



ACT DEPARTMENT OF JUSTICE
& COMMUNITY SAFETY

Department of Justice and Community Safety

Human Rights Act 2004

Twelve-Month Review – Report

Department of Justice and Community Safety

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Table of Contents

Executive Summary	2
Terms of Reference	4
Conduct of this Review	7
Operation of the HRA.....	10
The Compatibility Statement	18
A Direct Right of Action	23
Building a Human Rights Culture	34
Economic, Social and Cultural Rights	37
Environment-Related Human Rights.....	50
Appendix 1:- Submissions Received.....	57
Appendix 2:- Annual Reporting on Human Rights	58
Appendix 3:- Economic, Social and Cultural Rights Enforcement Methods.....	63
Appendix 4:- References.....	74

Executive Summary

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

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

The HRA is based largely on a model Human Rights Bill developed by the ACT Bill of Rights Consultative Committee in its report *Towards an ACT Bill of Rights Act*. However, in some key respects, the HRA contains departures from the Model Bill.

A significant departure was the decision not to expressly include rights guaranteed under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Another important departure was the decision not to include a direct duty to comply with human rights, coupled with a direct right of action and a set of express remedies.

The first year of the HRA provided an opportunity to consider how the dialogue model was working and how it was helping to develop a human rights culture in the ACT. It is now possible to draw some conclusions about the operation of the HRA and about the case for incorporating economic, social and cultural rights.

It is clear that the HRA is achieving results within the Executive and Legislature and that it should continue to operate as a dialogue model (**Recommendation 1**). Moreover, while there is a case for improving community engagement, the focus at this time should remain on the dialogue with the Assembly (**Recommendation 2**).

Within the Executive, the Government should continue to encourage Agencies to make greater use of the Explanatory Statements to make the case for compatibility. But, where a bill raises significant human rights issues, the compatibility statement

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

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

Twelve-Month Review of the *Human Rights Act 2004*

should provide a 'summary of reasons', focusing on the human rights principles and drawing on the case established by the sponsoring agency (**Recommendation 3**). For key bills, agencies should be encouraged to make the case for compatibility to the wider community in connection with exposure drafts or public consultation (**Recommendation 4**).

The Government should accept that the interpretive provision in section 30 of the HRA imposes a duty to comply with the human rights in Part 3 of the HRA. But, it should be amended to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation. (**Recommendation 5**).

The Government should examine options for amending the HRA to include a direct duty on public authorities to comply with human rights and a direct right of action. Any proposal will need to address the scope of the duty and the sanctions, if any, for breach. These should be subject to a bar on any new right to compensation arising from breach, following the model recently adopted in Victoria (**Recommendation 6**).

Subject to the successful incorporation of a direct right of action, the HRA should not be amended to include a complaints handling function (**Recommendation 7**).

The Human Rights Unit should continue to consult with agencies about their positive and negative experiences in implementing the HRA (**Recommendation 8**).

The Human Rights Unit should engage directly with agencies in their planning and training initiatives to raise the profile of human rights (**Recommendation 9**).

The Government should explore support for the direct enforceability of specific rights, such as the rights to health, education and housing, but should not amend the HRA to include economic, social and cultural rights (**Recommendation 10**).

The Government should revisit the question of economic, social and cultural rights as part of the five-year review under the HRA (**Recommendation 11**).

The Government should not consider specific mechanisms to protect environment-related rights before other recommendations are addressed (**Recommendation 12**).

Terms of Reference

Statutory Requirement

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

Twelve-month review

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

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

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

Five-year review

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

History and Context

Twelve-month review

Section 43 was introduced by an amendment proposed by Kerrie Tucker MLA.³

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

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

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

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

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

³ Proposed section 42A in item 6 of Proposed Amendments dated 02 March 2004.

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

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

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

Five Year Review

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

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

This recommendation of the Consultative Committee was immediately accepted:

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

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

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

Conduct of this Review

Purpose

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

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

Methodology

On 1 July 2005, the Department released a framework document for comment at the Second HRO Community Forum. The document canvassed issues relating to the protection of economic, social and cultural rights along with various issues relating to mechanisms governing the operation of the HRA. Two of those issues related to key aspects of the dialogue model: the obligation of public authorities to comply with human rights and the nature of the dialogue between the executive and legislature.

On 6 April 2006, Chief Minister Jon Stanhope MLA issued a media statement announcing the release of a Discussion Paper on the Twelve-Month Review.⁹ The Discussion Paper was simultaneously published on the Chief Minister's website and the website of the Department of Justice and Community Safety. In addition, the Discussion Paper was distributed to stakeholder networks established through the biennial ACT Human Rights Community Forum, run by the ACT Human Rights Office (HRO), and the ACT Human Rights ACT Legal Network established by the HRO and the ACT Human Rights Act Research Project at Australian National University (ANU).

Following the format of the Framework Document, the Discussion Paper canvassed threshold issues relating to the protection of economic, social and cultural rights,

Twelve-Month Review of the *Human Rights Act 2004*

such as direct enforceability, through their inclusion in Part 3 of the HRA, indirect enforceability, through their inclusion as directive principles of policy, and indirect protection, through the interpretation and application of existing rights mechanisms. The Discussion Paper also canvassed specific issues relating to the operation of the HRA, such as the scope of legislative scrutiny practice and documentation, the extent to which the existing mechanisms properly capture the conduct of public authorities and the various measures taken to promote a human rights culture in the ACT.

The Discussion Paper posed these issues in the form of specific questions to assist respondents to focus on the sorts of issues and concerns at the heart of this review.

Submissions

The consultation period for the review closed on 19 May 2006. Following requests, this period was extended by one week to provide greater opportunity for participation.

There was a reasonably strong response to the Discussion Paper, with submissions received from most of the participants and stakeholder organisations in Canberra.

Submissions were received from 16 individuals or organisations. Almost all were from academics or stakeholders with a direct interest in human rights or related social justice matters. None of the submissions addressed all of the questions raised in the Discussion Paper and most responses related to the specific interests of the individual or organisation. For example, some submissions addressed only one primary issue from the range canvassed in the discussion paper.

Questions about the inclusion of economic, social and cultural rights and an express duty or direct right of action on public authorities drew the most responses. In both cases there were nine in favour and two unsupportive. Six submissions prioritised economic, social and cultural rights to housing, education and health as having particular significance to the ACT. Two focussed specifically on the right to housing.

A significant minority (six) argued for a specific remedy for breaches of human rights.

Only three submissions addressed the protection of environmental-related human rights. Of these, only two provided detailed comments.

⁹ Jon Stanhope MLA, [Review of First Twelve Months of Human Rights Act](#), *Press Release*, 6 April 2006.

Twelve-Month Review of the *Human Rights Act 2004*

Four submissions argued for an extended form of compatibility statement. Primarily the focus in these submissions was on the need for greater public participation.

Eight submissions supported additional measures to enhance the human rights culture in the ACT. Only one submission was satisfied with progress so far (ALA).

A list of persons and organisations that made submissions is at **Appendix A**.

Operation of the HRA

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

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

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

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

Twelve-Month Review of the *Human Rights Act 2004*

There have been few dramatic changes in the public face of government and this lack of instant impact has led some to wonder if the HRA has had any impact at all:

[S]ince that day of liberation when we got the Bill there had been not one court case on it, not one executive action which could be said to have occurred because of it, nor one legislative Act in consequence of the new consciousness of human rights to which the Bill gave witness had happened as a result ...¹⁰

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

So, how has the HRA impacted upon the ACT?

Judiciary

To date, the courts and tribunals have arguably been the least affected by the HRA. As McKinnon has noted there has 'not yet been a flood of litigation as a result of the Act'.¹¹

Echoing McKinnon's empirical observation, Justice Connolly noted extra-judicially:

The Human Rights Act has certainly not had a revolutionary impact on the practice of the criminal law in Canberra. There has not been a flood of litigation, and magistrates and judges have not been overwhelmed by masses of English, New Zealand or European jurisprudence on equivalent human rights statutes.¹²

In her twelve-month survey, Dr Watchirs, the Human Rights Commissioner, noted that the HRA had 'only a small impact in a handful of cases where parties have specifically argued human rights issues'.¹³ Similarly, McKinnon noted that, while the HRA 'has not gone entirely unnoticed', it could not be said to have been a 'decisive factor' or to have been considered in 'any great depth' by the courts so far. At most, it has been used 'to lend support to a conclusion already reached by other reasoning'.¹⁴

Similarly, Mr Refshauge SC, the Director of Public Prosecutions, observed that:

¹⁰ Jack Waterford, 'Bills that let judges make laws', *The Canberra Times*, 11 June 2005.

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

¹² Justice Terry Connolly, 'Practicing Criminal Law under the Human Rights Act – No Rogue's Charter', Paper presented to the Conference of Australian Prosecutors, 14 July 2005.

¹³ Dr Helen Watchirs, Review of the first year of operation of the Human Rights Act 2004, *Democratic Audit of Australia*, June 2005, p 1.

¹⁴ Gabrielle McKinnon, 'The ACT Human Rights Act 2004 – The First Year', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 2.

Twelve-Month Review of the *Human Rights Act 2004*

The decisions [in the criminal sphere] were all ... made on the basis of principles of law or the exercise of a discretion that were unexceptional applications of the common law and which were unaffected by or independent of the [HRA] ... The same seems true of those decisions in the civil area also.¹⁵

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

There is no evidence of any awareness and certainly not mining of the rich jurisprudence which courts in Europe, [etc.] have created to identify and explain the rights enacted by the respective [provisions]. In two respects, I think the ACT courts, as yet, have failed to recognise this jurisprudence and develop it locally.¹⁶

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

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

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

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

[T]he quality of the dialogue [in the judiciary] is likely to depend upon the breadth and depth of the surrounding legal/human rights culture, including, for example, the capacities of interest groups, the level of academic interest in any local experiment, and the orientations and expertise of the local legal profession.¹⁷

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

Of course, the court is not entirely responsible. Counsel appearing before it ... should be prepared with submissions on the issues and not merely refer to the *Human Rights Act 2004* as if it held an answer. They have a duty to assist the Court to identify and apply the right legislation properly.¹⁸

A critical mass of jurisprudence also requires a critical volume of cases and appeals.

It has always been expected that complex human rights issues would be more likely to be raised in [appeal] cases where issues are obvious, compared to trials ... where evidential and procedural matters are usually dealt with quickly.¹⁹

However, not all participants, or observers, are equally disappointed over the record.

The Chief Minister, who was a principal proponent of the HRA, has been sanguine:

I do not regard it as noteworthy or remarkable that in its first year of operation, the Human Rights Act was cited in only 14 Supreme Court cases. Perhaps it is a sign that processes further away from the courthouse are working well.²⁰

¹⁵ Richard Refshauge SC, 'The *Human Rights Act 2004* and the Criminal Law', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, pp 5-6.

¹⁶ Richard Refshauge SC, 'The *Human Rights Act 2004* and the Criminal Law', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 7.

¹⁷ Leighton McDonald, 'New directions in the Australian bill of rights debate' [2004] *Public Law* 22 at p 30.

¹⁸ Richard Refshauge SC, 'The *Human Rights Act 2004* and the Criminal Law', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 9.

¹⁹ Dr Helen Watchirs, *Submission 11*, p 12.

Twelve-Month Review of the *Human Rights Act 2004*

Justice Connolly is also taking a more long-term view in relation to the impact of the HRA. 'It will take some time for an awareness to grow, and for Canberra practitioners to become familiar with the growing jurisprudence on the Human Rights Act.'²¹

As awareness of the Act increases, and practitioners become more familiar with its provisions and the impact of the English and New Zealand schemes, we can expect that the impact will grow ... Perhaps for a while vague references to the Human Rights Act might be a bit like "the vibe" of Mabo and the Constitution ... In time, however, the full impact of the legislation will emerge.²²

Even the sceptics had to accept that more time was needed. So, while Professor Tom Campbell maintained his objection that the HRA was capable of transferring political power to the judiciary, he was unable to draw any immediate conclusions:

This democratic objection cannot be subjected to empirical and normative assessment prior to courts utilising the powers given to them over a significant period of time, so that the force of this criticism remains on the table at this stage.²³

Executive

By contrast with the courts, the executive has been the most affected by the HRA. In the first year the Human Rights Commissioner has suggested that: '[t]he biggest impact of the Act has been in influencing the formulation of government policy and new legislation'.²⁴ She had observed 'a marked increase in the awareness of human rights principles due to the kind of scrutiny now required of proposed legislation', among other things.²⁵

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

At this stage, the conversation within the executive is perhaps the most fruitful in terms of impact on policy development and government action ... This can be a robust dialogue, particularly where agencies are committed to the implementation of a particular policy in a particular way.²⁶

²⁰ Jon Stanhope MLA, Speech given to the HRO Community Forum 1 May 2006.

²¹ Justice Terry Connolly, 'Practicing Criminal Law under the Human Rights Act – No Rogue's Charter', Paper presented to the Conference of Australian Prosecutors, 14 July 2005.

²² Justice Terry Connolly, 'Practicing Criminal Law under the Human Rights Act – No Rogue's Charter', Paper presented to the Conference of Australian Prosecutors, 14 July 2005.

²³ Professor Tom Campbell, *Submission 1*, p 2.

²⁴ Dr Helen Watchirs, 'Review of the first year of operation of the *Human Rights Act 2004*, *Democratic Audit of Australia*, p ...

²⁵ Dr Helen Watchirs, Review of the first year of operation of the Human Rights Act 2004, *Democratic Audit of Australia*, June 2005, p 5.

²⁶ Elizabeth Kelly, Government in the ACT: a Human Rights Dialogue, paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

Twelve-Month Review of the *Human Rights Act 2004*

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

[A] great deal of debate and talk occurs within government. A legislative proposal might be addressed ... by the proponent government agency, the Parliamentary Counsel's Office, the Department of Justice and Community Safety, and the Human Rights Office. No doubt this debate has an effect on the final form of a Bill, and probably in many cases in a way that enhances an HRA right.²⁷

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

Regrettably, because of resource constraints, [the human rights] section in each submission is usually added after the circulation of the consultation draft submissions. This is a pity both because those to whom the submission is circulated for consultation are denied the benefit of the exposition of what are seen as the human rights considerations and thus the opportunity to learn and be informed. It also means that debate about the human rights implications of such submissions are limited because the consultation draft rarely includes an opportunity to comment on what are said to be the human rights implications.²⁸

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

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

On 1 July 2005, the Commissioner presented an audit report of the Quamby Youth Detention Centre. The report assessed the operating procedures at Quamby against the relevant human rights standards in the HRA and it made a series of recommendations in relation to the treatment of detainees. It was the first audit prepared under the HRA and it was understood to be the first time that operational practices at Quamby had been assessed against relevant human rights standards.²⁹

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

²⁷ Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 1.

