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Ms Renee Leon
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Dear Ms Leon,

SUBMISSION TO THE REVIEW OF THE HUMAN RIGHTS ACT 2004 (ACT)

Thank you for the opportunity to make a submission to the Attorney-General's review of the first year in operation of the *Human Rights Act 2004* (the 'HR Act') pursuant to s.43 of the Act. Our comments are set out below using the broad framework of the Department of Justice and Community Safety's Discussion Paper.

In essence there are three main amendments recommended that would improve and strengthen the Act and its implementation in laws and practices through building a human rights culture in ACT agencies, and the broader community. The first is to require ACT authorities to act consistently with the HR Act. Secondly, there should be a direct right of action to enforce the HR Act in the courts. Thirdly, economic, social and cultural rights, as is currently the case with civil and political rights, should be explicitly recognised in the HR Act, even if only at the current level of the 'interpretative' model, should our first and second recommendations be accepted.

Please also find three attachments to this submission:

- an advice we obtained from the Office's former Human Rights Legal Advisor, Dr Rowena Daw, on the question of possible direct application of the HR Act to public authorities (Appendix A);
- a table and summary of ACT agencies' Annual Report extracts prepared by Leslie Roberts from this Office on measures they have taken to respect, protect and promote human rights, as required by sections 7(2A) and 8(2A) of the *Annual Reports (Government Agencies) Act 1995* (Appendix B); and
- a paper on environmental rights written by Dr Hanna Jaireth for the Human Rights Office's Second Human Rights Community Forum on 1 July 2005 (Appendix C).

(1) Introduction

(a) General human rights framework

As a party to both the International Covenants on Civil and Political Rights ('ICCPR') and Economic, Social and Cultural Rights ('ICESCR'), Australia must implement our international human rights obligations. There are four main categories of action for implementing human rights:

- respect - the government must abstain from interferences;
- protection - the government must prevent other's interferences;
- fulfilment - the government must take necessary measures for realisation; and
- promotion – providing forums for public education, information, and debate.

The ACT is the first jurisdiction to give explicit and enforceable (albeit indirectly through statutory interpretation) legislative recognition to obligations in the ICCPR under the *Human Rights Act 2004,* which is a modest first step in the long process to build a human rights culture. This task is more difficult in the Asia-Pacific, as we are the only region without a human rights regime, and we lack existing mechanisms for enforcement and jurisprudence, as for example exists in the European system. At the regional level international organisations often use euphemistic terms, such as ethics and 'good governance', to avoid implying criticisms of governments through using a human rights framework. Taking a 'human rights approach' means comprehensively integrating norms, standards and principles into the design, implementation and evaluation of programs and policies, as well as implementation through laws. This is a constructive process of continuous improvement, rather than simply shaming and blaming.

Role of the ACT Human Rights Office

The Human Rights Office is a small independent office of six staff (two part-time) headed by the Human Rights and Discrimination Commissioner who is a statutory office-holder appointed by the Minister under the *Discrimination Act 1991*. Under the HR Act the Discrimination Commissioner is also the Human Rights Commissioner, whose role as set out in s.41 is to:

- review the effect of Territory laws on human rights and report in writing to the Attorney-General (which is later tabled in the Legislative Assembly, subject to privacy and public interest considerations that may require the report to be amended);
- provide human rights education; and
- advise the Attorney-General on anything relevant to the operation of the Act.

A very important goal in implementing the HR Act is creating a human rights culture in the general community, rather than merely focussing on litigation. The Human Rights Office convenes biannual Human Rights Community Forums near 1 July (the anniversary of the HR Act's implementation) and 10 December (International Human Rights Day) to facilitate networks, liaison and sharing information for practical issues, and strategic test cases. In the four Forums that we have held to date, numbers of participants have grown from 30-40 NGOs,[1] statutory office-holders,[2] private practitioners and human rights academics, to general community numbers of about 140-50. The Forums give stakeholders an opportunity to contribute, shape priorities and develop the human rights agenda in the ACT to ensure that the HR Act has a real impact in social justice terms. Following the Forum held on 9 December 2005, a Human Rights Act Legal Network and interactive electronic Discussion List was established and convened by Gabrielle McKinnon of the Regulatory Institutions Network at the Australian National University.

We publish a quarterly electronic newsletter, *Humanity*, which updates subscribers on our human rights initiatives, such as submissions and educational events, and summarises recent case law and legislation. The Human Rights Office has worked collaboratively with communities and agencies to prioritise strategic areas and existing laws that need to be reviewed because they have some provisions that are inconsistent with human rights and require legislative reform, for example, the *Mental Health (Treatment and Care) Act 1994*. We have been active in developing strategic

[1] For example, Shelter, ACTCOSS, Welfare Rights and Legal Centre, Women's Legal Centre, ADACAS, Mental Health Community Coalition, YWCA, Youth Coalition, Council of the Ageing, Unions ACT, Amnesty International, the Aboriginal Justice Centre, Women Lawyers Association, the Environment Defender's Office, VOCAL and Prisoner's Aid.

[2] For example the Community and Health Services Complaints Commissioner, the Victims of Crime Coordinator, and the Office of the Director of Public Prosecutions.

partnerships with bodies that have similar interests and mandates, for example the Aboriginal Justice Centre. The Office has also participated in forums with other relevant bodies to consider specific issues in depth from a human rights perspective, including:

- anti-terrorism laws (‘National Security Laws and Human Rights – Are We Crossing the Line?’, co-hosted with the Federal Human Rights and Equal Opportunity Commission on 31 October 2005);
- corrections (2 July 2004);
- mental health (21 June 2005);
- indigenous health and human rights (with Winnunga Nimmityjah Aboriginal Health Services on 2 May 2006); and
- victims’ rights (co-organised with Victims of Crime Coordinator a ‘National Forum on Victims Rights in a Human Rights Framework’ on 16 November 2005).

The Office has convened more informal roundtables on issues of community interest, such as human rights service delivery, analysing recent court decisions, and same sex law reform.

We have also made comprehensive submissions to State (eg Victoria) and Federal bodies, for example the HRO Human Rights and Discrimination Law Policy Advisor, Ms Jenny Earle, worked in collaboration with and on behalf of most members of the Australian Council of Human Rights Agencies (‘ACHRA’) in making a detailed submission to the HREOC ‘Striking the Balance’ inquiry regarding work and families. At the local level the Office has been active in implementing various strategies on racism and women, and making submissions to ACT Legislative Assembly Committees, including issues such as terrorism and housing for people with mental illness. We work cooperatively with bodies, such as universities, to place local student and graduate interns in our Office, and in one case supported a placement overseas with the Regional Office for the Asia-Pacific of the United Nations High Commissioner for Human Rights in Bangkok.

