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Research School of Social Sciences
Coombs Building #8, Cnr Fellows & Garran Roads
The Australian National University
Canberra ACT 0200
AUSTRALIA

t: +61 2 6125 6040
f: +61 2 6125 1507
e: hilary.charlesworth@anu.edu.au

31 August 2007

Consultation Committee for a Proposed WA Human Rights Act
C/- Department of the Attorney General
GPO Box F317
Perth WA 6841
by email: humanrights@justice.wa.gov.au

Dear Committee,

Re: Consultation on a WA Human Rights Act

Thank you for the opportunity to make a submission to this consultation.

We are currently working on a project, funded by an Australian Research Council Linkage grant, to assess the impact of the ACT *Human Rights Act 2004* ('HRA'), over the first five years of its operation.

The ACT HRA was the first legislative bill of rights in Australia and has now been in force for three years. Given that the model proposed by the WA government draws on the HRA, we believe that the trends emerging from the HRA will be of relevance to the WA consultation.

The Experience in the ACT

1. After a significant process of consultation, the ACT Consultative Committee recommended the adoption of a legislative bill of rights which would give human rights a central position in the development and interpretation of legislation and in the exercise of executive functions. This recommended model was a statutory one rather than a constitutional one, drawing in particular on the New Zealand *Bill of Rights Act* and the UK *Human Rights Act*. If a statute could not be interpreted consistently with human rights, it would continue to operate and would not be repealed by the bill of rights: the most courts could was to issue a declaration of incompatibility. The Committee envisaged that this model would not affect the balance of power between the parliament and the judiciary, but would generate a dialogue about human rights protection amongst all arms of government and the public. This model was the one adopted by the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('Victorian Charter') and is also the model favoured by the WA government.

2. The final version of the HRA was a more limited document than that recommended by the Consultative Committee. In particular, the final version of the HRA did not include
   - a provision explicitly binding all public agencies to act consistently with human rights unless otherwise mandated by legislation;

- a direct cause of action against the government for a breach of human rights;
- rights under the *International Covenant on Economic Social and Cultural Rights* ("ICESCR"), instead limiting the rights protected to those under the *International Covenant on Civil and Political Rights* ("ICCPR").

It appears that this scaling back of the Committee's draft legislation reflected the political difficulties of championing the first bill of rights in Australia, in a context where there were differing views within the government, and criticism from the Opposition that the HRA could be "the most important and potentially most dangerous legislation we have ever seen in this Territory."[1]

3. In hindsight, however, these criticisms appear to have been unfounded. In fact, although there is good evidence to suggest that the HRA is contributing to the creation of a human rights dialogue among the three arms of government, the ACT experience of the HRA has thus far been benign and suggests that an overly cautious approach may actually compromise the effectiveness of a charter of rights in promoting adherence to human rights in WA.

Impact in the Courts

4. Despite fears that the HRA would lead to a large increase in unmeritorious litigation, the HRA has had a relatively minor impact in the courts. To date, the HRA has been referred to in a total of 50 cases: 40 cases in the Supreme Court and Court of Appeal, three cases in the Magistrates Court, one case in the Children's Court, four cases in the Administrative Appeals Tribunal, and two in the Residential Tenancies Tribunal.[2] Consistent with the experience of other jurisdictions, the area in which the HRA has been most often cited in argument has been in criminal proceeding. For example, the HRA has been cited in relation to bail proceedings, challenges to search warrants and the admissibility of evidence, whether the defendant could receive a fair trial in where vital evidence had been lost and whether there was prejudice to the accused in a joint trial. However, cases have also covered a wide range of subject matters, from public housing to planning decisions and defamation.

5. In the majority of these cases, treatment of the HRA was superficial: the HRA was referred to in passing by the judge, but was not considered in any detail and did not have an impact on the final decision. However, there have also been a number of significant cases in which the HRA has been discussed in detail, and in which the HRA has affected the outcome.