²⁸ Richard Refshauge SC, 'The *Human Rights Act 2004* and the Criminal Law', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 10.

²⁹ Human Rights Office, *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005.

Twelve-Month Review of the *Human Rights Act 2004*

It demonstrates the value of these powers in the human rights dialogue that has taken place in the territory. This is the sort of dialogue and action on human rights issues that is making a lead for the rest of the country ... Reports such as these show that the [HRA] is being worked out in a spirit of cooperation between the bodies with responsibility for that task. The process shows that the [HRA] is not an obstacle to good administration, but an essential element.³⁰

Legislature

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

In the first year nearly a hundred bills were assessed for compatibility under the HRA. The public face of this scrutiny process was usefully summarised by the Human Rights Commissioner:

In 2005, 78 Bills were introduced (62 government and 16 private member's Bills) and in 2004, 80 Bills were introduced (60 government and 20 private member's Bills) into the ACT Legislative Assembly. In 2005 63 Bills were passed, 1 Bill was discharged and 6 were negatived, and in 2004 50 Bills were passed, 8 were negatived and 10 were discharged ... This number of ACT Bills, compared to 195 Commonwealth Bills in 2005 and 238 in 2004, is quite significant for a small jurisdiction with only 17 Members of the Legislative Assembly.

Clearly, this workload imposes a significant administrative workload on the executive, particularly the Human Rights Unit: '[t]o properly scrutinise all Bills (and subordinate legislation) in a small jurisdiction with few legal resources is a challenge'.³¹

It also brings with it a new focus and workload for the Legal Affairs Committee:

Section 38 has brought about a significant change in the task of the Committee. It must now assess clauses in bills from a rights perspective on a much broader basis than is the case under its terms of reference as provided for in a resolution of the Assembly. ... A report on a human rights issue is not confined to making a comment that some clause is, or even may be, in conflict with some rights standard. The Committee might report that a bill enhances rights protections. [It] is aware that its reports may be consulted by members of the Assembly for the purposes of debate on a bill. A report may thus provide explanation, and outline different points of view, in a way that will facilitate a debate about rights.³²

³⁰ Jon Stanhope MLA, Legislative Assembly, *Hansard*, 18 August 2005, p 2907.

³¹ Dr Helen Watchirs, *Submission 11*, p 7.

³² Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

Community

Submissions to the review suggest a small, but growing impact beyond government.

Superficially, some observers suggest 'the HRA has implemented and helped to develop a 'rights consciousness' within the ACT and arguably throughout Australia.³³

While it was difficult to assess, the Women's Legal Centre tended to share this view:

[T]he amount of the discussion about human rights emanating from both government and non-government bodies, particularly over the past twelve months, has noticeably increased. It appears that the Act is gaining momentum, as it is used more in submission to courts, in judgements delivered and in the common parlance of the community sector.³⁴

However, it may be that the HRA is yet to have a major relevance at the coalface.

ACTCOSS observed that 'while the HRA is a welcome and requisite step towards building a human rights culture, its impact 'at the coalface' in assisting marginalised and disadvantaged people in the ACT has been difficult to identify to date'.³⁵

Similarly, the Women's Legal Centre 'observed minimal changes in the awareness of human rights in our client group' over the first twelve months of the HRA. They noted that 'the operation of the HRA appears to be still very far removed from the everyday life experience of those most likely to suffer serious violations of their human rights'.³⁶

This was echoed by Care Inc. and the Consumer Law Centre who indicated that '[s]ince the inception of the Human Right Act, we have not witnessed and cannot describe any specific benefits flowing from the Act to our client base'.³⁷

The Victims of Crime Coordinator acknowledged the potential for the HRA to protect victims' rights but expressed concern that, in the absence of clear guidance on the application of the HRA to victims, the reforms of recent years to enhance the protection of victims may be compromised.³⁸

³³ Australian Lawyers Alliance, *Submission 6*, pp 5-6.

³⁴ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, p 1.

³⁵ ACT Council of Social Service Inc, *Submission 9*, p 16.

³⁶ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, p 5.

³⁷ Care Inc. and Consumer Law Centre of the ACT, *Submission 8*, p 2.

³⁸ Ms Robyn Holder, ACT Victims of Crime Coordinator, *Submission 7*.

Twelve-Month Review of the *Human Rights Act 2004*

Several organisations expressed the view that the HRA has not produced outcomes. ACTCOSS noted that there were references to human rights in the context of mental health, corrections and criminal law, but could not trace the discussion to outcomes:

Yet while these have received public attention, it is also apparent that the outcomes of the debate have been only fractionally different from what might have been expected had the HRA never been contemplated.³⁹

There may be differing views as to the appropriate response to this lack of impact. Clearly, there is general support for greater community education and 'rights skilling'. However, it is unclear whether the community sector seeks legislative amendment. The Women's Legal Centre was optimistic about the potential in their client base:

If the Act stays in force for many years to come, and if activities aimed to increase understanding of the content and function of the Act continue, then this lack of understanding at the grass roots level may be ameliorated by the passing of time and consistency of effort.⁴⁰

However, ACTCOSS clearly saw a need to change some features of the HRA:

While the more radical predictions about the effects of ... the HRA have proved demonstrably false, there been no emphatic changes to attach to its presence. This seems to stem from two aspects of the chosen model – it is both minimalist and protracted. While this was in part intentional, it appears that both advocates and critics have been surprised by the relatively small effects of the HRA so far. Given its slight impacts, it is time to reconsider whether a stronger model for rights protection is required to give effect to what remains a very laudable goal.⁴¹

³⁹ ACT Council of Social Service Inc, *Submission 9*, p 4.

⁴⁰ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, p 5.

⁴¹ ACT Council of Social Service Inc, *Submission 9*, p 4.

The Compatibility Statement

The compatibility statement is widely seen as a key aspect of the dialogue model.⁴² For each bill presented by a Minister, the Attorney must prepare a written statement about the bill indicating whether in his or her opinion, the bill is consistent with human rights. If a bill is not consistent, the statement must indicate how it is inconsistent.

Consultative Committee

The Consultative Committee made the following recommendations:

The [compatibility] statement should be made available to the public and should be given the same status as the Explanatory Statement when interpreting the legislation. This statement would be prepared on the advice of the executive. It should include a discussion of the human rights issues raised by the Bill and how those issues are accommodated within the Human Rights Act.⁴³

The Committee recognised, however, that the proposed statement 'was not fail-safe'. Necessarily, it could not be determinative. In particular, it noted that the statement would not take account of amendments in the Assembly. Nor would it stop the legislature or judiciary from taking a different view, 'particularly in relation to issues such as the breadth of the limitation authorised by the reasonable limits clause'.⁴⁴

Government Response

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

For each government bill, the Attorney-General must table in the Assembly a statement as to whether, in his opinion, the bill is consistent with human rights.⁴⁵

In most cases, a 'one-line' statement is issued as evidence of the conversation between the sponsoring Department or agency and the Human Rights Unit in the Department of Justice and Community Safety on human rights issues.

The approach has been to conduct compatibility assessment through consultation between the Human Rights Unit in the Department of Justice and Community Safety

⁴² *Human Rights Act 2004*, section 37.

⁴³ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.13].

⁴⁴ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.17].

⁴⁵ *Human Rights Act 2004*, section 37.

Twelve-Month Review of the *Human Rights Act 2004*

and the agency responsible for the relevant bill. The Unit aims to explain the relevant human rights issues, define the questions for agencies to ask themselves, and assist them to explore those questions, rather than receive the definitive answer to their problem. This reflects the broader focus on building a human rights culture throughout government.

In effect, the approach is to make the case for compatibility at first instance in the Explanatory Statement, prepared with the assistance of the Human Rights Unit.

This approach is complemented by the Unit's involvement in developing Government Responses to Scrutiny Reports by the Standing Committee on Legal Affairs where the Committee raises human rights issues in accordance with its statutory role under the HRA.⁴⁶

Comment

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

The 'one-line' statement has been criticised for its failure to facilitate a human rights dialogue among the community, the executive and the legislature. Peter Bayne suggests that 'compatibility statements contribute nothing to dialogue, at least where they merely state that the Bill is compatible,' although he notes, 'the Explanatory Statement may address HRA issues, sometimes at a relatively sophisticated level'.⁴⁷

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

First, a public dialogue may produce a rich legislative history which, in turn, might be brought into account in any curial assessment of whether a provision of an Act is HRA compliant, or, if is not, how it might be interpreted so as to be HRA

⁴⁶ *Human Rights Act 2004*, section 38.

⁴⁷ Peter Bayne, 'Pre-enactment dialogue about proposed laws under the influence of the *Human Rights Act 2004*', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 4.

Twelve-Month Review of the *Human Rights Act 2004*

compliant. Secondly, to the extent that pressure groups and the wider public get involved in the debate, a rights focused culture will thereby be produced.⁴⁸

The lack of publicity may have led others to doubt the existence of a dialogue at all. As noted above, Waterford was not able to identify any impact of the HRA at all.⁴⁹

Effectively, the *content* of the statement, it is said, reflects the *quality* of the dialogue. However, in truth, the statement is *evidence* of the dialogue, but not its only *source*. At the very outset, it was envisaged by government that the statement would 'institutionalise human rights considerations at the beginning of the policy process'.⁵⁰ Moreover, it was said, 'although this work will be invisible to practitioners and the public, in many respects it is where the biggest impact of the Act will be felt'.⁵¹ The significance of this point was noted by the ACT Human Rights Act Research Project:

We acknowledge that regardless of the content of the statement, the requirement to certify compatibility serves a crucial purpose in ensuring that the government must undertake a human rights assessment of all new legislation it proposes.⁵²

A key issue is the openness of the dialogue between the executive and legislature.

In a unicameral parliament, such as the ACT's, where government power is even less likely to be checked than in a bicameral parliament, the possibility that the presentation of compatibility statements or responses to declarations of incompatibility could become a mere formality is heightened.⁵³

As noted above, the dialogue currently operates through the Explanatory Statements. Some criticise the approach on the basis that it 'outsources' compatibility assessment to line agencies which may lead to inconsistencies in the agency-wide approach. Others support the approach, but criticise the way that it has operated in practice:

Although I support the current practice of details being included in Explanatory Statements and letters written to the LA Standing Committee on Legal Affairs ... I do not think that these are sufficiently detailed or accessible.⁵⁴

⁴⁸ Peter Bayne, 'Pre-enactment dialogue about proposed laws under the influence of the *Human Rights Act 2004*', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 1.

⁴⁹ Jack Waterford, 'Bills that let judges make laws', *The Canberra Times*, 11 June 2005.

⁵⁰ Elizabeth Kelly, 'Human Rights Act 2004: A New Dawn for Human Rights Protection?', 2004, 41 *AIAL Forum* 30, p 33.

⁵¹ Elizabeth Kelly, 'Human Rights Act 2004: A New Dawn for Human Rights Protection?', 2004, 41 *AIAL Forum* 30, p 33.

⁵² Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 2.

⁵³ Carolyn Evans, 'Responsibility for Rights: The Human Rights Act', 2004, 32 *Federal Law Review* 292, pp 297-298.

⁵⁴ Dr Helen Watchirs, *Submission 11*, p 10.

Twelve-Month Review of the *Human Rights Act 2004*

A similar point was made by the Legal Adviser to the Scrutiny of Bills Committee:

I read every Bill and every Explanatory Statement, and I have to say that only infrequently does the ... Statement attempt to make a case for compatibility.⁵⁵

Clearly, the capacity to publish human rights analyses will be limited by resources.

The Research Project thought a solution might lie in a selective risk-based approach:

In our view it would be preferable for a summary of the reasons for compatibility to be included in each compatibility statement. However, if this is not possible, we would recommend that the government provide reasons wherever significant issues of human rights are raised by legislation, and not only where the bill is already the subject of great public controversy.⁵⁶

A similar approach was recommended by the Legal Adviser, Professor Bayne:

[The dialogue may require a] more systematic use of the Explanatory Statement as a vehicle for a statement as to whether the Bill is considered to comply with HRA rights, and a short explanation, where appropriate, of why this is considered to be the case. At times it might be appropriate to explore a particular issue at some length ... At other times, a shorter statement ... will be appropriate.⁵⁷

While this approach may promote openness, will it guarantee a wider participation?

The main criticism of the scrutiny process ... is that the public and interest groups outside the three arms of the Westminster system are not fully engaged because they lack access to critical information on proposed legislation.⁵⁸

The concern was summed up by the ACT Human Rights Act Research Project:

[But], in our view the lack of content in the compatibility statement means that an opportunity is being lost to broaden the dialogue to include the community ...⁵⁹

Assuming that public participation is a threshold requirement of the dialogue model, there may be a need to consider additional mechanisms, where appropriate.

In our view [the public participation] could be further improved from the perspective of creating human rights dialogue if the exposure drafts of such legislation also included an outline of the government's position on the human rights implications of the draft bill, so that the community could consider and respond to these views, before the bill is tabled in the Legislative Assembly.⁶⁰

Whatever approach is taken, there is general support to act sooner rather than later:

⁵⁵ Professor Peter Bayne, *Submission 4*, p 2.

⁵⁶ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 3.

⁵⁷ Professor Peter Bayne, *Submission 4*, p 1.

⁵⁸ Dr Helen Watchirs, *Submission 11*, p 9.

⁵⁹ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 2.

⁶⁰ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 3.

Twelve-Month Review of the *Human Rights Act 2004*

[The Human Rights Office] recommend[s] that reform of the HR Act by requiring more details in the Attorney-General's compatibility statements proceeds quickly rather than waiting for a more general review in three years time.⁶¹

Recommendations

- **Recommendation 1:** the HRA should continue to operate as a dialogue model.
- **Recommendation 2:** while there is a case for improving community engagement, the focus should remain on the dialogue between the Government and the Assembly.
- **Recommendation 3:** Government should continue to encourage Agencies to make greater use of the Explanatory Statements to make the case for compatibility. But, where a bill raises significant human rights issues, the compatibility statement should provide a 'summary of reasons', tailored to the circumstances, focusing on the human rights principles and drawing on the case established by the sponsoring agency.
- **Recommendation 4:** For key bills, agencies should be encouraged to make the case for compatibility to the wider community in connection with exposure drafts or other means of public consultation.

⁶¹ Dr Helen Watchirs, *Submission 11*, p 10.

A Direct Right of Action

Within Australia, the ACT stands alone as the only jurisdiction to have enacted a bill of rights.