With this new educative and advisory role under the HR Act the Office was funded with an additional $252,000 (see Budget Paper No. 3, 2004/05, page 178), which has been primarily spent on two new positions, the Human Rights and Discrimination

Law Policy Advisor and Human Rights Legal Advisor.[3] This initiative is a start in implementing the commitment in Priority 2 of the Canberra Social Plan to promote, protect and enhance the rights of all Canberrans by building a human rights culture. At the ACT Legislative Assembly Select Committee on Estimates hearings on 2 June 2004 the Committee questioned if this was a sufficient budget to implement the *Human Rights Act 2004*.[4] This situation is in contrast with public debate on the larger combined budget of the new Human Rights Commission (see below), which includes the existing Community and Health Services Complaints Commission that has nearly double the staff of the Human Rights Office. Funding for the new Commission does not provide any more specific human rights resources, and in fact may dilute this $252,000 allocation by generalising the two expert positions established in the Human Rights Office.

(c) New Human Rights Commission

The *Human Rights Commission Act 2005* has not yet come into force and is designed to provide an independent, fair and accessible one-stop shop for systemic monitoring, advocacy and overview, as well as discrimination and other complaints regarding services offered to children, young and older people, the disabled, and community and health services. This involves amalgamating the small Human Rights Office with the larger Community and Health Services Complaints Commissioner, as well as incorporating new Commissioner/s for Children and Young People, and Disability and Community Services.

The Act repeals the *Community and Health Services Complaints Act 1993* and makes extensive amendments to the *Discrimination Act 1991* to provide a generic system of complaint handling, including conferring conciliation powers on the President, and enable initiatives such as joint investigations in complex complaints across several Commissioners' areas of responsibility. The Human Rights Office has recommended to the ACT government on several occasions that funding should be concentrated on

[3] Two administrative positions (ASO 2 and 4) were also upgraded (ASO 3 and 5) to incorporate new and more complex responsibilities, including community education, and responding to human rights inquiries and requests.

[4] Select Committee on Estimates (Appropriation Bill 2004-05) Transcript of Evidence 2 June 2004, p.1224.

staff resources for Commissioners rather than have a large number of executives, such as the President. The legislation will also significantly amend the *Human Rights Act 2004* by transferring some decision-making powers of the Commissioner to the Commission. That is, the Commission will report to the Attorney-General on the human rights effects of laws, such as the Quamby audit discussed below. On the other hand the new Commission's specific statutory basis clarifies the administrative responsibility for reports, unlike the current Human Rights Office that has no legislative basis.

Also, there will be opportunities to do joint work in areas that involve systemic human rights issues, such as mental health and disabilities generally (as was highlighted by the 2002 Gallop Inquiry). The Mental Health Council of Australia's 2005 Report *Not for Service: Experiences of Injustice and Despair in Mental Health Care in Australia* notes that the ACT had the lowest funding of mental health care services, but supports the government's commitment to improvement following two critical reviews that it is in the process of implementing.[5]

(2) General Operation of the Human Rights Act

(a) Is the dialogue model in the HRA contributing to a human rights culture in the ACT?

The minimalist ACT model ensures that parliament retains sovereignty, and so strengthens democracy whilst maintaining the rule of law. As stated by Lord Hoffman in the *Alconbury* case in respect of the *UK Human Rights Act 1998* – it is 'intended to strengthen the rule of law, but not to inaugurate the rule of lawyers'.[6] This model engages all three arms of the Westminster system in a dialogue about what is the content of and proportionate limits on human rights. The dialogue model respects constitutional and democratic boundaries between: the courts, which interpret and enforce laws; parliaments, which enact and amend statutes; and the executive, which administers or implements laws.

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[5] Ken Patterson, *Investigation into Risk of Harm to Clients of Mental Health Services* (2002) and Rod Mann and Kerrie LaRoche, *The Review of the Design and Operation of the Psychiatry Services Unit* (2003).
[6] *Alconbury Ltd v Secretary of State for the Environment, Transport and the Regions* [2000] 2 WLR 1389 at 1427C.

The biggest impact of the HR Act has been in influencing the formulation of government policy and new legislation, which are the cornerstones of building a strong human rights culture. Government agencies need to comprehensively integrate human rights into the design, implementation and evaluation of programs and services as well as mainstream human rights in the development, interpretation and implementation of policy and legislation. Through a thorough scrutiny process of laws and associated areas, human rights are more likely to be woven into the fabric of law and society in the ACT. Over time more dialogue will infuse public debate, influence public attitudes, shape legislation and improve the conduct of service providers. In this way the vision of building a human rights culture as outlined in the Canberra Social Plan has more chance of success.

In 2005, 78 Bills were introduced into the ACT Legislative Assembly (62 government and 16 private member's Bills) and in 2004, 80 Bills were introduced (60 government and 20 private member's Bills). In 2005, 63 Bills were passed, 1 Bill was discharged and 6 were negatived. In 2004, 50 Bills were passed, 8 were negatived and 10 were discharged (ie, lapsed).[7] This number of ACT Bills, compared to 195 Commonwealth Bills in 2005 and 238 in 2004,[8] is quite significant for a small jurisdiction with only 17 Members of the Legislative Assembly. To properly scrutinise all Bills (and subordinate legislation) in a small jurisdiction with few legal resources is a challenge.

In March 2005 the ACT hosted the 6th Australasian and Pacific Conference on the Scrutiny of Bills, which focused on human rights scrutiny ('Legislative Scrutiny in a Time of Rights Awareness').[9] It is interesting to compare the UK and NZ models of scrutiny in respect of Ministerial compatibility statements and reporting by parliamentary committees. Under s.37 of the HR Act, the Attorney-General must prepare a compatibility statement for all government bills, and under s.38 the Standing Committee on Legal Affairs must report to the ACT Legislative Assembly. This centralised scheme is also used in NZ and includes Private Member's Bills, but is focussed on incompatibility, and many bills (over thirty) have been described as

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7 Found on the ACT Legislation register: http://www.legislation.act.gov.au/b/annual/2004.asp.
8 Found at Comlaw on the Federal AG's website: http://www.comlaw.gov.au/ComLaw/legislation/bills1.nsf/browse?OpenForm&VIEW=&ORDER=bynumber&COUNT=50&START=1&CLASSIFICATION=&CATEGORY=bill-2004.
9 Also the 9th Australasian and Pacific Conference on Delegated Legislation was held in the ACT.

incompatible. However, in the UK the Minister responsible for introducing the Bill performs the function of tabling compatibility statements, and it appears that few Bills have been characterised as not being in compliance with the HR Act. The Victorian Bill adopts the UK system of localised portfolio scrutiny. I do not think that the ACT needs to shift responsibility for compatibility statements to respective Ministers.

