that without a balancing statement of responsibility, the ACT could develop what Robert Hughes calls a 'culture of complaint'.[119]

5.76 The Anglican Bishop of Canberra and Goulburn, the Right Reverend George Browning, proposed a charter of ideals (rather than rights) and responsibilities. Among the responsibilities he suggested listing in such a charter were a commitment to the protection of children and provision for the elderly and a commitment to environmental responsibility.[120]

5.77 International experience suggests that fears of social breakdown and growing individualism are common when bills of rights are under consideration. Writing of the United Kingdom experience in the lead-up to the introduction of the *Human Rights Act*, Francesca Klug described 'a profound caricature of human rights as irredeemably egotistic and individualistic, with no capacity to recognise the common good.'[121] In fact, Klug argues, human rights have always been as much about communitarianism as individualism. Human rights require above all an understanding of common ethical values rather than giving priority to individual freedom.[122]

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[116] Submission 100.

[117] Mary Ann Glendon, *Rights Talk: Impoverishment of Political Discourse* (1993) 10, quoted in Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 127. See also submission 125 (Professor John McMillan).

[118] Submission 64.

[119] Submission 57. See also submissions 106 (Malcolm H Brandon) & 109 (IR McLeod).

[120] Submission 5.

[121] Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (2000) 14.

[122] *Ibid* 196.

5.78 A number of submissions pointed out that the Universal Declaration of Human Rights makes mention of the responsibility of individuals toward the community and several submissions argued that possible community fears about a bill of rights could be allayed by including explicit reference to responsibilities. Such a reference could be as simple as a statement that individuals claiming a right had a responsibility to ensure that all other members of society had access to that same right. In her submission, Laurayne Bowler suggested a formal statement that individuals asserting a claim to particular rights had a responsibility to consider the implications for the human rights of others.[123]

5.79 The ACT Baha'i Community similarly argued that an explicit and prominent reference to responsibilities would serve to dispel any misplaced community apprehensions that bills of rights were concerned with the interests of the individual to the detriment of the community as a whole.[124] The ACT Council of Social Services also recommended that an ACT bill of rights should include a statement of responsibility.[125]

5.80 Others saw potential danger in aligning rights and responsibilities in a single document. Rights and responsibilities must always co-exist in a social compact between government and a community. The risk of formally linking the two is that rights will come to be seen as 'rewards' for those who are deemed to have properly fulfilled their obligations to society.

5.81 The National Children's and Youth Law Centre put this point strongly:

> [T]he enjoyment of rights should not be contingent on the performance of responsibilities. If that should happen, and rights should become seen as the reward for 'good citizenship', those most vulnerable to rights abuse and least able to complain about it—the infirm, the mentally ill, prisoners and accused people, for example—would be in danger of falling outside the embrace of a bill of rights.[126]

5.82 The Consultative Committee believes that the protection of human rights should not be the reward for what is deemed 'good behaviour'. Human rights are based on the notion of human dignity. Of course, claims to human rights will often need to be balanced against those of other individuals and groups in the community and as a result may be limited in particular ways.

5.83 The Consultative Committee notes that an idea of responsibility is in fact inherent in the notion of rights. If human rights are the conditions necessary for people to live lives of dignity and value, there is a responsibility to support these conditions. The responsibility does not fall on government and public authorities alone and is shared by the ACT community. The Committee believes that the responsibilities of institutions and individuals to respect the rights of

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[123] Submission 97.

[124] Submission 87.

[125] Submission 89. See also submission 68 (M Sergi), submission 135 (Bernard Katz) & submission 139 (Shannon Read).

[126] Submission 19.

others are already adequately acknowledged in the ICESCR and the ICCPR and require no further elaboration in the ACT *Human Rights Act*.

Summary

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 perceived difficulties with the implementation of such rights are over-stated. The Committee considers that Indigenous rights will be protected within this general framework, though this issue should be reviewed in five years. In the Committee's view, there is no need for the *Human Rights Act* to contain a separate list of responsibilities, as the articulation of rights implies responsibilities.

Recommendation 10

The Consultative Committee recommends 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*.

Recommendation 11

The Committee considers that, at this stage the general human rights framework proposed in the *Human Rights Act*, especially the right to self-determination and the economic, social and cultural rights contained in it, will offer particular protection to Indigenous people. The protection of Indigenous rights within the general human rights framework should be reviewed in five years. The Committee recommends that the preamble to the *Human Rights Act* include a recognition of the special historical context of Indigenous people in the ACT.

Recommendation 12

The Committee recommends that the preamble to the *Human Rights Act* should make explicit the notion of responsibility as inherent in the concept of human rights.

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