However, within the 'human rights jurisdictions', which include the United Kingdom, Canada, South Africa and New Zealand, we stand alone as the only jurisdiction not to have enacted a direct right of action for breaches of human rights standards.

Many have questioned why the HRA does not impose duties on public authorities. Currently, the HRA only applies directly to legislation. It does not apply directly to administrative decision-making or conduct, except through its effect on the interpretation of legislation.

Some have questioned why the HRA does not provide for a direct right of action and specific remedies for breaches of human rights. Currently, human rights issues may only be raised in the context of existing litigation.⁶² And, except for the ability of the Supreme Court to issue a declaration of incompatibility,⁶³ only existing remedies that are already available will apply in cases where a human rights argument is raised.

Consultative Committee

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

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

The ACT *Human Rights Act* should provide that all public authorities must act in a way or engage in conduct that is compatible with the *Human Rights Act*, unless the incompatible conduct is required by legislation ... If public authorities are

⁶² For example, where the operation of a statute is in issue and a party is seeking, in relation to an existing remedy, an interpretation of a provision that is (more) consistent with human rights, relying on the interpretive provision in s 30 of the HRA. Or where the operation of a statute is in issue and a party is seeking a declaration that the statute places unreasonable limits on human rights (a declaration of incompatibility).

⁶³ The Supreme Court may only issue a declaration of incompatibility if it is hearing a proceeding and it is unable to interpret a Territory law consistently with human rights (HRA, s 32).

Twelve-Month Review of the *Human Rights Act 2004*

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.⁶⁴

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

The Consultative Committee recommends that the ACT *Human Rights Act* should regulate the conduct of any body that performs a public function. This will obviously include all government agencies ... [It] should also regulate non-government bodies to the extent that they are exercising a public function. As a consequence, the *Human Rights Act* will reach beyond government into the community sector, charitable organisations, certain [incorporated] associations ...and into the private sector if and when these bodies perform public functions.⁶⁵

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

Although this is merely a restatement of existing legal principle, an express clause confirms that breaches of the Human Rights Act must be remedied. The clause should provide that if a public authority breaches the Human Rights Act, the Supreme Court may order whatever remedy is open to it and seems just and equitable in the circumstances. These remedies may include those traditional remedies which the Supreme Court is empowered to make such as a declaration, injunction, writs of mandamus and habeas corpus in addition to specific remedies that the Human Rights Act provides, such as ordering that a public apology be made. Another remedy the Supreme Court could order ... would be the exclusion of evidence obtained in breach of human rights.⁶⁶

Government Response

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

The Government considers that the best approach for the Act is to introduce legislation that recognises the ICCPR rights and requires laws to be interpreted as far as possible in accordance with them but does not give a direct right of court action to enforce those rights. Recognising that other jurisdictions that have introduced human rights legislation have required time to adapt policies and practices, the Government believes this is an approach that will provide a level of immediate protection and support for the rights while protecting the Territory from the risk of substantial claims in the early days of the Human Rights Act.⁶⁷

The Government emphasised that the particular 'dialogue model' adopted by the HRA would 'avoid the potential for claims to be made against government agencies

⁶⁴ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.60].

⁶⁵ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.53].

⁶⁶ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [4.74].

⁶⁷ Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 4.

and other public authorities directly for breaching the HRA but will still provide a strong legislated framework against which all legislation will be tested'.⁶⁸

The Interpretive Provision

Some commentators suggest there is scope for the HRA to deal with conduct of public authorities and to provide remedies through the operation of the interpretive provision within the HRA.

As noted above, the 'interpretive provision' is a key aspect of the dialogue model. Subsection 30(1) states that '[i]n working out the meaning of a ... law, an interpretation that is consistent with human rights is as far as possible to be preferred'. Subsection 30(2) makes this rule subject to the 'purposive test' in section 139 of the *Legislation Act 2001*, that '[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.

The precise operation and effect of the interpretive provision is largely unexplored. Some have suggested that it will have a profound impact on statutory interpretation.⁶⁹ Some have suggested that it will only reinforce ordinary common law principles.⁷⁰ Still others have suggested that it will have,⁷¹ or may be given,⁷² a limited operation.

At one level, the HRA could be viewed merely as a framework of principles for statutory interpretation. In the immediate aftermath of its passage, Chief Justice Higgins said the HRA 'is a check on the legislature, not a 'free for all' source of individual rights'.⁷³ In this way, the HRA might reflect an extension of the common law

⁶⁸ Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 4.

⁶⁹ Charlesworth Hilary, 'Human Rights and Statutory Interpretation', in *Statutory Interpretation: Australian Approaches* (S. Corcoran & S. Bottomley eds, Federation Press, Sydney, 2005).

⁷⁰ Judith Potter & Richard Elkins, 'The New Zealand Bill of Rights Act 1990: A Judicial Perspective', 12 *Journal of Judicial Administration* (2002) 85, at p 91.

⁷¹ Peter Bayne, legal advisor to the Standing Committee on Legal Affairs, has noted that it will have limited impact where the statute authorises a breach of human rights expressly, by virtue of its unambiguous language, or implicitly, by virtue of its underlying purpose: Legislative Assembly, Standing Committee on Legal Affairs, *Scrutiny Report No 11*, 20 June 2005, at p 9.

⁷² Professor George Williams has suggested that '[w]e could expect the Australian judiciary... to be generally circumspect in interpreting a Bill of Rights': G. Williams, *A Bill of Rights for Australia*, UNSW Press, Sydney, 2000, at p 48.

⁷³ Justice Terence Higgins, 'Australia's First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative', Paper delivered at the National Press Club, 3 March 2004, p 4.

Twelve-Month Review of the *Human Rights Act 2004*

presumption that the legislature will not trespass upon basic rights without clear and express words:

A Bill of Rights – particularly a legislative Bill – does not fundamentally alter [a court's] role, it merely expands the repertoire of rights recognised, which may therefore be enforced. The only difference is that [the HRA] gives more scope for this function to restrict the actions of the legislature on a wider variety of issues.⁷⁴

The limited effect of such an approach was expressed by McKinnon in this way:

If [it] is construed narrowly, the human rights it recognises might be considered as relevant only to the interpretation of legislation by courts and government officials, rather than to the actions of public authorities more generally.⁷⁵

At another level, it could be viewed as a rebuttable set of limits on statutory power. Over the past twelve months, many commentators have pointed to the effect that the interpretive provision may have in narrowing the scope of statutory powers. So, for example McKinnon notes that '[a]s government activity takes place within a statutory framework, most government actions could be considered to involve a process of interpretation and application of legislation and thus within the reach of the Act'.⁷⁶ Moreover, 'the effect of section 30 of the HRA is [a] body must, unless the statute provides plainly to the contrary, exercise its powers in a way that is HRA compliant'.⁷⁷ Where a body fails to exercise its powers in this way, its actions might be *ultra vires*.

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

[A]lthough the Act does not create a new cause of action, it could be utilised as an adjunct to existing causes of action, for example a claim for review of an administrative decision based on an interpretation of legislation inconsistent with human rights, or, possibly, in a claim for breach of statutory duty.⁷⁸

⁷⁴ Justice Terence Higgins, 'Australia's First Bill of Rights – Testing Judicial Independence and the Human Rights Imperative', Paper delivered at the National Press Club, 3 March 2004, pp 9-10.

⁷⁵ Gabrielle McKinnon, 'Strengthening the *ACT Human Rights Act 2004*', paper presented to the Human Rights Office Community Forum, 1 July 2005, p 1.

⁷⁶ Gabrielle McKinnon, 'Strengthening the *ACT Human Rights Act 2004*', paper presented to the Human Rights Office Community Forum, 1 July 2005, p 1.

⁷⁷ Professor Peter Bayne, *Submission 4*, p 5.

⁷⁸ Gabrielle McKinnon, 'Strengthening the *ACT Human Rights Act 2004*', paper presented to the Human Rights Office Community Forum, 1 July 2005, p 3.

Twelve-Month Review of the *Human Rights Act 2004*

At the same time, there may be limits in this approach to the interpretive provision.

First, the interpretive provision may only ever affect the exercise of statutory powers. The approach will be limited 'when the executive acts outside statutory powers',⁷⁹ whether in its unique capacity as government or in its capacity as an ordinary person:

In the ACT the issue of rights abuse is more likely to arise in the context of the powers that the executive can exercise as a legal person – the powers as a landowner to exclude certain types of protesters from government land, for example, or the power to enter into contracts for the operation of detention facilities ... or the power as an employer to make working life intolerable for the whistleblower. Sometimes these powers are limited by statute, but many of the everyday activities of government are carried out using non-statutory powers.⁸⁰

Second, the interpretive provision is tied to a purposive rule of statutory construction. As noted above, s 30(1) establishes a basic interpretive rule, however s 30(2) makes this rule subject to the purposive test in s 139 of the *Legislation Act 2001*, which requires that '[i]n working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation'.

After three months of the HRA, Justice Spigelman warned 'the interaction of these sections will call for careful analysis by the courts of the Territory'.⁸¹ After a year, Professor Hilary Charlesworth observed that it was 'not yet clear how ACT courts and tribunals will deal with the co-existence [of the interpretive rule and purposive rule]'.⁸² She noted that s 30 'requires a novel approach' but that 'the unusually explicit priority it accords to the purposive rule of statutory interpretation may erode [its] potential'.⁸³ After nearly two years, the Human Rights Commissioner notes ongoing uncertainty:

Unfortunately there has not been a definitive judgement in the ACT Supreme Court to clarify exactly how section 30 operates in the context of the purposive approach required under section 139 of the *Legislation Act 2001* (ACT).⁸⁴

⁷⁹ Dr Carolyn Evans, 'Human Rights Act and Administrative Law Talk', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 2.

⁸⁰ Dr Carolyn Evans, 'Human Rights Act and Administrative Law Talk', paper presented to ANU Conference 'Assessing the First Year of the ACT Human Rights Act', 29 June 2005, p 8.

⁸¹ Justice James Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004', (2004) 26 *Australian Bar Review* 1.

⁸² Charlesworth Hilary, 'Human Rights and Statutory Interpretation', in *Statutory Interpretation: Australian Approaches* (S. Corcoran & S. Bottomley eds, Federation Press, Sydney, 2005), pp 21-22.

⁸³ Charlesworth Hilary, 'Human Rights and Statutory Interpretation', in *Statutory Interpretation: Australian Approaches* (S. Corcoran & S. Bottomley eds, Federation Press, Sydney, 2005), pp 21-22.

⁸⁴ Dr Helen Watchirs, *Submission 11*, p 17.

Twelve-Month Review of the *Human Rights Act 2004*

Third, the indirect operation of the interpretive provision is unnecessarily complex and this may be having an adverse effect on the growth of a broad rights dialogue:

One of the challenges that is emerging ... is how to ensure that the HRA has relevance not just to those who develop legislation, but also to officers involved in administrative decision making and carrying out other duties within government. A direct obligation to act in accordance with the HRA is likely to have more meaning for these officers than the current provision in section 30.⁸⁵

The ... statutory interpretation model ... is more difficult to explain than the direct right of action in the courts model ... In our experience of providing human rights education and training over the last two years ... the interpretive model is problematic for both general and legal specialist organisations - audience's eyes literally glaze over. This model is a barrier to explaining human rights mechanisms in a simple and understandable way to ordinary people.⁸⁶

The lack of a provision for an effective remedy, or ... direct effect ... makes it harder to gain and sustain interest in human rights because it is more difficult to attach the rights to a person's individual circumstances. ... [T]here is a limited ability to find a tangible way that an individual might 'use' their human rights.⁸⁷

The 'Application Clause'

On the other hand, it has been suggested that the HRA may have a wider operation through the operation of a general interpretive rule within the *Legislation Act 2001*.

In 2004 Butler argued that, because the *Legislation Act 2001* makes all statutes binding on 'everyone' the rights in Part 3 of the HRA must bind government officials:

[A]ll official conduct is caught by the HRA ... s 121 *Legislation Act 2001* provides the default rule that all ACT legislation binds all governments except to the extent that it expressly provides otherwise. There is nothing in the HRA that otherwise provides. In particular, nothing in Part 4 HRA suggests otherwise; all that Part 4 does is deal with specific issues in relation to the interaction of the HRA and *statutes*; it does not purport to exempt ACT officials from HRA application.⁸⁸

Since then, this approach has been given some credence by other stakeholders.⁸⁹

In his submission, Professor Bayne clearly endorsed this wider operation of the HRA. Given the apparent strength of the approach, combined with the operation of the interpretive provision, he did not support the inclusion of any direct right of action.⁹⁰

⁸⁵ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 3.

⁸⁶ Dr Helen Watchirs, *Submission 11*, pp 16-17.

⁸⁷ ACT Council of Social Service Inc, *Submission 9*, p 17.

⁸⁸ Andrew Butler, 'The ACT Human Rights Act: A New Zealander's View', (2004) *Ethos*, No 94.

⁸⁹ See, for example, Peter Bayne, 'The Human Rights Act 2004 (ACT) and administrative law: A first report', *AIAL Forum*, p 6; Human Rights Office, *Human Rights Audit of Quamby Youth Detention Centre*, 30 June 2005, note 56 at p 27.

Twelve-Month Review of the *Human Rights Act 2004*

However, there are some weaknesses in this approach to the operation of the HRA.

First, section 121 was never intended to achieve more than reverse the traditional presumption that legislation did not bind the Crown unless it was expressly stated.⁹¹ The general proposition that every statute binds everyone is clearly unobjectionable. But, it would be surprising if the proposition could elevate a bare statement of rights to a set of legally binding rules, particularly given their legislative history and context.

Second, this general proposition is too remote to constitute a true application clause. In every other instance where a set of rights is incorporated into ordinary legislation, they have been given a clear operation and effect through a direct application clause. A provision applying human rights to public officials ought to be within the HRA itself and its omission ought to have considerable bearing on the interpretation of the HRA.

Third, the theory on which it relies is based on constitutional models of human rights. In response to concerns over the absence of an application clause in the HRA, Butler underplays the significance of application clauses within other bills of rights:

[T]o say that an application clause is necessary before [the HRA] can apply to the conduct of officials misunderstands the usual role of an application clause. Under both the Canadian Charter and the [New Zealand Bill of Rights] the function of the application clause is to *narrow* the scope of application ... In contrast other bills such as those in the Irish and US Constitutions contain no application clauses and have been interpreted as applying to all public officials.⁹²

Leaving aside the New Zealand Bill of Rights which is a legislative model containing a clear application clause, the other Bills of Rights are constitutional models in which statements of rights stand beside rules governing the Legislature and the Executive. It would be unnecessary to include an application clause because the rights exist at the apex of legislative and executive power – a stream cannot rise above its source. At the least, it is unclear how constitutional law from Ireland or the United States can be readily applied to a legislative model of human rights protection such as the HRA.