In New Zealand, Parliamentary Counsel are directed to send copies of all Government Bills to the Ministry of Justice to be vetted by an officer in the Legal Services Group. Bills promoted by the Ministry of Justice are sent to the Crown Law Office for vetting, to minimise any perceived conflict of interest. In the case of a Private Member's Bill, the Ministry of Justice is required to examine it for consistency as soon as possible. A report is then made to the Attorney-General and the Chief Parliamentary Counsel on whether or not the Bill contains any provisions that appear to be inconsistent. Reports of apparent inconsistency issued by the Attorney-General are publicly available documents, tabled in the House of Representatives and later published. Failure to report an inconsistency would have potentially serious political consequences. All Bills must be referred to a Select Committee for consideration. Also the NZ Law Commission when recommending reform proposals to Government is required to test them against human rights.

The UK Joint Committee on Human Rights was established in 2001 to evaluate human rights implications of Bills, by advising both Houses about whether rights have been fully respected, and to identify provisions where doubts about compatibility remain. The Committee is composed of 12 members drawn from both Houses of Parliament, with representatives from the three main political parties and beyond. The Committee questions Ministers, either orally or more usually in writing, before publishing its report to both Houses of Parliament, on subjects ranging from homelessness to police reform. Its report on the *Anti-Terrorism, Crime and Security Bill 2001* prompted the Home Secretary to make a number of changes to the Bill. A similar process of dialogue occurred in the ACT in relation to the Committee's Report on the *Terrorism (Extraordinary Temporary Powers) Bill 2006*. When a Bill passes from one house to another in the UK, a second compatibility statement from the responsible Minister is required, taking into account any amendments made. For example, the House of Lords made amendments to the *Civil Partnership Bill 2004*

which had features that were considered discriminatory. The responsible Minister changed the statement of compatibility to reflect these amendments, but the House of Commons later removed the incompatibility.

This second formal step is not necessary in the ACT because we have a unicameral system. There is no obligation to report on the compatibility of amendments introduced on the floor of the Legislative Assembly. There is time pressure to get the Bill through its stages, but these amendments may have a significant impact on human rights, and are not covered by the Attorney-General's compatibility statement. It would be useful if there were a requirement on the Attorney-General to report on any incompatibility of finalised Bills.

Some complex and controversial Bills have been preceded by a public inquiry or report where there is an official government response that deepens and widens public debate, such as the *Human Rights Commission Act 2005* which was influenced by the 2003 Report of the Foundation for Effective Markets and Governance (FEMAG) *Review of Statutory Oversight and Community Advocacy Agencies* and the Government's 2004 response, *The Right System for Rights Protection*. This follows the growing trend in other jurisdictions towards releasing draft Bills for public consultation before introducing them to Parliament, thus increasing the scope for making influential contributions on the protection of human rights.[10]

The number of Cabinet Submissions in the ACT is high, including not only Bills, but also policy proposals that may lead to legislative implementation. In some cases the Human Rights Office is given access to draft Cabinet Submissions and our advice to the Minister (or Department) on human rights issues in draft Bills, such as one enabling emergency involuntary electro-convulsive treatment, may support the Bill being released as an exposure draft, to enable further community consultation. Our practice on providing confidential comments on draft Cabinet Submissions has changed over the time the HR Act has been in operation, in that we now prefer open and less time–pressured consultation that can be shared with the community. I also prefer a process whereby I am assured that the Attorney-General and responsible

[10] See David Feldman, 'The Impact of Human Rights on the UK Legislative Process', 25 -91 (2004), at 107.

Minister receives our advice, rather than it being screened by the agencies involved in preparing or responding to the Cabinet Submission.

(b) Could the dialogue be made more effective by changes to the HRA?

The main criticism of the scrutiny process in the dialogue model 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. We recommend that the Attorney-General be required not only to report on the compatibility of government Bills on their introduction, but also to report in the ACT Legislative Assembly on any **in**compatibility in finalised Bills (which is less onerous than compatibility and similar to the NZ model referred to above).

The UK Joint Committee on Human Rights found that it could not satisfactorily undertake its scrutiny role without more specific information and recommended that Ministers should provide a Human Rights Memorandum on Bills (without divulging legal advice to the Government), that at least includes:

- identification of the rights engaged by the specific provisions of the Bill;
- explanation of the reasons why there is no incompatibility with those rights;
- clear identification of the pressing social need relied on to justify any interference with rights that are qualified;
- assessment of the likely impact of the measures on the rights engaged;
- explanation of the reasons why any interference with those rights is justified; and
- citation of the evidence taken into account in the Department's assessment.[11]

We support this view, and recommend that the HR Act require more details to be included in the Attorney-General's compatibility statements. We also recommend that this amendment proceed quickly rather than waiting for a more general review in three years time. Although I support the current practice of some details being included in Explanatory Statements and more detailed letters written to the LA Standing Committee on Legal Affairs (and appended to their reports), I do not think

[11] Joint Committee on Human Rights, *The Work of the Committee in the 2004–2005 Parliament*, Nineteenth Report of Session 2004–05 para 78.

that these are sufficiently detailed or accessible. The UK Joint Committee on Human Rights found that the peak of implementation of the *Human Rights Act 1998* was in 2002, within the first two years of its operation (although unlike the ACT there was also a two year phasing in period):

> We have not found evidence of the rapid development of awareness of a culture of respect for human rights and its implications throughout society, and what awareness there is often appears partial or ill informed. We fear that the high-water mark has been passed, and that awareness of human rights is ebbing, both within public authorities and within the public at large.[12]

In 2005 the Joint Committee noted agencies' failure to properly understand the changes necessitated by the new human rights regime, the lack of 'central mechanisms within the Government to ensure that all Departments follow best practice in implementation of the HRA, and fully embrace the principles of human rights in their delivery of services to the public.'[13] This was one of the driving forces for the Joint Committee recommending that a Human Rights Commission be established – the ACT regime at least has started with an independent and expert monitor by extending the mandate of our Office. The UK *White Paper - Fairness for All: A New Commission for Equality and Human Rights* (2004) highlights the need for a centre of expertise to monitor, champion and promote human rights that can educate the public about the principles behind the legislation, and attempt to develop systemic change. The UK Commission for Equality and Human Rights is to be established in phases under the *Equality Act 2006*.[14]

I do not recommend that the Act be amended to include specific references to responsibilities, as is the case with the 2006 Victorian Bill (see below). Responsibilities are inherent in human rights as stated in the HR Act's Preamble: 'This Act encourages individuals to see themselves, and each other, as the holder of rights, and as responsible for upholding the human rights of others.' An ACT Private Member's Rights and Responsibilities Bill was defeated in 2004 as it made inalienable rights contingent on responsibilities – such an approach has also been largely unsuccessful at the international level as it is considered oppressive.