6. The most significant case has been *SI v KS*.[3] The case was an appeal against a final protection order made against a child in the Magistrates Court, pursuant to s 51 of the *Domestic Violence and Protection Orders Act 2001 (ACT).* This Act provided that the Magistrates Court could make an interim protection order in the absence of the respondent or his/her representative. If the respondent did not return a written notice of objection at least seven days before the hearing, then the order would become final. The respondent was not aware of the notice requirement, and when he attended court on the hearing date was informed that the order had automatically become final.

7. Higgins CJ granted the appeal and set the final protection order aside. He found that the Act, correctly construed, did not authorise the Deputy Registrar to make the final order. He found that the right to fair trial under s 21 of the HRA would be breached if the court was required to make an order without giving the person subject to the order a fair opportunity to be heard and

[1] ACT, *Parliamentary Debates,* Legislative Assembly, 25 November 2003, 4577 (Bill Stefaniak).
[2] A brief summary of the facts and judgment in each of these cases is available on our website: http://acthra.anu.edu.au/cases/.
[3] [2005] ACTSC 125.

if there was no ability for the court to reconsider an order made in the absence of that person. However, he did not find it necessary to consider a declaration of incompatibility, as he considered that the provision could be interpreted to be consistent with the HRA. He noted that the provisions in question had been given a declaration of compatibility with the HRA by the ACT government and that the Chief Minister had specifically noted that there was a requirement that orders must be sought in a court of law and the potential for a response to be provided. Hence, he interpreted s 51A as empowering, but not mandating the making of a final order in the absence of a written objection, and as not precluding a respondent to an order made ex parte from applying to set it aside.

8. The case is significant for a number of reasons. It is the only case in which a declaration of incompatibility under the HRA has been sought. Detailed human rights arguments, including international and comparative jurisprudence, were presented by the parties, and by the ACT Attorney-General and Human Rights Commissioner, who intervened in the case. The case is also significant for Higgins CJ's apparent use of the interpretive power to overturn the plain meaning of the relevant provision, although this approach has not been repeated in later cases.[4]

9. Other important cases include:
   - *R v Upton*,[5] where proceedings against an adult were stayed (although not permanently) because of delays in the case. Connolly J discussed English and New Zealand authorities, but it was not clear whether the final outcome was based on the right to be tried without delay under the HRA or under the Supreme Court's general power to stay proceedings which would result in an unfair trial.
   - *Perovic v CW*,[6] where proceedings against a child were permanently stayed because the child had not been brought to trial as quickly as possible, as required by HRA s 20(3). In coming to his decision, Magistrate Somes drew on a wide range of cases from England and Europe. This was the first case in which the HRA was the sole basis for the final decision.
   - *Stevens v MacCallum*,[7] where the appellant's conviction was set aside because of a miscarriage of justice due to the incompetence of the appellant's solicitor. Although comparative human rights jurisprudence played a prominent role in the judgment, it was not raised by the court or counsel in the appeal proceedings, and it is unclear whether the HRA actually affected the outcome of the case.

10. These cases show some encouraging signs of the use of the HRA. There are also some indications that the HRA is now being raised by the parties, whereas previously the HRA tended to be noted in the judgment although it had not been argued by the parties. Conversely, there have now been instances where detailed human rights arguments have made by the parties in argument, but not dealt with in any detail in the final judgment.[8]

11. If the WA government is serious in its commitment to improving adherence to human rights, then we believe that it is important that the voice of the court is heard in the dialogue, and not stifled by overly restrictive provisions in the charter. One of the most important new powers given to courts under a dialogue bill of rights is expanded interpretive powers. These provisions allow courts to interpret legislation to be compatible with human rights so far as possible, consistent with the purpose of the legislation.

[4] However it is notable that Higgins CJ does not expressly rely upon the HRA interpretation power, and the issue is slightly clouded by the references to other grounds for the decision, including the Magna Carta.
[5] [2005] ACTSC 52.
[6] CH 05/1046 (Unreported, ACT Children's Court, Magistrate Somes, 1 June 2006).
[7] [2006] ACTCA 13.
[8] See *R v Griffin* [2007] ACTCA 6.