Fourth, the approach would seem to have a range of unintended consequences. Taken literally, the approach described above would mean that the rights would apply not only vertically, to government officials, but horizontally, to private actors.

⁹⁰ Professor Peter Bayne, *Submission 4*, p 4.

⁹¹ This was prompted by a decision of the High Court in *Bropho v Western Australia* (1990) 171 CLR 1, see the Explanatory Memorandum for the Legislation Amendment Bill 2002 (ACT), p 17.

⁹² Andrew Butler, 'The ACT Human Rights Act: A New Zealander's View', (2004) *Ethos*, No 94.

Twelve-Month Review of the *Human Rights Act 2004*

So, Professor Bayne has argued in his submission, '[t]he reference in section 121 to "everyone" raises ... the possibility that conduct by anyone is affected by the HRA'.⁹³

Clearly, there is some uncertainty regarding the 'wider operation' of the HRA. Professor Bayne argued that the consequences of s 121 could not be 'wished away': '[w]hat must be faced is that there is much uncertainty about the effect of the HRA, and the issues ... should be faced squarely and appropriate amendments made'.⁹⁴

Complaints Handling

Allied to the direct duty and right of action issues is the question of whether there should be a mechanism for handling complaints regarding human rights breaches. The Consultative Committee did not recommend a complaints handling function, on the basis, evidently, that they would be addressed by a direct duty or right of action. In the absence of such a duty or right, complaints handling may be a live issue.

Only three submissions addressed the proposal to establish a complaints function. Civil Liberties Australia argued for a complaints function within the Human Rights Commissioner operating as a 'community-based first step on a ladder of remedy':

This approach would allow quicker remedy for citizens whose rights had been overlooked or ignored. If it was not possible to resolve an issue relatively quickly, the matter would default into the ACT legal system, as occurs now. The complainant could independently still seek legal remedy if not satisfied ...⁹⁵

The Women's Legal Centre also supported a right to complain to the Human Rights Commissioner where a breached is alleged against a government officer or authority:

In our experience, this process has the potential to achieve positive results for complainants in discrimination matters without the need to resort to a court process ... [I]t would be an opportunity to increase understanding on both sides of the difficulties involved in balancing and protecting human rights ... [H]andling individual complaints of ... breaches would also allow the Commissioner to more closely monitor the compliance of government agencies with the Act.⁹⁶

In reality, a complaints handling function may be a poor substitute for a direct duty to comply with human rights that is capable of being enforced by courts and tribunals.

⁹³ Professor Peter Bayne, *Submission 4*, p 6.

⁹⁴ Professor Peter Bayne, *Submission 4*, p 6.

⁹⁵ Civil Liberties Australia, *Submission 15*, p 1.

⁹⁶ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, pp 3-4.

Twelve-Month Review of the *Human Rights Act 2004*

Significantly, the Canadian and New Zealand Human Rights Commissions do not handle individual human rights complaints. (Similar to the ACT, however, they do accept discrimination complaints, under their respective discrimination legislation.) The United Kingdom does not have a Human Rights Commission or any other comparable body to deal with individual human rights complaints. By contrast, South Africa does have a Human Rights Commission that accepts individual complaints

Conclusion

On a conservative view, the rights in Part 3 of the HRA and the machinery in Part 4 may have limitations in their ability to build a human rights culture within government.

Obviously, the rights in Part 3 will have an influence on the interpretation of the law. Clearly, the rights would constitute relevant considerations for decision-makers and could influence the outcome of decisions, depending on the weight given to the HRA. Moreover, the fact that those rights are declared in statute could give rise to legitimate expectations about how those decisions would be made.

However, beyond these effects, there appear to be many fertile areas for exploration, with none more fertile than the effect of sections 121 and 139 of the Legislation Act.

The intention behind the declaration of rights in Part 3 and the machinery in Part 4 was to establish a mechanism to regulate the business of government in the ACT. Section 30 was always meant to operate as an orthodox interpretive provision:

Unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. Decision makers in all government areas will have to incorporate consideration of human rights into their decision-making process, and a statutory discretion must be exercised consistently with human rights unless legislation clearly authorises an administrative action regardless of the human right.⁹⁷

And it was always understood to create a duty to act consistently with human rights, building on existing principles: '[a]ll public officials are under a duty to act lawfully ... the HRA makes conforming to human rights standards a part of that duty'.⁹⁸

⁹⁷ Human Rights Bill 2003, Second Reading Speech, Legislative Assembly, Hansard, 18/11/03, p 4247. See also Australian Capital Territory. Legislative Assembly, *Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights Act*, p 5; Human Rights Bill 2003, Explanatory Statement, p 5 and Department of Justice and Community Safety, *The Human Rights Act 2004: Guidelines for Departments: Developing Policy and Legislation*, p 6.

⁹⁸ Department of Justice and Community Safety, *The Human Rights Act 2004: Guidelines for Departments: Developing Policy and Legislation*, p 6.

Twelve-Month Review of the *Human Rights Act 2004*

There is a good case for removing the express reference to the 'purposive test'. Its inclusion within section 30 complicates the operation of the interpretive provision. No other human rights jurisdiction has taken a similar approach and it cannot be justified on the sort of a 'democratic objection' levelled by Professor Tom Campbell. Fears over the potential for judicial activism by way of rewriting existing legislation have proven to be unfounded and the current situation is unlikely to drastically alter.

Moreover, there is a very strong case for introducing an express duty on government officers or public authorities to comply with the human rights in Part 3 of the HRA. Much of the debate surrounding the operation of the HRA, and some of the obstacles to the growth of a human rights culture within government and the wider community, could be resolved by the introduction of a direct duty to comply with human rights.

The inclusion of a specific provision binding public authorities would serve to clarify the scope of the Act as well as give force to the obligations of government and its agencies under the Act. It would be useful in clarifying that the obligations of government employees are not only to interpret legislation in a manner that is not inconsistent with human rights but also to act in a manner that is consistent with those rights.⁹⁹

The proposal is consistent with the approach of the Consultative Committee. It is consistent with the expectations built in the introduction of the Human Rights Bill. And it is consistent with current understanding and practice throughout the ACT.

Any proposal will need to address the scope of the duty and the sanctions for breach. There is a range of options, reflected in the approaches taken in other jurisdictions. Under bills of rights models in Victoria, New Zealand and the United Kingdom, the duty extends to entities that exercise functions of a public nature and are established by or under statute or are exercising those public functions on behalf of government. The models require a clear definition of what constitutes a public function, at least in relation to private bodies that exercise powers under statute or in the public interest. To date, however, there has not been a settled body of caselaw in this area,¹⁰⁰ and it is unclear how the principles, let alone the precedents, will be received in Australia.¹⁰¹

⁹⁹ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, p 2.

¹⁰⁰ See advice by Dr Rowena Daw, incorporated in Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, Appendix A.

¹⁰¹ There is some reluctance in Australia to adopt or explore the law in the United Kingdom relating to the definition of 'public function' for judicial review purposes. See for example Greame Hill, '*Griffith University v Tang* – Comparison with *Neat Domestic*, and the Relevance of Constitutional Factors', (2005) 47 *AIAL Forum* 6 and Daniel Stewart, 'Non-Statutory Review of Private Decisions by Public Bodies', (2005) 47 *AIAL Forum* 18. To some extent the United Kingdom human rights jurisprudence relies on this caselaw, so it may have implications for the adoption or exploration of law on the definition of 'public function' under the HRA.

Twelve-Month Review of the *Human Rights Act 2004*

Under these models, there is variation in the extent of statutory remedies for breach. In the United Kingdom, a court may only award damages if it is 'necessary to afford just satisfaction to the person in whose favour it is made', taking account of all of the circumstances and the principles applied by the European Court of Human Rights.¹⁰² The New Zealand legislation is silent on a right of action or remedy, but the courts have implied a right to compensation,¹⁰³ to the consternation of some observers.¹⁰⁴

On 20 July 2006, the Victorian Parliament passed the *Charter of Human Rights and Responsibilities*. The Victorian Charter specifically precludes any right to damages for breach.¹⁰⁵ It simply allows access to any existing relief or remedy based 'on the ground that the act or decision [of the public authority] was unlawful'.¹⁰⁶ It preserves all of the statutory, and some non-statutory, judicial review remedies.¹⁰⁷

Recommendations

- **Recommendation 5:** The Government should accept that the interpretive provision in section 30 of the HRA imposes a duty to comply with the human rights in Part 3 of the HRA. But, section 30 should be amended to clarify that a human rights consistent interpretation must prevail unless this would defeat the purpose of the legislation.
- **Recommendation 6:** The Government should examine options for amending the HRA to include a direct duty on public authorities to comply with human rights and a direct right of action. Any proposal will need to address the scope of the duty and the sanctions, if any, for breach. These should be subject to a bar on any new right to compensation arising from breach, following the model recently adopted in Victoria.
- **Recommendation 7:** Subject to the successful incorporation of a direct statutory duty, the HRA should not be amended to include a complaints handling function.

¹⁰² Human Rights Act 1998, s 8(3).

¹⁰³ *Simpson v Attorney-General* [1994] 3 NZLR 667 (*Baigent's Case*).

¹⁰⁴ See for example, Jim Allen, 'Oh That I Were Made Judge In The Land', [2002] *Federal Law Review* 20. Allen suggests that the court in *Baigent's Case* 'simply read back into the Bill of Rights Act the remedies provision that parliament had specifically removed (and had removed as the price of getting the Bill enacted)'.

¹⁰⁵ Charter of Human Rights and Responsibilities Bill 2006, s 39(3).

¹⁰⁶ Charter of Human Rights and Responsibilities Bill 2006, s 39(1).

¹⁰⁷ Charter of Human Rights and Responsibilities Bill 2006, s 39(2).

Building a Human Rights Culture

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

Measures

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

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

The Human Rights Office has been proactive, consistent with its statutory role of providing education about human rights in general and the HRA in particular.¹⁰⁸ It has provided education and training activities including workshops, seminars and discussion forums and it holds biannual Human Rights Community Forums to discuss issues relating to human rights and the community and government sectors.

The Human Rights Office also produces a range of publications on its website.¹⁰⁹

In addition, there have been a number of issue-specific conferences in the ACT. These include: a national forum on victims' rights organised by the ACT Victims of Crime Coordinator and the Human Rights Office,¹¹⁰ a forum for awareness of human

¹⁰⁸ *Human Rights Act*, paragraph 41(1)(b).

¹⁰⁹ These can be found at <http://www.hro.act.gov.au/publications.html>.

¹¹⁰ *Peaceful Coexistence: Victims' Rights in a Human Rights Framework*, Canberra, 16 November 2005

Twelve-Month Review of the *Human Rights Act 2004*

rights in a correctional context held by ACT Corrective Services;¹¹¹ and a mental health service provision forum held by ACT Health and the Human Rights Office.¹¹²

Beyond government, work is also being done to raise awareness and discussion. For example, the Regulatory Institutions Network (RegNet) at the Australian National University in conjunction with the Gilbert and Tobin Centre of Public Law at the University of New South Wales held a forum to assess the first year of the HRA.¹¹³ RegNet, with the Department's support, has also established a research project to assess the impact of the HRA over its first five years. As part of that project, RegNet has developed a website which incorporates a case database and news service.¹¹⁴

Annual Reporting

Progress in the development of a human rights culture within government agencies can be at least partially measured by their reporting on implementation of the HRA. As noted above, the annual reporting obligation is one of the mechanisms that was intended to facilitate the dialogue and the development of a human rights culture.

A survey of annual reporting on human rights during the 2004-05 financial year was prepared by the Human Rights Office and provided to this review.¹¹⁵ The survey acknowledged that the annual reports 'do not give a complete picture' of progress in implementing human rights, it did make a number of observations about the issues. While there were notable exceptions, it appeared that 'little progress has occurred at the agency level in regard to disseminating information to staff about the [HRA]' and that 'limited training has been carried out across the service'.¹¹⁶ Similarly, while some agencies have taken major steps, most 'have not reported anything about reviewing their current legislation, policies and practices for compatibility with human rights'.¹¹⁷ Many agencies reported that new legislation had been developed consistently with human rights and a number of agencies reported that they had consulted with the

¹¹¹ *Developing a Human Rights Framework for Corrective Services*, Canberra, 2 July 2004.

¹¹² *How does the ACT Human Rights Act 2004 impact on Mental Health treatment and care?*, Canberra, 21 June 2005

¹¹³ *Assessing the First Year of the ACT Human Rights Act*, Canberra, 29 June 2005.

¹¹⁴ This can be found at <http://acthra.anu.edu.au/index.html>.

¹¹⁵ The survey was prepared Leslie Roberts and was incorporated in Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, Appendix B.

¹¹⁶ Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, Appendix B, p 2.

¹¹⁷ Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, Appendix B, p 3.

Twelve-Month Review of the *Human Rights Act 2004*

Human Rights Unit in the process of developing legislation and, occasionally, policy. Few agencies reported changes in work practices resulting from the HRA.

The descriptive parts of the survey have been extracted in Appendix 2.

In summary, as Dr Watchirs noted in her submission, 'Annual Reports by agencies ... in relation to respecting, protecting and promoting human rights show that there is still a way to go in creating and sustaining a human rights culture'.¹¹⁸ The survey recommended various strategies aimed at improving the development of this culture, including consultation with agencies about implementation activities and obstacles, reporting on positive and negative experiences and further training of agency staff.

Agencies will be required to report against the same criteria in their 2005-2006 annual reports.

Recommendation

- **Recommendation 8:** The Human Rights Unit should continue to consult with agencies about their positive and negative experiences in implementing the HRA.
- **Recommendation 9:** The Human Rights Unit should engage directly with agencies in their planning and training initiatives to raise the profile of human rights.

¹¹⁸ Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, p 28.

Economic, Social and Cultural Rights

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

As noted, the Consultative Committee recommended the incorporation of civil and political rights under the ICCPR along with economic, social and cultural rights under the ICESCR. The rights contained in the ICESCR are essentially the rights to:

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

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

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

Consultative Committee

The Consultative Committee recommended that economic, social and cultural rights be recognised in the same way in the HRA as civil and political rights:

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 ... and believes that the perceived difficulties with the implementation of such rights are over-stated.¹¹⁹

¹¹⁹ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, Summary at p 109.