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[12] Joint Committee on Human Rights, *6th Report,* session 2002-3, p.6.
[13] Joint Committee on Human Rights, *19th Report*, 2004-5, para 139.
[14] The Act received the Royal Assent on 16 February 2006. See http://www.cehr.org.uk/news/.

(c) What other changes would strengthen the growth of a human rights culture?

Some anomalies have also become apparent in the first year of the Act's operation because it does not apply to Federal laws, such as:

- there is no ACT evidence legislation, as only the Federal *Evidence Act 1995* is applicable (which is replicated in other jurisdictions) – this would be remedied by enacting an ACT Evidence Act using the model scheme; and
- the Australian Federal Police can use Federal (or common) law rather than ACT powers when arresting and charging defendants, such as protestors – part of the formula in funding agreements could be contingent on having an acceptable range of ratios of using these sources of powers.[15]

Many publications on human rights focus on the power of the Supreme Court to issue declarations of incompatibility under s.32 of the HR Act. Only 17 declarations were issued in the UK in 2000-05, and some commentators have referred to them as 'booby prizes' that parties do not want, as neither of them win - in the case of the applicant there is no remedy; and the respondent government is usually embarrassed. A bigger influence, however, will eventually be in ACT courts and tribunals 'reading down' legislative provisions to be consistent with the HR Act. A simple example is the case *Mendoza v Ghaidan* where the UK Court of Appeal read down the words 'as his or her husband and wife' to 'as if they were his or her husband and wife' to avoid discriminating against same sex or de facto couples in respect of succession to protected rent tenancy.[16] The ACT Court of Appeal referred to this UK decision in regard to legislative directions to prefer an interpretation that is consistent with a policy objective, for example as required by s.30 of the *Human Rights Act 2004*.[17] More complex human rights interpretation issues are likely to be raised in Courts of Appeal, compared to trials at first instance where evidential and procedural matters are usually dealt with quickly.

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[15] Professor Simon Bronitt recommended that AFP key performance indications should include higher standards of human rights compliance for ACT matters: 'Human Rights Interpretation and the Criminal Law', Australia's First Bill of Rights: A Forum on the National Implications of the Act Human Rights Act, Centre for International and Public Law (ANU), and Gilbert and Tobin Centre of Public Law (UNSW), Canberra, 1 July 2004.

[16] [2002] EWCA Civ 1533.

[17] *Kingsley's Chickens Pty Ltd v Queensland Investment Corporation and Canberra Centre Investments Pty Ltd* [2006] ACTCA 9 (2 June 2006).

Another provision that is rarely used is the power of the Attorney-General to intervene by right under s.35, and the Human Rights Commissioner by leave under s.36 of the HR Act. These provisions were invoked in 2005 in a case in the Supreme Court where s.51A of the *Domestic Violence and Protection Order Act 2001* was challenged on the grounds that it is incompatible with the rights of fair trial and liberty. We argued that s.51A was designed to streamline cases, but had gone too far through bypassing the right to a hearing before an interim order was made final for 12 months, and recommended an interpretation including a right to a hearing rather than issuing a declaration of incompatibility. In his decision in *SI v IS* (2 December 2005) Chief Justice Higgins did not refer to these interventions, but implied a right to a hearing using in part the Magna Carta. The Chief Justice noted that the Attorney-General had issued a compatibility statement and must have intended the new provision to be human rights compliant. The written submission in this case, prepared by the former Human Rights Legal Advisor, Dr Rowena Daw, is available on the HR Office website. Legal practitioners have found this a useful example of how a detailed human rights argument is researched and framed.

Under the proposed Victorian model, a law expressly overriding human rights will prevent a Declaration of Incompatibility being issued by a court for five years. We do not recommend that this provision be introduced into the ACT HR Act. The HR Office is preparing a protocol about exercising the Commissioner's discretion to apply for leave to intervene, referring to the Federal HREOC's Guidelines in this area. There is of course a need for further avenues of independent advocacy, given our limited legal aid budget and overloaded small community legal centres, such Welfare Rights and Legal Centre, and the Women's Legal Centre.

In the case of incompatible subordinate legislation, the courts may strike it down if the principal authorising Act is human rights compliant. Regulations could easily be found to be *ultra vires* using ordinary administrative law principles, as has occurred in NZ.[18] However, for clarity we recommend that the HR Act be amended to specify that subordinate legislation can be struck down for being incompatible. Also for clarification we recommend that some rights are recognised as non-derogable rights,

[18] *Drew v Attorney-General* [2002] NZLR 58.

such as torture, and should therefore not be subject to limitations under s.28 of the HR Act.

(d) Are the audits by the Human Rights Commissioner an appropriate and effective way to review laws for compliance with the HRA?

An obvious touchstone for our real commitment to respecting, protecting and fulfilling human rights is how we treat people held in detention by the government. The human rights audit of Quamby, the ACT juvenile detention facility, was an important milestone in implementing human rights, and we did not uncover gross human rights breaches in our systemic investigation. However, a surprising finding was that Quamby had not been operating under a proper legislative basis since self-government in 1989, despite several Legislative Assembly Committee Reports and an inquest. This situation was clarified by amendments to the Children and Young People Act and various disallowable and notifiable instruments, enacted before the government released the Report. Victoria Coakley, the former Human Rights Legal Advisor, performed the main research and drafting of the 95-page report in the very short time frame of May-June 2005. The HR Office also made the most of limited resources by working with the support of the Office for Children, Youth and Family Support in the Department of Disability, Housing and Community Services, which funded an expert human rights legal consultant, Jane Hearn, to assist with technical and empirical research and drafting. The audit reported on issues relevant to humane treatment (including strip searches, surveillance, periods of lockdown, seclusion and conditions of detention), and other issues such as communication with the outside world, complaints systems, discipline resulting in loss of remission and privileges, mixing of young people who are of different ages, gender and status (convicted and remandees). The audit made 52 recommendations for change, 25 of which have been accepted in full by the government and the remaining 27 in principle. The Office is monitoring implementation, including through new draft Standing Orders, which we will report on annually.

Jon Stanhope, the ACT Chief Minister commented on the impact of this audit at the HRO fourth Human Rights Community Forum on 1 May 2006:

> The human-rights audit of the Quamby Juvenile Detention Centre by the Commissioner last year was a perfect, practical example of a dialogue system at work. The process was conducted in such a collaborative way that by the

> time the final report was written, most of its recommendations had already been acted upon. This, surely, is a result worth any number of front-page Supreme Court judgments exposing rights abuses against juvenile offenders. In fact, I believe that those who criticise the Human Rights Act according to the somewhat tortuous argument that it has *not* resulted in dozens of stern judgments or screaming headlines misunderstand the intent of the law, which is to promote a human-rights culture that would regard such a headline as a *failure of process*, more than a signal of success. 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.