12. We consider that the interpretive power in the WA draft Bill is unduly narrow. The proposed power is contained in s 34 of the draft Bill, which requires that a provision must be interpreted compatibly with human rights only where the legislation is ambiguous or obscure, or when it would otherwise lead to a manifestly absurd or unreasonable result. This provision appears to add little to the common law principle of legality, which presumes that parliament does not intend to override fundamental rights without clear wording.[9]

13. We accept that there may be concerns that a very broad interpretation power might be seen to undermine the principle of parliamentary sovereignty, if it allows the courts to override the clear meaning of legislation as intended by parliament. However, it is important to acknowledge that a Human Rights Act is itself an expression of the intention of parliament, regarding the importance and priority which is to be given to human rights in the formulation and interpretation of legislation.

14. A provision which requires legislation to be interpreted consistently with human rights "as far as it is possible to do so," would provide boundaries to the interpretation power, whilst allowing the Courts to prefer a new human rights consistent interpretation of legislation which might previously have been interpreted in a settled way. It would also be appropriate to allow for the exclusion of a human rights interpretation, where legislative provisions are expressly stated to apply 'not withstanding' the Human Rights Act.

15. We note that despite the provision in section 30 of the ACT HRA that a human rights interpretation may "displace the apparent meaning" of legislation, the interpretation power has generally been used very cautiously in the ACT.[10] This may reflect the rather complex nature of section 30 which directs the Courts to prefer a human rights interpretation of legislation, subject to the requirement in s139 of the *Legislation Act* to prefer an interpretation which best suits the purpose of the legislation over any other interpretation. In our view the clarity of this provision could be improved, and we would instead recommend the interpretive provision included in the draft Human Rights Bill annexed to the Report of the ACT Consultative Committee.[11]

16. A major factor in the lack of engagement with the HRA by the ACT legal profession and judiciary to date appears to be the omission of a new cause of action and remedy under the HRA. Instead, a plaintiff must find another basis for bringing a case, and can then ask the court to interpret any relevant legislation consistently with rights protected under the Human Rights Act. In our view, a WA charter of rights should reflect the clear obligation under the ICCPR to ensure that any person whose rights are violated has access to an effective remedy for this breach. An explicit right of action was omitted from the ACT HRA based on concern that to include a remedy would open the floodgates to a wave of unmeritorious litigation. Rather, the mere trickle of activity that has occurred under the HRA may call into question its ability to generate dialogue between the courts and parliament, and to provide accountability for the government's implementation of human rights.

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[9] See eg *Coco v The Queen* (1994) 179 CLR 427 at 437. See also Spigelman CJ 'Statutory Interpretation And Human Rights', address to the Pacific Judicial Conference Vanuatu, 26 July 2005, available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speech_spigelman260705

[10] See eg *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122 and *Z v Commissioner for Housing* [2007] ACTAAT 12. The case of *SI v KS* [2005] ACTSC 125 is a notable exception, however in that case Higgins CJ does not expressly refer to the interpretation power, and also relied on other grounds (such as the Magna Carta) to determine the meaning of the legislation in question.

[11] *Towards an ACT Human Rights Act: Report of the ACT Bill of Rights Consultative Committee*, May 2003, Appendix 4, p4, clause3.

17. We acknowledge that the ACT legal profession is smaller and less specialised than its WA counterpart, and that it is difficult to predict the extent of litigation that might result in another state. However, other jurisdictions such as the United Kingdom and New Zealand, where a right of action has been specifically included, or found to be implied, within a charter, have not been overwhelmed by the impact of litigation against the government. Nevertheless the case law which has developed has provided guidance in the implementation of human rights to improve government practice.