Indivisibility

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

The Consultative Committee hopes that, by identifying the deep connections between the two Covenants in the Human Rights Act, the simplistic distinctions often drawn between economic, social and cultural rights on the one hand and civil and political rights on the other will be seen to have no substance.¹²⁰

In particular, the Consultative Committee sought to dispel as artificial the traditional notion that civil and political rights are 'negative' and economic, social and cultural rights are 'positive'. Broadly, this notion is that civil and political rights essentially operate to restrain government action where a decision to act would breach human rights, whereas economic, social and cultural rights compel government action where a failure to act would lead to human rights breaches. The Committee recognised that many civil and political rights are intertwined with economic, social and cultural rights, that many civil and political rights require positive action for their fulfilment and that *all* categories of rights are 'universal', 'inter-dependent', 'inter-related' and 'indivisible'.¹²¹

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

Enforcement

The Committee canvassed two alternative approaches to enforcement:

The first alternative clearly recognises the different obligation of implementation attaching to rights set out in the ICESCR compared to those in the ICCPR. It provides that ICESCR rights are subject to 'progressive realisation' and that, in applying such rights, a court or tribunal is required to balance the nature of the benefit from observing such human rights with the fiscal cost involved. In other words, the obligation on the ACT government to protect economic, social and cultural rights is one to take reasonable measures within its available resources to realise the rights progressively. The second alternative does not explicitly distinguish between economic, social and cultural rights on the one hand and civil and political rights on the other. It provides that limitations may be placed on rights if the limitations are reasonable and justifiable taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitations, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve the limitation's purpose [that is, rights should be subject to a 'reasonable limits' clause].¹²²

¹²⁰ Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [5.32].

¹²¹ Vienna Declaration, [UN Doc. A/CONF.157/24](#) at [5] & [8].

¹²² Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act*, Report, May 2003, at [5.46].

Twelve-Month Review of the *Human Rights Act 2004*

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

Justiciability

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

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

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

Financial Implications

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

Government Response

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

At this stage we have decided to take a more cautious approach because of the constitutional and service delivery arrangements in our jurisdiction. There are features of Territory Government that are unique and which limit our capacity to have full and total control over such matters ... The ACT is also committed to a number of inter-governmental agreements. These agreements require the ACT Government to act in a particular way or to use a certain set of guidelines in determining how services are to be provided ... In addition, some services are provided by Commonwealth agencies [and are not amenable to the HRA].¹²³

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

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

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

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

¹²³ Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

Twelve-Month Review of the *Human Rights Act 2004*

law, there is little guidance available in the form of decided cases about the extent of that liability. Acknowledging that exposure to a possible large liability for costs in relation to those rights would result in resources being diverted from service provision, the Government will reserve the economic, social and cultural rights from inclusion in the Human Rights Act at this time.¹²⁴

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

It is considered that the economic, social and cultural rights are not so easily adapted as the civil and political rights to protection through the court process and are better recognised and protected through inclusion in a foundation planning document such as the ACT Social Plan.¹²⁵

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

Alternative Enforcement Methods

The Discussion Paper dealt with the protection of economic, social and cultural rights in terms of the nature of the protection required and the scope of the rights protected.

It canvassed these threshold issues through a discussion of comparative models:

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

It sought comment on whether there was a case for protecting a set of economic, social and cultural rights such as the right to education, housing and health.

The full discussion of these issues is extracted at Appendix 3.

¹²⁴ Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

¹²⁵ Government Response to the Report of the ACT Bill of Rights Consultative Committee: Towards an ACT Human Rights ACT, Tabling Speech, 23 October 2003.

Direct Enforceability

In summary, the South African model incorporates a discrete set of economic, social and cultural rights within the general framework for civil and political rights. These are subject to a general 'reasonable limits' clause (similar to section 28 of the HRA). Moreover, different categories of rights are subject to further specific limits:

- The first category protects rights of access to housing, health, food, water and social security.¹²⁶ They are subject to a 'progressive realization' clause, requiring the government to adopt 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the relevant] right'.
- The second category consists of children's economic, social and cultural rights;¹²⁷ the right to basic education;¹²⁸ and certain rights of detained persons.¹²⁹ These rights are not subject to an internal 'reasonable limits' clause. They are not qualified by reference to progressive realisation or resource constraints.
- The third category of rights prohibits certain kinds of conduct, including arbitrary or non-judicial eviction¹³⁰ and refusal of emergency medical treatment.¹³¹

The South African courts have confirmed that these rights are justiciable and have developed a methodology and caselaw on the process of 'reasonableness review'. They have also developed principles relating to the 'minimum core' obligations of the state to protect rights from improper invasion, if not to ensure their full enjoyment.

The South African model is the vanguard for the protection of economic, social and cultural rights. However, it may have limited application to the situation in the ACT. The South African Constitution is a self-consciously transformative document. It is acutely conscious of the historical context and the deep social inequalities that motivated the desire to recognise economic, social and cultural rights in South Africa.

¹²⁶ Articles 26(1) and 27(1).

¹²⁷ Articles 28(1)(c), 28(1)(d), 28(1)(e).

¹²⁸ Article 29(1)(a).

¹²⁹ Article 35(2)(e).

¹³⁰ Article 26(3).

¹³¹ Article 27(3).

Twelve-Month Review of the *Human Rights Act 2004*

The United Kingdom model is also of interest because it has selected a single economic, social and cultural right: 'no person shall be denied the right to education'.

Indirect Enforceability

Like the South African Constitution, the Indian Constitution protects a set of rights. However, unlike South Africa, these rights are not justiciable. They are 'directive principles' that the executive and legislature must apply when making law. Moreover, they are guiding, but not enforceable, principles for consideration by the courts.

The Indian model is significant because it has permitted economic, social and cultural rights to be read into, and protected through, the civil and political rights framework. For example, Indian courts developed case law on implied rights to livelihood, health and education through the application of the 'directive principle' to the right to life. And they have developed a different threshold for enforcement of these rights: the focus has been on ensuring that due process is followed before they can be denied.

Indirect Protection

Some jurisdictions have sought to protect economic, social and cultural rights solely through the interpretation and application of a civil and political rights framework. Some rights such as the right to equality and non-discrimination, and the right to due process have been used effectively to protecting economic, social and cultural rights.

For example, Canadian courts have applied the 'right to equal protection and benefit of the law without discrimination' to social justice objectives by focusing on failures to take steps to ensure that disadvantaged groups benefit equally from services. However, it should be noted that courts have been cautious about the impact of their decisions on budgets and policies and a proposal to develop a direct enforceability model was rejected in 2000 on the basis that it would require a 'substantial extension' of the existing machinery under the Act and was therefore not feasible at the time.

Other Jurisdictions

Other jurisdictions, such as Ireland and the United Kingdom, have explored different avenues for the protection of economic, social and cultural rights, including models that differentiate between categories of rights, models that set 'minimum core' obligations and standards for 'progressive realisation', models that operate through a 'due process' requirement and models that operate through programs and policies.

Indivisibility

A prevalent argument in favour of inclusion in submissions was that human rights are indivisible:

The omission of ESC rights in the HRA is its most fundamental weakness, as from the outset [it] has introduced a schism in its recognition of human rights ... the symbolism of including all the rights from the outset and articulation of the deep connections between them has been lost, perhaps permanently. It remains incumbent on our legislators to redress this error in the current legislation.¹³²

A further and related argument for recognising economic, social and cultural rights was that civil and political rights are best secured by protecting these basic rights:

A primary argument ... is that lack of protection of these 'bread and butter' rights such as housing lead to diminution in other civil and political rights. It is difficult for homeless people to receive information, register to vote, or seek bail or access to their children with the barrier of not having an address.¹³³

It was also suggested that rights recognised in conventions other than the ICESCR (such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women) should be included as 'there is a danger in picking and choosing rights that undermines the essential proposition that human rights are inalienable and indivisible'.¹³⁴

Despite the global case for indivisibility, there was support for a limited set of rights. While the Women's Legal Centre argued 'there is not a set of ESC rights that has a stronger case for protection',¹³⁵ Professor Bayne argued that '[t]o go down the path of

¹³² ACT Council of Social Service Inc, *Submission 9*, p 6.

¹³³ Dr Helen Watchirs, *Submission 11*, p 21. See also Women's Legal Centre (ACT & Region), *Submission 12*, p 6.

¹³⁴ Ms Robyn Holder, ACT Victims of Crime Coordinator, *Submission 7*, p 2.

¹³⁵ Women's Legal Centre (ACT & Region) Inc, *Submission 12*, p 6.

Twelve-Month Review of the *Human Rights Act 2004*

inclusion would require case by case consideration of each of the ICESCR rights'.¹³⁶ Over half of the submissions in favour of recognising these rights, prioritised rights to health, housing and education as rights having 'particular significance for the ACT'.¹³⁷ Dr Watchirs noted that education and health were rated in the top three most important human rights behind a right to fair trial in a 1997 Australian survey.¹³⁸

Justiciability

A number of submissions argued that economic, social and cultural rights could legitimately and appropriately be placed before the courts for judicial consideration.

One of the most obvious arguments in favour of justiciability drew on the fact that the courts had ostensibly adjusted to civil and political rights without mishap or calamity:

Given the benign and cautious approach that has been taken by the courts so far in adjudicating matters under the HRA, it appears that the government could now have more confidence in broadening the scope of the protected rights to include those social, economic and cultural rights over which [it] has jurisdiction.¹³⁹

However it is unclear whether this benign approach was the product of prudence or the necessary result of the existing machinery of the HRA. As Adjunct Professor Peter Bailey argued in 2004 on the eve of its commencement:

The very limitations of the HRA present a stunning opportunity to [include these rights]. The enforcement mechanism is so weak that there can be hardly any objection to, and some advantages in, including ESC rights in the HRA.¹⁴⁰

Professor Bayne took a more conservative approach to the issue of justiciability in rejecting the proposal to expressly incorporate economic, social and cultural rights:

In my view, [the Consultative Committee] did not make out the case to take this step, and, in particular did not attempt to consider alternatives. While further and better exploration of their recommendation might persuade, on the state of what we know and can anticipate, I agree with the government view point that 'economic, social and cultural rights are not so easily adapted as the civil and political rights to protection through the court process and are better recognised and protected through inclusion in a foundation planning document ...'¹⁴¹

¹³⁶ Professor Peter Bayne, *Submission 4*, p 9.

¹³⁷ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 5.

¹³⁸ Dr Helen Watchirs, *Submission 11*, p 23.

¹³⁹ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 5.

¹⁴⁰ Bailey Peter, 'Australia's First Bill of Rights', Paper presented to ANU Conference, 'Australia's First Bill of Rights', 1 July 2004.

¹⁴¹ Professor Peter Bayne, *Submission 4*, p 6.

Twelve-Month Review of the *Human Rights Act 2004*

The reality is that there may be little guarantee as to how the courts would deal with economic, social and cultural rights if they were to be expressly included in the HRA.

Even the sceptics have difficulty. Professor Campbell has long argued that a bill of rights 'allows an open-ended amount of judicial activism that has the potential to remove control over a broad range of issues from the domain of ordinary, non-legal politics'.¹⁴² However, in relation to the HRA, he acknowledged in his submission that:

This democratic objection cannot be subjected to empirical and normative assessment prior to courts utilising the powers given to them over a significant period of time ... [T]he force of this criticism remains on the table at this stage.¹⁴³

Financial Implications

Many submissions argued that fears of financial implications were overstated, pointing to the fact that even civil and political rights had financial implications: '[b]oth sets of rights include positive (commission) and negative (omission) obligations'.¹⁴⁴ Similarly, the ACT Council of Social Service noted that 'judicial decisions frequently have resource implications ... whether they are about human rights or otherwise'.¹⁴⁵

Ultimately, the core of the argument is not that some rights have financial costs and others do not, it is more a question of degree. Perhaps the reluctance to recognise ESC rights is a tacit admission that much larger sums might need to be spent if these rights were to be given any meaningful protection. That being said, it is also unlikely that the Courts would make findings that would be too far out of step with Executive practice given that human rights will always exist within a normative framework [and options exist for addressing these fears].¹⁴⁶

However, as with justiciability, it is unclear how the courts would deal with this issue. This presented a concern not only for Professor Campbell, but for Professor Bayne:

To say that "entrenchment of certain Covenant rights would [not] **necessarily** impel the courts to engage in the wholesale reallocation of resources" is to say very little. It does not deny that this result might or even probably would have this result. All that is denied is that this result would be sure to follow. This is hardly an adequate basis on which to meet the resource allocation objection.¹⁴⁷

¹⁴² Tom Campbell, 'Incorporation through Interpretation', in T. Campbell, K. D. Ewing and A. Tomkins eds, *Sceptical Essays on Human Rights*, OUP, 2001, p 81.

¹⁴³ Tom Campbell, *Submission 1*, p 2.

¹⁴⁴ Dr Helen Watchirs, *Submission 11*, p 22.

¹⁴⁵ ACT Council of Social Service, *Submission 9*, p 7.

¹⁴⁶ ACT Council of Social Service, *Submission 9*, p 7.

¹⁴⁷ Professor Peter Bayne, *Submission 4*, p 8.

Alternative Enforcement Methods

In general, those in favour of recognising economic, social and cultural rights were in favour of a dialogue model with a qualification based on 'progressive realisation'.¹⁴⁸

One submission suggested that any such qualification should apply generally:

If there is to be additional qualification of rights (other than HRA section 28) in adopting ESC rights into the HRA, then it should be carefully considered whether it would be more appropriate to apply these to all of the rights, rather than maintaining a dual system of rights recognition.¹⁴⁹

By comparison, there was mixed support for the indirect enforcement of economic, social and cultural rights through the establishment of a set of 'directive principles'.

Professor Campbell suggested that these rights be partially incorporated, so as to engage 'mechanisms that place obligations on the actions of the ACT government'. This would include the compatibility statement, but not the interpretive provision or declaration of incompatibility. Similarly, Professor Bayne suggested that economic, social and cultural rights be 'brought into focus through the scrutiny process'.¹⁵⁰

However, while it might be appropriate to develop complementary avenues for the protection of rights, the ACT Council of Social Service rejected this approach:

On the question of the development of directive principles or any other forms of recognition of ESC rights, such as those articulated in the Canberra Social Plan, these are welcome as an additional response to including them in the HRA. ... However, directive or other policy principles are not a substitute for recognising ESC rights in the HRA and should not be presented as such.¹⁵¹

Some submissions acknowledged the potential for protection of economic, social and cultural rights through the existing civil and political rights framework. For example, Dr Watchirs saw a number of areas where indirect protection was already available:

It is clear that some civil and political rights in the HR Act already have impact on ESCR. The right to recognition and equality before the law under s.8 of the HR Act can apply to any ESCR. There are also inherent connections between some civil and political rights, such as right the freedom from inhumane and degrading

¹⁴⁸ See, for example, Women's Legal Centre (ACT & Region), *Submission 12*, p 6.