The audit function has been the most powerful in achieving systemic change at legislative as well as practical levels. We will report annually in the implementation of the audit recommendations. Prisons are not required to be democracies, as they operate effectively under a clear chain of command and discipline, but consultation with users is important. The next audit planned by the Commissioner will be of Belconnen Reman Centre, in co-operation with Corrections ACT, and informed by the ACT Ombudsman's approximately 100 complaints per annum, and observations from weekly visits. Because the HR Act does not have extra-territorial effect, ACT prisoners housed in NSW prions cannot use it to protect against human rights breaches, such as inhumane treatment. After the Alexander Maconochie Centre (AMC) is completed I recommend that the Belconnen Remand Centre should be bulldozed, like its architectural relative, Katingal in Sydney. The HR Office is a member of the Human Rights Working Group convened by the Director of the Prison Project, John Paget. We also have had input to the design of the new youth detention facility. In both institutions we are committed to monitoring human rights of detainees to the extent our resources enable to do this.

<u>(2) Direct application to ACT agencies and right of action</u>

(a) Should the HRA provide that ACT government authorities must act consistently with the human rights in Part 3 of the HRA?

In our view not only ACT 'government authorities' should be required to act consistently with human rights, but we support the Consultative Committee's view that any body exercising a 'public function' should be bound. Recognition of public interest in the performance of functions, and the extent to which the function itself engages human rights, are vital ingredients of a public function test (also see Appendix A regarding clause 4 of the Victorian Charter of Human Rights and

Responsibilities 2006). Dr Daw's examination of the experience in overseas jurisdictions that have incorporated a 'public authority' or 'public function' concept into their human rights statutes, identifies some key issues for this Review.

We have an opportunity in the ACT to strengthen the HR Act by providing that bodies or organisations carrying out functions for which the government has accepted responsibility in the public interest, have a duty to act consistently with human rights.[19] This would provide clearer direction to government agencies and other public and community service providers about their obligations, and make a positive contribution to the development of a human rights culture. Our survey of agency annual reports (see Appendix B) indicates that ACT agencies have not yet seriously fulfilled their obligations under the HR Act using the current interpretative model. We support the Consultative Committee's recommendation that as well as incorporating human rights standards into agency 'acts and practices', remedies for breaches must be available. The NZ *Baigent* principle of implied remedies eg injunctive relief, tort damages, breach of statutory duties, needs to be explicitly set out in the HR Act, rather than waiting for a Supreme Court case on this issue.

In the UK, courts are included as public authorities, which enables the common law to be interpreted consistently with human rights in private litigation, such as tort,[20] and has led to the development of new principles such as privacy.[21] We agree with the ACT Consultative Committee recommendation that 'all law be interpreted to be consistent with human rights…[to] allow the common law to be developed in light of international standards.'[22] This recognises the evolution of the UK common law using human rights jurisprudence, and it is difficult for Australian jurisdictions without human rights legislation to disentangle these strands, especially with the concept of one intra-national law in Australia.[23] Lord Carswell in the January 2005 issue of the *Australian Law Journal* described the impact of the *Human Rights Act 1998* on the

[19] See the report of the UK Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act,* Seventh Report of Session (2003-2004), paras 140-14.
[20] *Venables and Thompson v News Group Newspapers Ltd* [2001] 2 WLR 1038.
[21] *Campbell v MGN Ltd* [2004] UKHL 22.
[22] Bill of Rights Consultative Committee Report *Towards an ACT Human Rights Act* (2003), para 4.54.
[23] *Pfeiffer v Rogerson* (2000) 172 ALR 625.

UK judiciary and profession as 'seamless', and that the avalanche of litigation expected did not occur.[24] Justice Terry Connolly of the Act Supreme Court said:

> 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. Lawyers of my generation and older were of course familiar with keeping up to date with developments in the common law by reading the Appeals Cases. That is of course no longer a common practice, as the common law of Australia is whatever the High Court says it is. As a consequence I suspect that most of us have got out of the habit of perusing the English Appeals Cases. For Canberra practitioners seeking a better understanding of the Human Rights Act, much guidance can be obtained from re-acquainting ourselves with UK jurisprudence.[25]

(b) Should the HRA provide a direct right of action to the courts to enforce human rights compliance by ACT government authorities?

The HR Act uses a statutory interpretation model (similar to the NZ *Bill of Rights Act 1990*), which is more difficult to explain to the community than the direct right of action in the courts model (as is contained in the UK *Human Rights Act 1998,* as well as the interpretative provision). In our experience of providing human rights education and training over the last two years (the Human Rights Office responded to invitations to speak on the HR Act before it came into operation on 1 July 2004) the 'interpretative 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 an understandable way to ordinary people.

The technical position is that s.30 of the HR Act requires that interpretations of ACT laws that are consistent with the civil and political rights listed in the Act, are 'as far as possible to be preferred'. It requires that the interpretation of an ACT law by any person or body, such as a court or a public servant, is to be consistent with human rights. Unfortunately there has not been a definitive judgement in the ACT Supreme Court to clarify exactly how s.30 operates in the context of the purposive approach required under section 139 of the *Legislation Act 2001 (ACT).* Section 30 may also be supported by the High Court's 'legitimate expectation' approach in *Teoh* requiring administrative decision-makers to take international human rights conventions into

[24] (2005) 79 ALJ 1 at 36.

[25] 'Practicing Criminal Law Under The Human Rights Act – No Rogue's Charter', Conference Of Australian Prosecutors' Canberra - 14 July 2005.

account in their decisions.[26] The Victorian Court of Appeal recently endorsed this principle.[27]

A breach of the standards in the HR Act in executive decision-making can provide a basis for review by the courts. For example, a remedy can be sought under the *Administrative Decisions (Judicial Review) Act 1989,* where a decision-maker exercises a discretion, performs a duty or makes an administrative decision as an error of law, is otherwise contrary to law, or fails to take into account a relevant consideration. In the UK, the Public Law Project has noted that half of AD(JR) cases concern human rights (mainly in the areas of immigration and asylum, and mental health), but arguments are not well developed and tend to be tacked on without adequate research.[28] Human rights terminology, such as 'proportionality' (using s.28 of the HR Act) is not dissimilar to judicial review principles of 'reasonableness' (*Wednesbury*).[29] However, AD(JR) litigation is not accessible to ordinary people, and ACT lawyers do not use administrative review routinely. International human rights jurisprudence is also not well understood, and overseas resources such as legal textbooks and loose-leaf services are expensive as well as difficult to obtain.