18. We also recommend that an award of damages be made available for loss or damage caused by breach of the human rights charter. Currently, the position of the WA government, reflected in ss 29 and 41 of the draft Bill is that damages are not available for injury or loss suffered as a result of the breach. In our view, this approach is unnecessarily limited and would prevent a court from ensuring that justice is done between parties in rare cases where a breach of human rights by a public authority causes significant loss to a person, and no other remedy could rectify the situation. It would be possible to include a specific cause of action for a breach of human rights by a public agency, but to lessen the potential financial impact upon the WA government by restricting the award of damages to cases where other remedies would be clearly insufficient.

Impact on Legislation and Policy

19. Although the HRA has not had a large impact in the courts, it has had a positive impact on the scrutiny of new legislation. Under HRA s 38, a standing committee must report to the Legislative Assembly about human rights issues raised in legislation presented to the Assembly. The Scrutiny Committee has been robust in analysing proposed legislation for breaches of the HRA and its reports and the respective government responses have often been referred to in Legislative Assembly debate by all parties.

20. The most obvious example of legislation where the HRA influenced the final shape of legislation was the Terrorism (Extraordinary Temporary Powers) Bill 2006. There was detailed debate about the human rights implications of the legislation, which resulted in the additional safeguards including greater judicial oversight of preventative detention and the omission of penalties.[12] The Opposition did not support the legislation, arguing that the HRA had been construed too narrowly, and that interests in community safety should have been given more weight in deciding whether derogations from rights were justified and proportionate. The debate in the ACT was also able to influence the debate at the national level.

21. Other examples where the HRA has been referred to extensively in debate include:[13]
    - offences against pregnant women and whether the right to life extended to the protection of unborn foetuses;
    - civil unions for same-sex couples and the right to equality;
    - a clause in the *Health Legislation Amendment Bill* allowing a President of the relevant tribunal to issue a warrant authorising the detention of a person who had failed to give evidence and whether this breached the right to liberty and security of the person;
    - pre-natal reporting requirements for mothers considered at risk and whether this breached the right to privacy.

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[12] As compared to the provisions of the Commonwealth legislation – See further our Working Paper No 1 'The ACT Human Rights Act 2004 and the Commonwealth Anti-Terrorism Act (No 2) 2005: a triumph for federalism or a federal triumph? Andrew Byrnes and GabrielleMcKinnon available at http://acthra.anu.edu.au/articles/Working%20Paper%20No%201.pdf

[13] Extracts from Legislative Assembly debates involving the HRA are available from our website: http://acthra.anu.edu.au/resources/index.html.

The use of privative clauses and strict liability offences are also issues that regularly give rise to comment by the Scrutiny Committee and in the Assembly.

22. Under the HRA s 37, the Attorney-General is also required to provide a written statement with each piece of government legislation, stating whether the bill is consistent with human rights, and if not, stating how the bill is not consistent with human rights. This was intended to be an important mechanism for generating human rights dialogue. However, with a few exceptions, these have simply stated that, in the Attorney-General's opinion, the bill is consistent with the HRA. A clause such as that contained in the Victorian Charter s 28(3)(a), which requires a statement of compatibility to state *how* the Bill is compatible with human rights (and not just where legislation is determined to be incompatible) may be useful in ensuring that statements are able to promote dialogue within Parliament and the community as intended.

23. As well as in the Legislative Assembly, the HRA has had an impact within government. Although the content of the statements of compatibility has been minimal, the requirement to certify whether legislation is compatible with the HRA has been crucial in ensuring that the government undertakes a human rights assessment of all new legislation. As well as improving the standard of legislation, this process has generated dialogue within the executive, as the department responsible for the bill is required to scrutinise its own legislation and to justify any potential infringements to the Human Rights Unit within the Department of Justice and Community Safety, which has responsibility for determining issues of compatibility, on behalf of the Attorney-General. The ACT government's further requirement that all Cabinet Submissions be human rights compliant has also encouraged early consideration of human rights issues.

24. As part of our research on the effectiveness of the HRA, we have conducted interviews with government officers in a range of positions and departments. These interviews have highlighted the importance of education for public servants, and in particular the importance of ongoing education for new staff. The interviews have also indicated that one of the early challenges of the HRA is to ensure that it has relevance, not just to those officers developing legislation, but also to those involved in administrative decision making and other duties within government.