¹⁴⁹ ACT Council of Social Service Inc, *Submission 9*, p 10.

¹⁵⁰ Professor Peter Bayne, *Submission 4*, p 10.

¹⁵¹ ACTCOSS, *Submission 9*, p

Twelve-Month Review of the *Human Rights Act 2004*

treatment (s.10(1)) and ESCR, such as adequate standard of living and social security. Also the right to life (s.9) can extend to the ESCR of health ...¹⁵²

The potential impact of the right to recognition and equality before the law was noted by Professor Bayne, especially in relation to employment, education and housing.¹⁵³

However, the ACT Human Rights Act Research Project was less optimistic:

Although it is theoretically possible that protected rights, such as the right to equality, may provide indirect protection for particular social, cultural or economic rights, it is difficult to point to any cases in the ACT where such indirect protection can be demonstrated ... Even in ... Canada where a Charter of Rights had long been established, the record of the courts in protecting social, economic and cultural rights through other rights ... has been mixed at best.¹⁵⁴

Conclusion

Undoubtedly, there are arguments for the protection of economic, social and cultural rights, based on the principle articulated by the Bill of Rights Consultative Committee that all rights are universal, inter-dependent, inter-related and indivisible.

However, despite the passage of twelve months, now two years, since the HRA was passed, there is limited knowledge on what effect those rights may have in the ACT.

In general, the thinking on civil and political rights remains 'more developed' overseas and there are 'rich sources of case-law and debates on principles' on these rights.¹⁵⁵

Professor Paul Hunt, United Nations Special Rapporteur on the Right to Health, noted that economic, social and cultural rights are 'on the rising tide' but conceded that the 'trend' to take these rights more seriously 'is contested and uneven'.¹⁵⁶

There has been no serious attempt to incorporate them into domestic bills of rights in New Zealand, Canada or the United Kingdom.¹⁵⁷ South Africa is largely an exception.

Significantly, they have not been included in the Victorian Charter of Human Rights and Responsibilities. Unlike the ACT Bill of Rights Consultative Committee, the Victorian Consultation Committee did not recommend their inclusion into their Bill.

¹⁵² Dr Helen Watchirs, *Submission 11*, p 23.

¹⁵³ Professor Peter Bayne, *Submission 4*, p 9.

¹⁵⁴ Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, *Submission No 5*, p 5-6.

¹⁵⁵ In comparison, as Dr Watchirs points out, 'civil and political rights have been more developed in national and local laws around the world, and there are rich sources of case-law and debates on principles': Dr Helen Watchirs, *Submission 11*, p 23.

¹⁵⁶ Hunt Paul, paper presented to the Human Rights Office Community Forum, 1 May 2006.

¹⁵⁷ Except for the right to education in the UK HRA.

Twelve-Month Review of the *Human Rights Act 2004*

So, it is still the case that the inclusion of economic, social and cultural rights at this stage would make us exceptional amongst comparable human rights jurisdictions.

And it is still the case that the inclusion of these rights would have an unclear effect. The original objections relating to the political and financial impact of human rights litigation still find support, despite some arguments to the contrary.

Recommendation

- **Recommendation 10:** The Government should explore support for the direct enforceability of specific rights, such as the rights to health, education and housing, but should not amend the HRA to include economic, social and cultural rights.
- **Recommendation 11:** The Government should revisit the question of economic, social and cultural rights as part of the five-year review under the HRA.

Environment-Related Human Rights

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

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

The other thing that I am disappointed about is the lack of reference in the committee's report to environment and to [environmental rights in the Bill] ...¹⁵⁸

While international human rights treaties generally recognise the importance of environmental protection,¹⁵⁹ there is, as yet, no binding human right to a healthy environment in international law.¹⁶⁰ However, there is increasing recognition that the protection of human rights and the protection of the environment are interdependent and interrelated, and that civil, political, economic, social and cultural rights can be violated as a result of environmental degradation. In particular, civil and political rights such as the rights to life¹⁶¹ and privacy,¹⁶² and economic, social and cultural rights such as the right to health¹⁶³ can be adversely affected by failures to protect the environment.

¹⁵⁸ Kerry Tucker MLA, Legislative Assembly, *Hansard*, 25/11/03, p 4581.

¹⁵⁹ For example, the Convention on the Rights of the Child refers to aspects of environmental protection in respect to the child's right to health.

¹⁶⁰ In contrast, express recognition of the right to a healthy environment can be found in the domestic law of various countries such as South Africa, France, Costa Rica, Argentina, Chile, Ecuador, and the Philippines.

¹⁶¹ For example, in *Oneryildiz v. Turkey* (Chamber Judgement delivered November 30, 2004), the European Court of Human Rights found that the government in question had violated the applicant's right to life by failing to prevent the deaths caused by a methane explosion at a municipal waste dump.

¹⁶² For example, in *Lopez Ostra v Spain* (1994) 20 EHRR 277, the European Court of Human Rights held that environmental pollution emitted by a waste treatment plant constituted a breach of the right to a private and family life (Art 8 ECHR). In *Fadeyeva v Russia* (application no.55723/00, Chamber Judgement delivered 9 June 2005), the Court held that the government in question had violated the applicant's right to a private and family life because it had failed to design or apply effective measures to protect residents from excessive toxic emissions generated by a steel-plant. In *Guerra v Italy* (1998) 26 EHRR 357, the Court found that not only do governments have the obligation to prevent environmental pollution and hazards but also where the risks to health are severe, they are under the obligation to provide information to the affected individuals. See also UK case law: *Dennis v Ministry of Defence* [2003] Env LR 34 (successful reliance on the ECHR right to a private and family life for a claim relating to aircraft noise) and *Marcic v Thames Water Utilities Ltd* [2004] 2 A.C. 42 (public authorities liable for breaching a customer's right to a private and family life by failing to prevent a sewer from repeatedly flooding).

¹⁶³ For example, the UN Committee on Economic, Social and Cultural Rights has asserted that:

Consultative Committee and Government Response

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

For similar reasons, the Government did not support incorporating a free-standing environmental right directly into law. It considered that many of the civil and political rights protected in the Human Rights Act would apply to environmental matters.¹⁶⁴

While the ACT Greens favoured express recognition of environmental rights,¹⁶⁵ it, nevertheless, accepted that environmental interests could be protected (to a greater or lesser degree) within the framework of established human rights.¹⁶⁶

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

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

¹⁶⁴ For example, the rights to equality (s8), life (s9), protection of the family and children (s11), privacy (s12), peaceful assembly and association (s15), freedom of expression (s16), public life (s 17), fair trial (s 21) and minority rights (s27).

¹⁶⁵ Kerry Tucker MLA, Legislative Assembly, *Hansard*, 25/11/03, p 4582.

¹⁶⁶ Kerry Tucker MLA, Legislative Assembly, *Hansard*, 02/03/04, p 453.

Environment protection in the ACT

The ACT has a range of laws that protect the environment, including:¹⁶⁷

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

¹⁶⁷ Summary by Dr Hanna Jaireth, *Review of the operation of the Human Rights Act 2004 (ACT) concerning environment-related human rights*, Background paper for the Human Rights Office Community Forum 'Reviewing the ACT Human Rights Act One Year On', 1 July 2005.

Twelve-Month Review of the *Human Rights Act 2004*

Under the HRA, all public officials, statutory office holders and the judiciary have a duty to interpret these laws consistently with human rights unless the law clearly authorises an interpretation that is inconsistent with the HRA.¹⁶⁸

Mechanisms for statutory oversight

Environment Commissioner

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

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

Assembly Committees

Standing Committee on Legal Affairs

The HRA requires a Legislative Assembly Committee to report to the Assembly on human rights matters raised on all bills.¹⁶⁹ The Assembly's Standing Committee on Legal Affairs (performing its role as a Scrutiny of Bills and Subordinate Legislation Committee) already performs this function and in practice the obligation under the HRA to report to the Assembly about human rights matters falls to that Committee.

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

¹⁶⁸ Section 30 of the *Human Rights Act 2004*.

¹⁶⁹ Section 38 of the *Human Rights Act 2004*

Twelve-Month Review of the *Human Rights Act 2004*

HRA, and has 'regard to both domestic and international law in ascertaining whether a human rights issue arises'.¹⁷⁰

Dr Hanna Jaireth has suggested that:

[The Committee's scrutiny] function, in relation to environment-related human rights arising in bills, could be shared with the Standing Committee on Planning and the Environment, following the relevant nomination by the Speaker of the Assembly pursuant to section 38(2)(a) of the HRA.¹⁷¹

Standing Committee on Planning and the Environment

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

Comment

In general, there was little response in submissions to the issue of protecting environmental rights. The Environmental Defender's Office (ACT) argued for a specific environmental right:

The [HRA] should provide that everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable ... development.¹⁷²

The ACT Chapter of Civil Liberties Australia argued for the opposite conclusion:

There is no need for the environment or environmental issues to be considered separately under a human rights act. The environment and environmental issues are covered by environmental legislation. In particular CLA does not believe there is any common or fiscal sense in employing 'an expert in environment protection' in a statutory role. Double dipping should be avoided, both in terms of legislation and of special interest groups in relation to the public purse.¹⁷³

¹⁷⁰ Peter Bayne, Pre-Enactment dialogue about proposed laws under the influence of the Human Rights Act 2004, paper for 'Assessing the First Year of the ACT Human Rights Act', June 2005, p 2.

¹⁷¹ Dr Hanna Jaireth, *Review of the operation of the Human Rights Act 2004 (ACT) concerning environment-related human rights*, Background paper for the Human Rights Office Community Forum 'Reviewing the ACT Human Rights Act One Year On', 1 July 2005.

¹⁷² Environmental Defender's Office (ACT), *Submission 16*, p 2.

¹⁷³ Civil Liberties Australia, *Submission 15*, p 3.

Twelve-Month Review of the *Human Rights Act 2004*

In her submission, Dr Watchirs pointed to the potential ambit of existing civil and political rights, such as the rights to life and to privacy,¹⁷⁴ and future economic, social and cultural rights, such as the right to physical and mental health.¹⁷⁵ However, while the Environmental Defenders Office acknowledged that existing rights had been used elsewhere to protect 'ancillary environment rights', this approach had its limitations:

What other countries are recognising, however, is that there are strong arguments – both normative and in terms of efficiency and effectiveness – to codify separate and distinct environmental rights, thereby giving such rights 'an autonomous and distinctive character' which, by and large, they presently lack.¹⁷⁶

The existence of this debate on the case for recognising environmental rights may explain the decision of the Consultative Committee recommend the inclusion of a substantive right to a healthy environment. It also underscores the focus of the terms of reference for this review on the protection of '*environment-related*' rights through '*statutory oversight of their operation by an expert in environment protection*'.

For its part, the Environmental Defenders Office was a proponent of engaging each of the bodies listed above: the Environment Commissioner, the Standing Committee on Legal Affairs and the Standing Committee on Planning and the Environment. It noted that environment protection and sustainability were specialised fields, calling for specific expertise to deal efficiently and consistently with complaints handling and policy development and to raise the profile and narrow the focus of the rights debate.

The EDO suggested that the Environment Commissioner would be a 'logical choice'. However, it noted that the Environment Commissioner had limited resources.¹⁷⁷ A similar point was made by Dr Watchirs, who noted '[i]t may be unrealistic to expect the Commissioner for the Environment to take a more active role in monitoring human rights compliance regarding the environment within current resources'.¹⁷⁸ Moreover, she noted, a more active role was beyond the Human Rights Office.

¹⁷⁴ Dr Helen Watchirs, *Submission 11*, p 26.

¹⁷⁵ Dr Helen Watchirs, *Submission 11*, p 26.

¹⁷⁶ Environmental Defender's Office (ACT), *Submission 16*, p 7.

¹⁷⁷ Environmental Defender's Office (ACT), *Submission 16*, p 2.

¹⁷⁸ Dr Helen Watchirs, *Submission 11*, p 26.

Twelve-Month Review of the *Human Rights Act 2004*

Dr Watchirs did support giving the role to the Planning and Environment Committee, suggesting that it could be 'routinely nominated to scrutinise environment-related bills for human rights issues ... in accordance with s.38(2)(a) of the [HRA]'.¹⁷⁹

Professor Bayne rejected any suggestion of increasing the workload of the Scrutiny Committee but did contemplate an enlarged role for the Environment Commissioner and a wider function for the Standing Committee on Planning and the Environment:

It would not... be appropriate to simply extend the terms of reference of the Scrutiny Committee. Nor would it be appropriate to have this Committee somehow share the task with another Standing Committee. The task is more suited to the role of another Standing Committee simply acting alone. ... The process would be assisted, and perhaps only feasible, were some other body to prepare a pre-enactment report on the bill. ... So far as concerns environmental rights, the Environment Commissioner might play [such] a role.¹⁸⁰

Recommendation

- **Recommendation 12:** The Government should not consider specific mechanisms to protect environment-related rights before other recommendations are addressed.

¹⁷⁹ Dr Helen Watchirs, *Submission 11*, p 26.

¹⁸⁰ Professor Peter Bayne, *Submission 4*, p 11.

**Appendix 1:-
Submissions Received**

1. Professor Tom Campbell, Centre for Applied Philosophy and Public Ethics, Australian National University
2. Dr Bede Harris, Senior Lecturer, School of Law, University of Canberra
3. Mr Michael Curtotti, Lawyer & Principal, Synergy Legal
4. Professor Peter Bayne, Australian Catholic University
5. Professor Andrew Byrnes, Professor Hilary Charlesworth and Gabrielle McKinnon, Regulatory Institutions Network, Australian National University
6. Australian Lawyer's Alliance
7. Ms Robyn Holder, ACT Victims of Crime Coordinator
8. Care Inc. and Consumer Law Centre of the ACT
9. ACT Council of Social Service
10. Women's Rights Action Network Australia
11. Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner
12. Women's Legal Centre (ACT & Region) Inc
13. Housing is a Human Right Project, an ACT Shelter and ACTCOSS project
14. ACT Ombudsman
15. Civil Liberties Australia (ACT) Inc.
16. Environmental Defender's Office (ACT)

Appendix 2:- Annual Reporting on Human Rights¹

Overview

The 2004-2005 reporting year was the first period that ACT Government agencies were required to include in their annual reports information about the measures they had taken to 'respect, protect and promote human rights'. Each agency had to report on its implementation strategies and progress towards incorporating human rights standards into operations under Section B.2 of the *Annual Report Directions 2004-2005*. There were 43 reporting entities considered - three of these reported that the HRA was not applicable to their agency, and one provided a 'nil to report' response.²

There are inherent limitations in trying to summarise this type of information and draw concrete conclusions from it. A level of interpretation was required by each agency as to what was meant by 'respecting, protecting and promoting' rights, and that meant that agencies' responses were quite divergent and were difficult to fit into defined categories. Where this occurred, a 'best-fit' principle was applied. As this was the first reporting year, the following four simple categories were used:

- staff development – what steps the agency taken steps to train both new and existing staff about the HRA;
- review of existing legislation, policies and procedures – what steps the agency took to review its current operations;
- development of new legislation, policy and procedures with consideration of human rights – what processes the agency took to ensure that these initiatives were developed within a human rights framework;
- human rights valued and respected as normative standards – agency commitment throughout practice and operation, including workplace culture.