As Spiegelman, CJ pointed out in 1999, the American Bill of Rights jurisprudence is virtually incomprehensible to Australian lawyers.[30] Many lawyers considered the late Lionel Murphy's use in the 1980s of US precedents in the High Court to be out of step with the rest of the judiciary. It is quite likely that in the future British, Canadian and New Zealand cases may become increasingly less relevant because of Australia's lack of a national Bill of Rights. However, by enacting the *Human Rights Act 2004*, Canberra is hopefully paving the way towards global inclusion rather than isolation. Victorian precedents are likely to develop more quickly and widely than the ACT, simply because of the larger population. The High Court's treatment of ACT and

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[26] *Teoh -v- Minister for Immigration, Local Government and Ethnic Affairs* 1994-95 183 CLR 273.
[27] *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 (20 April 2006).
[28] The Public Law Project, *The Impact of the Human Rights Act on Judicial Review: An Empirical Research Study* (2003).
[29] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.
[30] NSW Parliamentary Debates, 23 November 1999, p.3523, found in Gareth Griffith, 'The Protection of Human Rights: A Review of Selected Jurisdictions', Briefing Paper 3/2000, at: http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/64C47BC4A6FCA94ACA256ECF00072EC0.

Victorian cases, compared to other Australian jurisdictions without a Bill of Rights, will be of great interest.

Several organisations have also suggested that the HR Office be empowered and resourced to handle human rights complaints, an issue that was not specifically considered by the ACT Bill of Rights Consultative Committee. The only jurisdiction we are aware of that handles human rights (as opposed to discrimination) complaints, as well as systemic work is South Africa. We do not think that it is appropriate for the Human Rights Commissioner to handle human rights complaints, many of which are *sub judice,* especially in the criminal area. Courts and tribunals have determinative powers, which is not part of the Discrimination Commissioner's existing role when investigating and conciliating complaints.

(3) Building a Human Rights Culture

(a) How effective are existing mechanisms in raising awareness of human rights?

ACT government agencies' acceptance of the HR Act has been uneven. Some even sought independent legal advice (from administrative rather than human rights law experts) to oppose its introduction and possible extension. There was similar resistance by Federal agencies in the 1980s to 'new administrative law' mechanisms such as freedom of information, privacy and AD(JR) legislation. Arguments were made that these laws were the 'thin edge of wedge' and there would be a 'loss of fearless advice'. In fact these laws are now routine and acknowledged to have had a positive normative effect on decision-making in most areas, but less so in the areas of immigration or refugee law where access to judicial review has gradually decreased for more than a decade.

An Inter-Departmental Committee was established in the first six months' of the HR Act's operation by the ACT Department of Justice and Community Safety, to facilitate compliance of policies, legislation and practice with the Act, such as requiring a section on human rights issues in draft Cabinet Submissions. The Department's website also contains useful publications, including a Plain English Guide to the HR Act, and Scrutiny Guidelines to assist agency decision-makers draft policies and laws that will be human rights compliant.[31] The obligation for agencies

[31] http://www.jcs.act.gov.au/humanrightsact/indexbor.html

to report on measures they have taken to encourage respect, protection and promotion of human rights in their Annual Reports shows patchy progress. However, some agencies are beginning to work proactively. For example, some amendments of health laws are to be tabled in the Legislative Assembly later in 2006, such as the *Public Health Act 1997.* They were identified as needing reform in the independent audit performed for the Department of Health by the Castan Centre for Human Right at Monash University. In the Department of Education's Annual Report it undertook to have an independent human rights audit in the 2005/06 period.

In looking at some agencies' Annual Reports, their central work can be categorised as human rights protective, and they have labelled some general principles as human rights initiatives. For example the ACT Auditor General's Office reported its human rights measures as consisting of procedural fairness, Public Interest Disclosure cases, inclusive management, Certified Agreement conditions of employment and Equity & Diversity Guidelines. Its work such as the *Performance Audit Report on Courts Administration* (2005) is very relevant to the right to a fair trial – the subject of an advice the Human Rights Office provided to the Attorney–General on delays involving 20 detainees at the Belconnen Remand Centre, where they had been held for more than 100 days.

It is interesting to compare the situation in the UK. Training and professional development in the two-year period between enactment and operation of the Act was central for agencies to develop human rights principles as the framework of service delivery. However, the UK Audit Commission's Report of 2003 found that cultural change had been achieved mostly in public authorities that were exposed to human rights litigation (such as the police), but half of the agencies still had no systematic arrangements to achieve compliance.[32] A major challenge has been to move service providers from a charity model to a human right framework. The British Institute of Human Rights highlighted this lack of government agencies using a human rights framework for delivery of services. It's 2004 Report, *Something for Everyone: The Impact of the Human Rights Act and Need for a Human Rights Commission* focuses on the need for public education and advocacy in the UK.[33] Existing monitors are

[32] Found at: http://www.dca.gov.uk/hract/acrep03.pdf.

[33] Found at: http://www.bihr.org/pdfs/Something%20for%20Everyone%20-exec%20summary.pdf.

beginning to use human rights benchmark for their systemic work, eg prison inspectorates.

(b) What methods might be used to improve awareness, particularly to engage the legal profession, the community sector, and the wider community?

Engagement with the community is central to improving the human rights of vulnerable populations whose rights have traditionally lagged behind the general population and are difficult to reach, such as people with a non-English speaking background, Aboriginal and Torres Strait Islanders, people with disabilities (including mental illness), the aged and people living in poverty. The HR Office's work in relation to biannual Community Forums has been influential in raising consciousness. However, more human rights awareness work needs to be done with key opinion leaders in order for them to be well-informed, such as private businesses, media and churches.

Professor Janet Heibert from Queens University Kingston, Canada visited the ACT in 2005 while working on her comparative academic studies on scrutiny mechanisms. She commented that the Canadian Charter of Rights and Freedoms was so entrenched in popular culture that it could be obtained free in a small booklet format at gas stations – teenagers in particular found this made the Charter more accessible. We support trying workable methods such as these in ACT.

Within the ACT various NGOs and government agencies are developing their own specific Charters of Rights, for example in the areas of homelessness, mental health, disability and carers. We encourage these targeted initiatives, which generate ownership and relevance to these communities, as long as these Charters at least meet, or are above, the HR Act benchmarks.

The National Judicial College provided initial training for the ACT judiciary and the Law Society produced a special issue of Ethos in 2005 Law Week where the theme was human rights. The Human Rights Commissioner has also given seminars to the legal profession, for example for Continuing Legal Education, and presentations to the Women Lawyers' Association of the ACT, as well as university students. It is more difficult to reach inter-State senior counsel who appear regularly in the ACT.

The ACT has recently announced several law reform initiatives that deepen compliance with human rights, such as recognising civil unions of same sex couples similar to laws enacted in the UK. The ACT government's commitment does not go as far as Spain and Canada which enacted national laws in 2005 recognising civil marriage, but not requiring it to be a religious sacrament. However, the ACT proposal goes beyond a simple registration scheme, eg Tasmania, and reinforces early legislation, including the *Domestic Relationships Act 1994*. The proposed law promotes rather than diminishes the family unit – all the law does is fairly recognise current realities and helps destigmatise members of these families, including children.