25. One way to ensure the relevance of a charter of rights to all officers within government is by imposing a direct obligation to act in accordance with the HRA. A direct obligation is likely to have more meaning to officers than provisions in the HRA relating to the interpretation of legislation. The ACT Consultative Committee recommended that the HRA impose a direct obligation to ensure that all government officers act consistently with human rights, unless specifically authorised otherwise by legislation, however this provision was omitted by the government in the final draft of the act.

26. The lack of a clear provision has created some uncertainty in the ACT as to whether the government is specifically bound by the Act in the exercise of executive powers which are not directly governed by legislation. The Department of Justice and Community Safety has advised other departments that the Act does create an obligation on public officials to act consistently with human rights. However the lack of clarity in this area may lead to conflicting views being taken by different departments and may require the issue to be ultimately settled by the Supreme Court.

27. We consider that such a provision would accord with the government's obligations under the ICCPR and ICESCR and note that such a direct duty is included in s 40 of the WA draft Bill.

Role of the Human Rights Commission and Education

28. The experience of the ACT and other jurisdictions suggests that well-resourced and creative education programs targeted at each sector of the community and government will be critical to ensuring that a charter of rights is effective in achieving a human rights culture. It also indicates that it is important to build in mechanisms to allow the community to engage in the dialogue over particular human rights issues. Experience in the United Kingdom has also shown the importance of working with the judiciary in the lead up to the commencement of a bill of rights.

29. In the ACT, the Human Rights Commission (formerly the Human Rights Office) has been vital in this role. The ACT has faced particular challenges as a result of its size in providing sufficient resources to educate the community about the HRA. Nevertheless, the Commissioner has made the most of extremely limited staff and funding to provide regular community forums on the HRA, as well as providing training sessions for the legal profession and a range of government departments.

30. An educative function is conferred on the Equal Opportunity Commissioner under s 45 of the WA draft Bill. This amends the *Equal Opportunity Act 1984 (WA)* to give the Equal Opportunity Commissioner additional powers to promote public knowledge of and respect for the human rights in the charter, and to do anything conducive or incidental to that function. We believe that it is vital that the introduction of a human rights charter does not lead to the privileging of some rights over others. Thus, we recommend that the Commissioner be given power to promote *human rights*, rather than only the human rights in the Human Rights Act.

31. We also suggest that the Commissioner be given additional powers analogous to those given to the ACT Human Rights Commissioner: powers to intervene in court proceedings, to review the effect of laws (legislation and common law) on human rights, and to provide advice to the government on any issues relevant to the operation of the Act. Power to intervene in court proceedings is important to bring international and comparative jurisprudence to the court's attention that the court may not have otherwise been aware of. Power to review laws is vital to ensure monitoring of the government's ongoing commitment to a bill of rights by an independent body. For example, the ACT Human Rights Commission has been able to use this power to carry out audits of government remand centres[14] and has also worked closely with the government to develop the legislation governing the ACT's new prison, the Alexander Maconachie Centre. The Human Rights Commission has also provided advice in response to government requests on a number of issues, including the federal government's intervention in the Northern Territory.[15] These additional functions also contribute to community awareness of the HRA.

32. Further, we believe that is important for the wording of the legislation to reflect the Human Rights Act's educative as well as legal effect. In particular, we draw the Committee's attention to s 28 of the draft Bill, which states: 'This Act does not require a person to act or make a decision compatibly with human rights, except as provided in Part 6.' We believe that such negative terminology may affect the perception of the law.

[14] Available at http://www.hrc.act.gov.au/index.cfm?MasterTypeID=1&SectionTypeID=7&MainTypeID=7.
[15] Available at http://acthra.anu.edu.au/news/Final%20HRDC%20ATSI%20NT%20advice%2020071.doc.