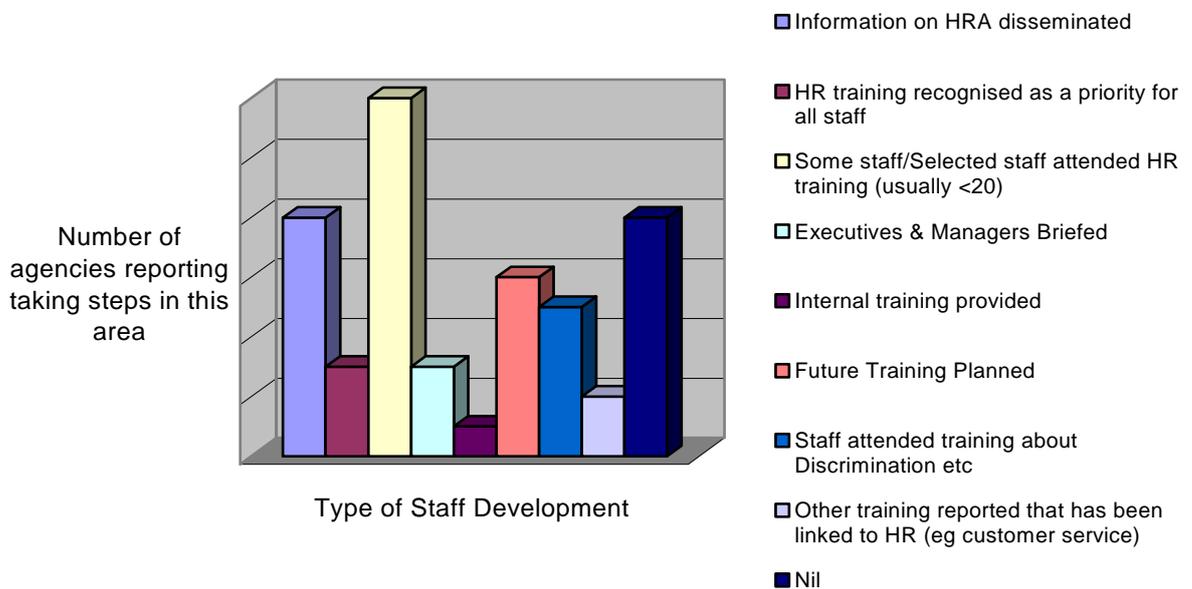
¹ This appendix substantially reproduces information prepared by Leslie Roberts that was incorporated in Dr Helen Watchirs, ACT Human Rights and Discrimination Commissioner, *Submission 11*, Appendix B.

² The Australian Hotel School was sold in October 2005 and has not been considered in this information.

Staff Development

It appears from Annual Reports that little progress has occurred at the agency level in regard to disseminating information to staff about the HRA. Some organisations reported distribution of the legislation, while others provided a hyperlink to it on their intranet. One positive example was an agency reporting that ‘information on issues outlined in the [HRA]’ is provided to staff in the employee handbook as part of their induction. Only limited training has been carried out across the service and it is not clear where the impetus for this training primarily lies – the Human Rights Unit, the agency itself or interested individual staff. Staff training that has been reported is usually small in number, that is, less than 20. Sometimes training has been limited to staff involved in policy or regulatory areas, or other ‘identified key staff’, which may demonstrate a lack of awareness about human rights implementation at service delivery levels, and/or lack of resources to hold or attend specialist training. Based on these reports, this means there must be significant numbers of government staff who have not received any human rights training. General training about discrimination or equity and diversity were also mentioned as providing awareness of human rights.

Table 1: Staff Development

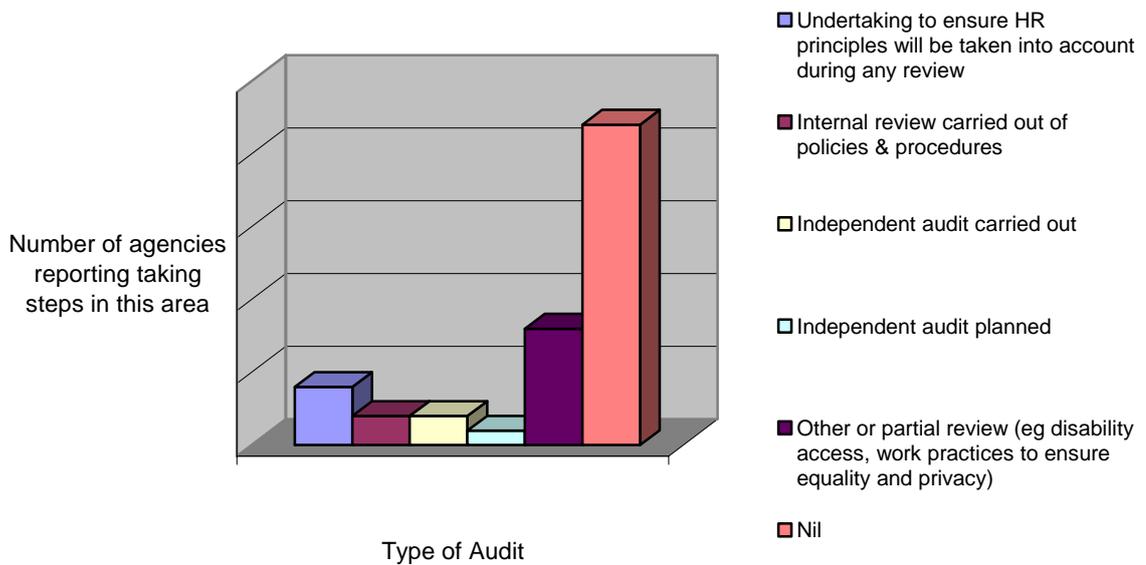


Note: One agency may have reported activities across several categories

Review of Legislation, Policies, Practices and Procedures

Most agencies have not reported anything about reviewing their current legislation, policies and practices for compatibility with human rights. Only two agencies sought independent consultants to carry out human rights audits, and two other agencies reported internal reviews. Several agencies have taken some steps that, while important, fall short of comprehensive review, such as ensuring facilities for people with a disability were in accordance with Australian standards, or conducting an internal review of work practices to recognise equality, protect privacy, encourage active participation and to ensure safety and security of all staff.

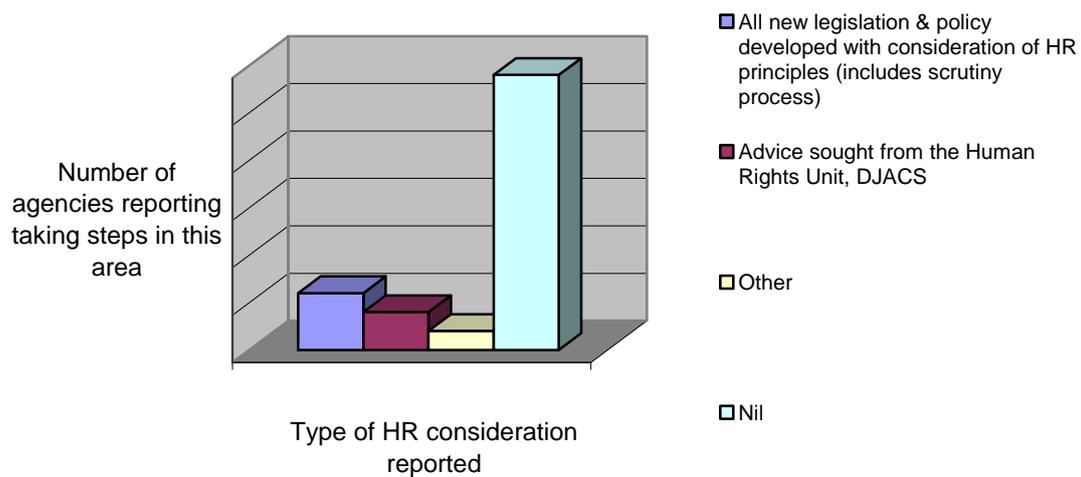
Table 2: Evaluations & Audits



New legislation, policies and procedures

Reporting about measures taken in this category was dependent upon whether the agency had been involved in preparation of new bills, and the Attorney-General's corresponding compatibility statements under s.37 of the HRA. Several agencies reported liaising with the Bill of Rights Unit (now the Human Rights Unit), Department of Justice and Community Safety, in regard to the preparation of compatibility statements, but there was no further breakdown as to whether, or to what extent, this advice was incorporated. Some agencies reported on seeking advice from the Human Rights Unit in regard to the development of proposed operational policy, which may indicate a broader consideration of human rights at the agency level.

Table 3: New legislation, policies & procedures

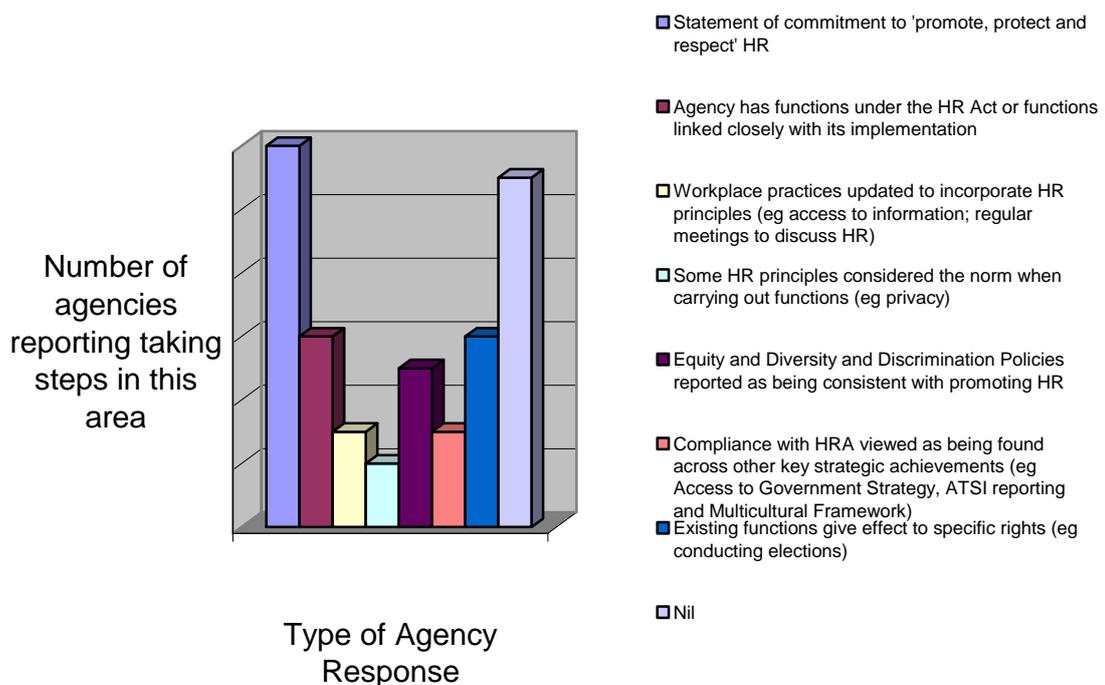


Note: One agency may have reported activities across several categories

Human rights valued and respected as normative standards

Where an agency has specific responsibilities relating to the implementation of the HRA, there is a greater level of awareness and activity. About half of the agencies provided a statement of commitment in respect of ‘respecting, protecting and promoting’ rights. Some agencies reported having policies about equity and diversity, or discrimination as being evidence of promoting human rights in the workplace. Only three agencies referred to promoting human rights in their work in related areas, such as Access to Government, the Multicultural Framework, Aboriginal and Torres Strait Islander reporting and the ACT Women’s Plan. Whether this indicates a lack of understanding about the nature of the HRA, or indicates a problem with the segmented nature of the Annual Reporting Guidelines, is difficult to determine from this limited information. Some agencies examined their existing functions in terms of how they give practical effect to human rights, for example, the right to take part in public life was reported as implemented by some agencies through consultation processes and holding elections. There was little information reported by agencies about changes to work practices as a result of the HRA, as this sort of activity tended to be associated with agencies having specific responsibilities under the Act.

Table 4: Human Rights Culture



Appendix 3:- Economic, Social and Cultural Rights Enforcement Methods

Direct Enforceability (South Africa)

The South African Constitution 1996 protects a discrete set of economic, social and cultural rights including the right to housing,¹ rights to health care, food, water and social security,² the right to education,³ and environmental rights.⁴

The Constitution is a self-consciously transformative document. As one commentator has observed, '[u]nlike many classic liberal constitutions, the primary concern is not to restrain state power, but to facilitate a fundamental change in unjust political, economic and social relations'.⁵ It is acutely conscious of the historical context and the deep inequalities that motivated the desire to recognise economic, social and cultural rights. The Preamble to the Constitution identifies its purpose as being to:

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

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

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.⁶

All of the rights protected by the Constitution are subject to a general 'reasonable limits' clause, which operates in a similar way to section 28 of the HRA.⁷

¹ Article 26.

² Article 27.

³ Article 29.

⁴ Article 24.

⁵ Sandra Liebenberg, 'Needs, rights and transformation: Adjudicating social rights in South Africa', *ESR Review*, November 2005, Vol 6 No 4, p 3.

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

⁷ Article 36.

Twelve-Month Review of the *Human Rights Act 2004*

In addition, the rights (and their enforcement) can be divided into three main types.⁸

- The first category protects the right access to adequate housing, health care, food, water and social security.⁹ They are subject to the 'progressive realization' clause, requiring the state to adopt 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right'.
- The second category consists of children's economic, social and cultural rights;¹⁰ the right of everyone to basic education, including adult basic education;¹¹ and the economic, social and cultural rights of detained persons, including sentenced prisoners.¹² These rights are not subject to an internal 'reasonable limits' clause or limited by references to 'progressive realisation' or resource constraints.
- The third category of rights prohibits certain kinds of conduct by public and private authorities, including prohibition of arbitrary or non-judicial eviction¹³ and refusal of emergency medical treatment.¹⁴

The Bill of Rights in the Constitution has its own application and interpretive clauses. The rights bind all arms of government, and private individuals and entities to the extent applicable taking into account the nature of the right and its relevant duties.¹⁵ Any person, including third parties, may approach a competent court alleging that a right has been 'infringed or threatened' and the court may grant 'appropriate relief'.¹⁶ When interpreting the rights, a court is required to 'promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.¹⁷ When interpreting legislation or developing the common law, a court is required to 'promote the spirit, purport and objects of the Bill of Rights'.¹⁸

⁸ Sandra Liebenberg, 'The protection of economic and social rights in domestic legal systems' in C.Krause et al (eds), *Economic, Social and Cultural Rights: A Textbook* (2nd edition), Martinus Nijhoff Publishers.