Critics of law reform based on human rights often state that it is an inadequate response to human rights concerns simply because of poor law enforcement. Extra-legal enforcement of human rights is important, but law is a necessary, although not sufficient step towards compliance by protecting human rights. It is important to remember that good law reform may not fully represent human rights compliance.

(5) Economic, Social and Cultural Rights

A primary argument for supporting economic, social and cultural rights ('ESCR') 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. ACT Shelter's Housing is a Human Right Campaign launched on 16 March 2006 is very effective. Stories are set out on accessible postcards, such as – 'If I could have stayed in Burma I would have had a house, but I couldn't vote. Here is Australia I can vote, but I have nowhere to live. What rights do we have if we don't have somewhere to sleep? If we have somewhere to sleep we have things we can dream.'

ESCR also interact with each other, for example in the case of shelter:

- work – if you sleep rough in car or in the open, it is difficult to be 'presentable' for employment;

- health – it is hard to afford to see a doctor or buy medicine if you have nowhere to live and food is the priority in surviving;
- education – how can you get to school on time and do well if you have not slept well and you and your parents can't afford to buy books and a computer?

The Universal Declaration of Human Rights (1948) includes both economic, social and cultural rights, and civil and political rights. In the 1960s these rights were split into two separate Covenants, due to political and philosophical (liberal and socialist) differences between superpowers in the Cold War. Traditionally ESCR have been given the 'poor relations' status in terms of enforceability. There have been differences in terms of immediacy of obligations (some ESC rights are to be achieved progressively and subject to available resources), and methods of monitoring and implementation (individual communications can be made to the Human Rights Committee under an Optional Protocol of the ICCPR, but no similar mechanism yet exists under the ICESCR). However, more recent treaties include both sets of rights without distinction, for example the Convention on the Rights of the Child. Also, the Vienna Declaration adopted by the UN World Conference on Human Rights in 1993 confirms that all rights are universal, indivisible, interdependent and interrelated.

Implementing both sets of rights has resource implications. Both sets of rights include positive (commission) and negative (omission) obligations. Principles have been developed for interpreting both sets of right, particularly looking at possible limitations: the *Limberg Principles* for ESC rights (1987) and the *Siracusa Principles* for civil and political rights (1985). The UN has held workshops on monitoring implementation of rights through indicators to measure performance, for example on ESC rights (1993) and civil and political rights (1999) by the UN High Commissioner for Human Rights, and the World Health Organization (WHO) in the right to health (2003). Mostly rights are specific enough to be 'justiciable', that is capable of being invoked in a legal action and a suitable basis on which to conduct judicial or administrative review by a court or tribunal. However, 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.
It is clear that ESCR are highly valued - a 1997 survey of Citizenship in Australia found that people rated the rights to a fair trial, education and health care as the three

most important rights (in that order). The survey found that rights perceived to be under threat were health care, work, and public safety and protection (in that order).[34] Although both sets of rights are of equal formal status and importance in principle, there were potential local practical difficulties in resourcing and timing for including ESCR rights in the HR Act. Many of these rights involve crossover of ACT responsibilities with Federal matters (such as housing, health and education). On the other hand, Federal agencies deliver services under contract with the Territory with appropriate classification of responsibilities, for example the Ombudsman, Privacy Commissioner and the Australian Federal Police.

Some civil and political rights in the HR Act have already had an 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 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. The right to freedom from forced work (s.26) is connected with the ESCR rights to strike, and to form and join trade unions.

To take a more detailed example, the ESCR of housing engages at least two civil and political rights. Firstly, s.12 of the HR Act, the right not to have privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Secondly, s.11(1) provides that the family is the natural and basic group unit of society and is entitled to be protected by society, and (2) every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. There are numerous cases on housing under the UK and European human regimes in respect of evictions,[35] obligation to ensure conditions not uninhabitable,[36] review rights,[37] information privacy,[38] and planning.[39] The ACT AAT case of *Merritt v Commissioner for Housing* (2004) concerned the rights of the child and family. Whilst the case was unsuccessful, the Tribunal stated that if it had granted the applicant's request this may breach obligations under the HR Act to another family or

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[34] University of Tasmania, Centre for Citizenship and Education (1998).
[35] *Gallagher v Castel Vale Action Trust* (2001) and *Sheffield County Council v Hopkins* (2001).
[36] *Lee v Leeds City Council* (2002).
[37] *R v Bracknell Forest District Council* (2001).
[38] *Tucker v Sec State Social Security* (2001).
[39] *First Secretary State v Chichester District Council* (2004).

child in more urgent need of accommodation, for example homeless, that were unable to be assisted. The Supreme Court in the controversial Canadian Charter case of *Chaoulli v Quebec* found that legislation prohibiting private medical insurance violated civil and political rights, including liberty and security of the person.[40]

According to the World Health Organization, 70 countries recognise the right to health in their Constitutions. Courts in several South American countries (for example Argentina Brazil, and Costa Rica) have found that the right to health encompasses the right of access to treatment in the area of HIV/AIDS, and the manufacture of a vaccine for haemorrhagic fever. In the Netherlands the right to health was held to be violated by the refusal to grant a claim for subsidy in respect of psychosocial help.[41] At the regional level the Inter-American Commission of Human Rights has held that withholding medical care of a tribe during an epidemic violated the right to health.[42] Similarly the right was held to be violated where indigenous people were infected by new contagious diseases when mining companies built a highway through the peoples' land, without providing timely and adequate medical assistance.[43]

Despite advances in health technology and research, underlying civil, cultural, economic, political and social conditions are the major determinants of human rights conditions and health levels. A human rights framework goes beyond the simplistic notion of socio-economic status as a determinant of health with its limited explanatory power, and provides a coherent framework for societal change. The General Comment of the CESCR on the Right to Health in 2000 clarifies the intent, meaning and core content of this right. The Special Rapporteur on the Right to Health, Paul Hunt, issues annual thematic reports that highlight implementation of this right. In his first report he set out four important principles in assessing progressive implementation of the right to health: availability (for example, the existence, affordability and location of services); accessibility (such as non-discriminatory

[40] *Chaoulli v Quebec* [2005] 1 SCR 791.
[41] B.C.A. Toebes, *The Right to Health as a Human Right in International Law* (1999).
[42] Case 1802 (Paraguay) *Annual Report of the Inter-American Commission of Human Rights* (1977), p36.
[43] The Yanomami Case, No. 7615, Inter-American Commission of Human Rights, Res. No. 12/85, CHR 24, 213, OEA/ser.L/V/II.66, doc. 10 Rev. 1 (5 March 1985).

services), acceptability (for example quality); and adaptability (for example relevance of service to the population in overcoming barriers, such as family responsibilities).[44]