Economic Social and Cultural Rights (ESC Rights)

33. In its Concluding Observations on Australia in 2000, the UN Committee on Economic, Social and Cultural Rights noted that:

    > In spite of existing guarantees pertaining to economic, social and cultural rights in the State party's domestic legislation, the Covenant continues to have no legal status at the federal and state level, thereby impeding the full recognition and applicability of its provisions.[16]

    The UN Committee strongly recommended that Australia incorporate the ICESCR into its legislation in order to ensure the applicability of the provisions of the Covenant in the domestic courts.

34. In its report, the ACT Consultative Committee emphasised the indivisible nature of rights and recommended that the HRA include relevant rights found in the ICESCR, in addition to civil and political rights. These include the right to an adequate standard of living, the right to the highest attainable standard of health, the right to housing, clothing and food, the right to education, and the right to work in just and favourable conditions. Unfortunately, the ACT government decided not to incorporate ESC rights into the HRA. It appears that this decision was based on an apprehension that these rights would give the judiciary greater control over matters of policy and the allocation of public funds.

35. The WA government has taken a similar position in its discussion paper. The government's position is to exclude ESC rights and focus initially on civil and political rights. The discussion paper argues:
    - inclusion of ESC rights in a legislative bill of rights would make WA an exception among other jurisdictions with similar human right laws;
    - the commentary and case law on civil and political rights is far more developed than that on ESC rights, and hence the likely practical impact of formally recognising ESC rights is unclear;
    - recognition of ESC rights would give the judiciary greater control over matters of social and financial policy which are the proper responsibility of the Parliament.

36. WA would not be alone in recognising ESC rights. Other common law jurisdictions that have adopted some or all of the rights in the ICESCR include South Africa, Canada and the UK. The ACT HRA requires the government to revisit the issue of ESC rights at the five-year review of the Act and there are some signs that the ACT government will seriously consider the inclusion of new rights over time, with the Chief Minister specifically noting his support for including the right to education. The Victorian Charter also requires that the Victorian government reconsider the inclusion of ESC rights in its first review.

37. Further, the case law from the jurisdictions recognising ESC rights suggests that fears related to the inclusion of ESC rights are not borne out. In dealing with these issues, Canadian and UK courts have shown restraint and deference to the policy choices of the legislature, particularly in cases where claims have major financial implications. The decisions by the South African Constitutional Court on economic, social and cultural rights also establish a "restrained and focused role"[17] for the courts in determining the scope of such rights. Justice Yacoob of the South African Constitutional Court has said that the protection of human rights does not oblige a government to go beyond its available resources. The issue for the courts is whether the measures taken to protect rights are reasonable:

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[16] Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia, E/C.12/1/Add50 (1 September 2000), [15].

[17] *Minister of Health v Treatment Action Campaign* [2002] 5 SA 271, [28].

> A court considering reasonableness will not enquire whether other or more desirable or favourable measures could have been adopted, or whether public money could have been better spent. ... It is necessary to recognise that a wide range of possible measures could be adopted ... to meet [human rights] obligations. Many of these would meet the test of reasonableness.[18]

38. One of the dangers of omitting economic, social and cultural rights in a charter is that it may be seen to devalue these rights in contrast to those which are specifically protected. There is reason for concern that this may be occurring in the ACT, where the requirement that the Scrutiny Committee consider the compatibility of bills with the HRA has the potential to erode the Committee's broader focus on consistency with human rights generally. Although the Committee's role has always involved consideration of the human rights implications of legislation, Committee members may now tend to be less concerned by breaches of rights, such as the ICESCR rights, which are not protected under the HRA.[19]

35. The consideration of the types of issues raised by ESC rights is by no means unusual for Australian courts. Indeed, there are many examples of cases in which Australian courts have explicitly considered these issues in rights terms. As the NSW Bar Association Committee on Human Rights noted in its recent Options Paper on a Charter of Rights for New South Wales:[20]

> 120. On a number of occasions Australian courts and tribunals have considered economic, social and cultural rights. For example, there has been specific consideration of the right to work [*Wickham v Canberra District Rugby League Football Club Ltd* [1988] SCACT 95; *Communications Electrical v WA Electronic Energy Specialty Alloys Pty Ltd* (1995) IRCA Madgwick J], the right to adequate housing, [*Sheather v Daley* [2003] NSWADT 51], recognition of the family as the fundamental group in society, [*McBain v State of Victoria* (2000) 177 ALR 320 (Sundberg J)], discussion of the right to social security [*Secretary Department of Social Security v Dagher* (1997) AAT], and the right to strike [*Victoria v McBean* (1996) 138 ALR 456 Full Court of the Federal Court].