⁹ Articles 26(1) and 27(1).

¹⁰ Articles 28(1)(c), 28(1)(d), 28(1)(e).

¹¹ Article 29(1)(a).

¹² Article 35(2)(e).

¹³ Article 26(3).

¹⁴ Article 27(3).

¹⁵ Article 8.

¹⁶ Article 38.

¹⁷ Article 39(1)(a).

¹⁸ Article 39(2).

Twelve-Month Review of the *Human Rights Act 2004*

In the past decade, a body of case law has developed on these various principles. Throughout, it was accepted that economic, social and cultural rights are 'justiciable'.

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

[W]e are of the view that these rights are, at least to some extent, justiciable ... [M]any of the civil and political rights entrenched in the [Constitution] will give rise to similar budgetary implications without compromising their justiciability.¹⁹ The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.²⁰

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

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

The provincial administration which is responsible for health services ... has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.²¹

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

Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.²²

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

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

¹⁹ For example, the courts have affirmed the right of prisoners to vote in elections, and obliged the government to make all reasonable arrangements necessary to enable them to exercise this right: *August and another v. Electoral Commission and others*, 1999 (4) BCLR 363 (CC).

²⁰ *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* [1996] ZACC 26, at [77] and [78].

²¹ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17, per Chaskalson P, at [29].

²² *Minister of Health and others v Treatment Action Campaign and others* [2002] ZACC 15 at [38].

Twelve-Month Review of the *Human Rights Act 2004*

that the bearers of those obligations should be given appropriate leeway to determine the best way to meet the obligations in all the circumstances.²³

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

A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right ... has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make ... a court may also 'make any order that is just and equitable'.²⁴

As with the proportionality assessment in section 28 of the HRA, a body of case law has developed on the 'reasonableness review' process undertaken by the courts. A key aspect of the process is that 'the socio-economic rights, and the corresponding obligations of the state, [are] interpreted in their social and historical context'.²⁵ In other words, there is a methodology attached to the 'reasonableness review' which is overtly sensitive to the broader environment in which the claim is made. So, while courts may 'evaluate policy', and while decisions may have 'budgetary implications', outcomes are anchored in the underlying socio-economic environment.

Another feature of the 'reasonable limits' clause in the South African Constitution is its application to 'minimum core' obligations or to the particularized negative rights. As noted above, courts have accepted from the outset that '[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion'. This approach has had special significance in relation to the right of access to housing.²⁶ In effect, courts are prepared to impose 'minimum core' obligations on the state in relation to actions that have the effect of impairing an existing enjoyment of a right.

Other jurisdictions have incorporated at least one justiciable economic, social and cultural right into the domestic sphere. For example, the right to education is

²³ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005(2) SA 359 at [87]-[88].

²⁴ *Treatment Action Campaign* at [101].

²⁵ *Treatment Action Campaign* at [24].

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

Twelve-Month Review of the *Human Rights Act 2004*

recognised in the UK *Human Rights Act 1998*,²⁷ and is 'without difficulty guaranteed and applied by the UK courts, if in a relatively circumscribed and qualified form'.²⁸

Indirect Enforceability (India)

Like the South African Constitution, the Indian Constitution protects economic, social and cultural rights such as the right to education,²⁹ rights to health and a standard of living,³⁰ and environmental rights³¹. However, unlike South Africa, these rights are not justiciable. They are included as 'directive principles', which the executive and legislative arms of government have a duty to apply when making law.³² As 'directive principles of state policy', they are guiding, but not enforceable by the courts:

The [directive principles] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.³³

This approach to economic, social and cultural rights is not applied to civil and political rights. These 'fundamental rights', which include the right to life³⁴ and the right to equality,³⁵ are justiciable. The Constitution prohibits laws that are inconsistent with these rights³⁶ and it guarantees a full suite of remedies for the enforcement of those rights.³⁷ These remedies bind all arms of government: the judiciary, executive and legislature.³⁸

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

²⁷ The right to education is guaranteed in Article 2 of the first protocol to the European Convention on Human Rights and is incorporated into UK law by the *Human Rights Act 1998*. See also Section 23 of the Canadian Charter of Rights and Freedoms which protects minority language educational rights.

²⁸ Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 12.

²⁹ Article 45.

³⁰ Article 47.

³¹ Article 48A.

³² Article 37. A similar approach is taken under the Sri Lankan Constitution: 'The [directive principles and fundamental duties] do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.' (Article 29). Other countries which have adopted the directive principles scheme include Ghana, Namibia, Uganda, Nigeria, and Papua New Guinea.

³³ Article 37.

³⁴ Article 21.

³⁵ Article 14.

³⁶ Article 13.

³⁷ Article 32.

Twelve-Month Review of the *Human Rights Act 2004*

Accordingly, these economic, social and cultural principles should, if possible, be read into civil and political rights.

The courts have also used the directive principles to develop case law around the fundamental right to life allowing an implied right to a livelihood,³⁹ the basic necessities of life such as adequate nutrition, clothing, reading facilities,⁴⁰ and the rights to shelter,⁴¹ health⁴² and education.⁴³ However, they have also been cautious about budgetary and policy implications. Instead, the focus has been on creating a basis for protecting the objectives in the directive principles from threats by requiring due process before they can be denied.

Indirect Protection

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

Canada

The courts have applied the 'right to equal protection and benefit of the law without discrimination'⁴⁴ to social justice objectives even though the Canadian Constitution does not include economic, social and cultural rights:

The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public ... [therefore] a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of Article 15 [of the Canadian Charter of Rights and Freedoms].⁴⁵

³⁸ Article 144.

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

⁴⁰ *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*, (1981) 2 SCR 516 at 529.

⁴¹ *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & others*, (1997) AIR SC 152.

⁴² *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) AIR SC 2426 (right to emergency medical treatment).

⁴³ *Jain v. State of Karnataka*, (1992) 3 SCC 666; *Krishnan v. State of Andhra Pradesh & other*, (1993) 4 LRC 234.

⁴⁴ Article 15 of the Canadian Charter of Rights and Freedoms, which is similar to Section 8 HRA.

⁴⁵ *Eldridge v AG of British Columbia* [1997] 3 BHRC 137, para 78.

Twelve-Month Review of the *Human Rights Act 2004*

The courts held the failure to provide interpretation services deprived deaf patients of equal benefit of health care services.⁴⁶ This failure could not be justified as a reasonable limitation as there was no evidence that the type of accommodation sought by the deaf patients in health services would 'unduly strain the fiscal resources'⁴⁷ of the government.

Nevertheless, the courts generally have been cautious about their capacity to adopt novel interpretations to influence budgets and policies.⁴⁸

In 2000, an expert panel considered the direct enforcement of economic, social and cultural rights in the context of a broader review of the *Human Rights Act 1977*.⁴⁹ The panel concluded that direct enforcement would require a 'substantial extension' of the existing machinery under the Act and was therefore not feasible at the time.

The panel indicated it was 'concerned about the breadth of the issues — legal, constitutional and political — that would be raised by the addition of social and economic rights to the Act that were enforceable by [Human Rights] Tribunal order'.⁵⁰ Those concerns included a lack of clarity about which rights should be considered, which entities should be subject to those rights, the language and operation of the 'reasonable limits' test, the wide distribution of federal, provincial and territorial responsibilities, and the capacity of orders to affect budgets and policies.

The European Court of Human Rights

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

Whilst the [European Convention on Human Rights] sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive

⁴⁶ *Eldridge v AG of British Columbia* [1997] 3 BHRC 137.

⁴⁷ *Eldridge v AG of British Columbia* [1997] 3 BHRC 137, para 92.

⁴⁸ *Gosselin v Quebec (Attorney General)* [2002] 4 S.C.R. 429. In this case, the court considered whether the right to an adequate level of social assistance falls within the scope of the right to life, liberty and security in Article 7 of the Charter. The court found that the differential welfare regulation did not breach the equality provisions of the Charter or deprive the claimant of the Charter right to life, liberty and security of the person, citing 'insufficient evidence' to support adopting such a 'novel' interpretation to impose a positive obligation on the government.

⁴⁹ The *Canadian Human Rights Act 1977* is anti-discrimination legislation akin to the ACT *Discrimination Act 1991*.

⁵⁰ Canada, Department of Justice, *Report of the Canadian Human Rights Act Review Panel*, June 2000, p 114.

Twelve-Month Review of the *Human Rights Act 2004*

factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention⁵¹

It has held a case of environmental damage and accompanying health problems to be a violation of the ECHR right to a private and family life and applied economic, social and cultural rights to restrict the scope of the ECHR right of property.⁵² It also rejected a landlord's challenge to rent control legislation on the basis that the government in question was protecting the right to housing.⁵³

Other Jurisdictions

Northern Ireland

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

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

The responses that opposed the inclusion of socio-economic rights highlighted three major concerns: that decisions on the allocation of resources for health, housing and the environment are primarily political and cannot in practice be decided by judges; that there can be no justification for granting rights on such matters to people in Northern Ireland when they are not granted in the rest of the United Kingdom or (except as noted below) in the Republic of Ireland; and from a slightly different perspective that including necessarily limited and imprecise rights of this kind may raise expectations that cannot in practice be delivered. The main arguments in favour of their inclusion have been, first, that not to do so would be in conflict with current international standards and experience and, second, that the overwhelming body of responses and the public opinion surveys carried out for the Commission have supported provisions in this area ... But ... from a slightly different perspective there has been some concern that the ... initial proposals would not give directly enforceable rights to those affected..⁵⁴

The Commission canvassed three options:

The first is to include provisions in the Bill of Rights guaranteeing that essential minimum standards in this area will be directly enforceable through the courts. The second is to include provisions requiring a progressive realisation of a much broader set of social, economic and environmental rights, relying not primarily on implementation through the courts. The third possibility is to adopt a mixed

⁵¹ *Airey case*, Series A No 32, October 9 1979.

⁵² *Lopez Ostra v Spain* (1994) 20 EHRR 277; See also *Fadeyeva v Russia* (application no.55723/00, Chamber Judgement delivered 9 June 2005).

⁵³ *Mellacher v Austria*, Series A No 169, December 19 1989

⁵⁴ Northern Ireland Human Rights Commission, *Progressing a Bill of Rights for Northern Ireland: An Update*, April 2004 p 14.

Twelve-Month Review of the *Human Rights Act 2004*

approach – insisting that minimum standards be directly enforceable but requiring other standards to be achieved progressively over time in other ways.⁵⁵

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

The minimum enforcement model seeks to protect due process rights in the social and economic rights sphere. It does not guarantee formal rights explicitly defining social and economic rights. We envisage this model operating by means of the courts having legal capacity to decide whether access to particular services provided by the state to citizens and others, is fair, impartial, non-discriminatory and subject to procedural protections (such as a right to appeal).⁵⁶

The substantive enforcement model seeks to define and enforce a set of social and economic rights protections ... [Each existing example of such a model] tends to demonstrate a highly selective element--generally related to the particular social and political history of the constitution-making process.⁵⁷

They compared these approaches with a 'programmatic response':

A programmatic response requires government to tackle the issue of social and economic rights through a pro-active development of strategies, which serve to embed social and economic rights in policy and practice ... A programmatic approach does not rely exclusively on legal remedies but operates to shape how legislation, policy and practice are developed and implemented. Programmatic rights [are] a set of legal and political objectives, grounded in and supporting legally enforceable rights, which require appropriate policies, programmes and measures to ensure their promotion, access, enforcement and effectiveness.⁵⁸

United Kingdom

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

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

[C]oncerns about the potential of economic and social rights to undermine the role of government and Parliament raise important issues that are not to be dismissed lightly, and which have been arisen in other jurisdictions where economic, social and cultural rights have been enforced. It is Parliament and

⁵⁵ Northern Ireland Human Rights Commission, *Progressing a Bill of Rights for Northern Ireland: An Update*, April 2004 p 15.

⁵⁶ Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', E.H.R.L.R. 2004, 2, 158-180, at p 162.

⁵⁷ Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', E.H.R.L.R. 2004, 2, 158-180, at p 164.

⁵⁸ Grainne McKeever and Fionnuala Ni Aolain. 'Thinking Globally, Acting Locally: Enforcing Socio Economic Rights in Northern Ireland', E.H.R.L.R. 2004, 2, 158-180, at p 166.

Twelve-Month Review of the *Human Rights Act 2004*

government which must retain the primary responsibility for economic and social policy, an area where the courts lack substantial expertise and have limited institutional authority. This principle must ... condition the scope of any extension of the powers of the courts in relation to economic, social and cultural rights.⁵⁹

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

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

[T]he South African approach to the protection of economic, social and cultural rights is not radically different from that of UK public law. It preserves the existing principles of judicial review of executive action, but in the context of an extended set of standards (of socio-economic rights) against which reasonableness and non-discriminatory impact of that action is to be judged. It allows the courts to undertake scrutiny of economic, social and cultural rights protection, whilst confining this scrutiny to matters within the courts' institutional competence.⁶⁰

The Committee concluded that the case for incorporation merited further attention. 'Any such measure,' the Committee said, 'should recognise the limits of the courts' institutional competence in relation to rights that are progressively realised, and should limit judicial scrutiny to grounds of reasonableness and non-discrimination'.⁶¹

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

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

We .. recommend that, in the preparation of legislation, government departments should look beyond the range of the Convention rights to the wider international obligations which the UK has accepted in the human rights field. The examination of proposed legislation against these standards should be made explicit in the explanatory notes to Bills ... More widely, we recommend that attention to the Covenant rights should be reinvigorated throughout the public sector. ... The government ... needs to promote the Covenant rights as a set of

⁵⁹ Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 25-26.

⁶⁰ Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 26.

⁶¹ Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 27.

Twelve-Month Review of the *Human Rights Act 2004*

positive guarantees and aspirations—as a standard under which the endeavours of Parliament, the government, public authorities and civil society can unite.⁶²

⁶² Joint Committee on Human Rights, 'The International Covenant on Economic, Social and Cultural Rights', *Twenty-first Report of Session 2003–04*, p 57.

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