Advocates in the ACT need to recognise that, according to international standards, the economic, social and cultural rights such as housing and health are being seen as increasingly justiciable, but subject to available resources and progressive realisation. Relevant South African cases include *Grootboom and Ors v The Government of the Republic of South Africa and Ors,* where the Constitutional Court found that the state has the duty to provide shelter where primary parental duties cannot be fulfilled (where the child is either removed, orphaned or abandoned by family, for example, if the child has HIV).[45] The court held that a housing program that did not cater for cases of desperate and immediate need (that is, squatters), could not fulfil their obligation to take 'reasonable measures'. In the case *Soobramooney v Minister of Health (Kwazulu-Natal)*[46] the Constitutional Court found that the State was not required to provide dialysis, as not prioritising treatment of terminal illnesses maximised care to more patients in a state with an overspent health budget. More recently, in the case *Minister for Health v Treatment Action Campaign* the Constitutional Court found that the government was required to provide single doses of the antiretroviral drug Nevirapine in the public health sector to HIV-positive pregnant women and their babies at birth, in order to prevent intra-partum HIV transmission, including reasonable measures for testing and counselling.[47]

(6) Environmental protection

(a) Are environmental-related rights sufficiently protected through existing civil and political rights in the HRA?

The second Human Rights Community Forum, held on 1 July 2005, the first anniversary of the commencement of the *Human Rights Act 2004* (ACT) considered the question of environment-related human rights posed in s.43(2)(b) of the Act. The paper circulated to participants for this purpose is attached as Appendix C, although I note it is already referred to in the Discussion Paper. It explores the extent to which

[44] Report of the Special Rapporteur, Paul Hunt (2003). *The Right of Everyone to the Enjoyment of the Highest Available Standard of Physical and Mental Health*, UN Doc. E/CN.4/2003/58, 13 February 2003.
[45] CCT 11/00 (2000).
[46] CCT 32/97 (1997).
[47] CCT 8/02 (2002)

environment-related rights may be encompassed by the civil and political rights recognised in the HR Act. There is some scope for applying the current provisions of the HR Act to the protection of the environment, particularly where the right to life and the right to privacy are involved.[48]

(b) Would environmental-related rights be better protected if socio-economic rights were incorporated into the HRA?

Incorporating social, economic and cultural rights into the HR Act would in my view be likely to increase the potential for improved protection of environment-related rights. In particular, recognising the right to the enjoyment of the highest attainable standard of physical and mental health is likely to strengthen those aspects of environmental rights that have direct implications for human health and wellbeing.

(c) Are environmental-related rights sufficiently protected through Assembly Committee processes?

The Community Forum paper suggests that the Standing Committee on Planning and the Environment could be routinely nominated to scrutinise environment-related bills for human rights issues and report to the Legislative Assembly, in accordance with s.38(2)(a) of the HR Act. I support this proposal.

(d) Is there adequate oversight of environmental-related rights by the Commissioner for the Environment?

The Commissioner for the Environment is obliged like other ACT Government agencies to comply with the HR Act in performing its functions. I note that the Commissioner's Annual Report 2004-2005 states "Our Office in its role as environmental ombudsman embraces the principle of human rights in that people who have complaints that have not been adequately resolved by other agencies may approach the Commissioner in an effort to resolve the matter." The report also notes that the staff have not had any formal human rights training and have not conducted any human rights audits (pp.60-61). It may be unrealistic to expect the Commissioner for the Environment to take a more active role in monitoring human rights compliance

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[48] The European Court of Human Rights has taken a broad approach to the meaning of 'private life' and has accepted that intrusions into the public sphere through environmental damage may interfere with an individual's private life. See for example *Rayner v United Kingdom (1986) 47 DR 5* where it was found that a complaint about air traffic over the applicant's home came within the ambit of the right to private life, although decided the interference it was justifiable (Blackstone's 3rd Ed, p.159).

regarding the environment within current resources. It would also not be possible for the Human Rights Office (or Commission) to take on an expanded role in relation to oversight of environmental rights.

(7) Conclusion

With nearly two years' operation of the HR Act in the ACT, our experience is that it takes time and effort to build a human rights culture, but that positive improvements are already noticeable. There has been an increase in awareness of human rights principles, for example more informed debate and scrutiny of proposals, such as anti-terrorism legislation. Law is very necessary, but alone is not a sufficient step towards compliance with human rights standards.

Protection of human rights should be above partisan politics, but of course there will be strong and varying arguments about what mechanisms should be used to implement and monitor them. There has not been as much resistance and controversy surrounding anti-discrimination laws, even decades ago, for example when the *Race Discrimination Act* was enacted by the Federal government in 1975.

Human rights legislation has a substantive and symbolic impact, but it is not a magic bullet to solve all problems. The HR Act is a source of inspiration and focus for social change, and a measure against which our local laws and actions can be compared to international standards in order to move forward and prevent backsliding. The challenge for the Human Rights Office is to be proactive and responsive to human rights issues that are raised in the ACT. The Office's work has already started to engage the community in debate by raising human rights awareness in our daily lives.

ACT government agencies need to comprehensively integrate human rights into the development, interpretation, implementation and evaluation of policy, programs, legislation and services. Annual Reports by agencies on their activities 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.

The Victorian Justice Statement (2004-2014) committed the government to consider a Charter of Rights and Responsibilities, and the Bill was introduced on 4 May 2006. In

February 2006 the Tasmanian Attorney-General Judy Jackson referred the question to the Tasmanian Law Reform Institute. Similarly, active consideration for a Bill of Rights is happening in NSW by Attorney-General Bob Debus, and in Western Australia under the Attorney-General Jim McGinty (with support from Professor David Malcolm, the former Chief Justice of the Supreme Court). Protection of human rights under the *Legislative Standards Act 1992* (Qld) is weak. In South Australia a Private Member's Bill of Rights was introduced, but failed.

There is little national government support for these initiatives, as the Federal Attorney-General, Philip Ruddock has discouraged States from enacting Bills of Rights and instead encouraged States to seek advice from the Federal HREOC about consistency of legislation with human rights standards.[49] New Matilda has launched a national campaign for a Bill of Rights in States and Territories that will culminate in Melbourne in August 2006**.** Other professional and civil liberties organisations, such as the Australian Lawyers' Alliance, are supportive of a national Bill of Rights. The ACT experience is inspiring and hopeful for these other Australian jurisdictions to forge ahead with better legislative protection of human rights.

Yours sincerely

Dr Helen Watchirs

ACT Human Rights and Discrimination Commissioner

24 May 2006

[49] Malcolm Farr, 'Sates Rights Push Wrong: Ruddock Slams Campaign: EXCLUSIVE', *Daily Telegraph*, 7 April 2006.