36. We believe that although the West Australian government has not embraced these rights in its discussion paper and draft Bill, it should give the issue further serious consideration. Economic, social and cultural rights are the human rights that often have the most relevance and meaning for the community, particularly for those most disadvantaged. This inclusion of further economic social and cultural rights has recently been considered thoroughly by the Joint Committee on Human Rights in the United Kingdom, which suggested that:

> Incorporating economic and social rights in UK law could extend the culture of accountability which the Human Rights Act established in respect of civil and political rights. It could extend this culture of justification and accountability to cover matters that are fundamental to the lives of most citizens; and it would have most practical effect in protecting the rights of the people who are most marginalised and deprived in an unequal society.[21]

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[18] *Government of South Africa v Grootboom* [2001] 1 SA 46, [41].

[19] As noted by Peter Bayne, legal advisor to the ACT Scrutiny Committee in discussion at the conference *Assessing the First Year of the* ACT Human Rights Act 2004, ANU, Canberra, 29 June 2005.

[20] NSW Bar Association, Human Rights Committee, *Options Paper for a Charter of Rights for NSW* (July 2007), available at http://www.nswbar.asn.au/docs/resources/publications/human_rights.pdf . The Committee "generally favour[ed] the inclusion of the ICESCR rights in a NSW charter of human rights." *id* at para 128.

[21] Twenty-first Report of the Joint Committee on Human Rights [UK], November 2004, [69]-[70]. The report is available at http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm.

37. In recognition that these rights may be more challenging to put into practice than civil and political rights, the ACT Consultative Committee recommended the inclusion of a provision acknowledging that such rights be subject to progressive implementation. This would allow an opportunity for the public service to become familiar with the application of these rights. The Committee also suggested that courts should be required to consider the financial circumstances of a public authority and the cost of acting in a manner compatible with human rights in reaching any decision in relation to these rights.[22]

38. At a minimum, we strongly recommend that the government consider introducing the right to education, which is included in the UK Human Rights Act. This right (drawn from Article 2, Protocol 1 of the European Convention, but also found in article 13 of the ICESCR) has been cautiously interpreted in the UK and European courts, [23] but may nevertheless be significant for ensuring equitable access to education programs Western Australia, particularly for those (including children in Indigenous communities) who are most disadvantaged or at risk of exclusion.

Conclusion

We would hope that the WA bill of rights is able to build on the ACT and Victorian experiences and take a more progressive approach to a bill of rights. In particular, we hope that the WA government may be able to take a more progressive approach to the recognition of economic, social and cultural rights so that a charter would raise human rights awareness within government and community, and achieve a quantifiable improvement in West Australians' enjoyment of human rights.

Please do not hesitate to contact us if you would like to discuss any of these issues further.

Yours sincerely

Andrew Byrnes
Professor of International Law, University of New South Wales

Hilary Charlesworth
Professor of Human Rights and International Law, Australian National University

Gabrielle McKinnon
Regulatory Institutions Network, Australian National University

Kim Pham
Regulatory Institutions Network, Australian National University.

[22] For an example of a draft provision, see *Towards an ACT Human Rights Act* (Report of the ACT Bill of Rights Consultative Committee, 2003), Appendix 4 at 23.
[23] See, eg, Lord Bingham in *Ali v Headteacher and Governors of Lord Grey School* [2006] UKHL 14: '[the right is] a weak one, and deliberately so. There is no right to education of a particular kind or quality, other than that prevailing in the State.'