



HUMAN RIGHTS
COMMISSION

Mr Simon Corbell MLA
Attorney-General
ACT Legislative Assembly
London Circuit
GPO Box 1020
Canberra ACT 2601

Dear Mr Corbell

Five year review of the ACT *Human Rights Act 2004*

Thank you for the opportunity to provide a submission to the five year review of the *Human Rights Act 2004*. This review marks an important milestone in the history of Australia's first human rights law to respect, protect and promote human rights. It is timely to reflect on the achievements of the HR Act, and to consider areas where it could be improved to have a greater impact in fulfilling the rights of all people in the ACT.

Our submission to the review is enclosed. The contact officer for this matter is
if your office or the

Department would like to discuss any of the issues raised in this submission. Of course we are very happy to brief you on these issues directly.

Yours sincerely,

Dr Helen Watchirs
Human Rights &
Discrimination Commissioner

Alasdair Roy
Children & Young People
Commissioner

Mary Durkin
Health Services Commissioner
Disability and Community Services
Commissioner

4 November 2009



HUMAN RIGHTS
COMMISSION

ACT Human Rights Commission

Submission to the Five Year Review of the *Human Rights Act 2004 (ACT)*

November 2009

Introduction

The five year review of the *Human Rights Act 2004* (HR Act) marks an important milestone in the history of Australia's first legislative charter of rights. After five years of the operation of the Act it is appropriate to reflect upon the achievements of the HR Act and to consider areas where it could be improved. The Preamble to the HR Act recognises that human rights are necessary for individuals to live lives of dignity and value, and that respecting, protecting and promoting the rights of individuals improves the welfare of the whole community. It is critical to monitor the progress of the HR Act in achieving these objectives and fulfilling the rights of all people in the ACT.

The Human Rights Commission welcomes the final report of the ACT Human Rights Act Research Project ('Research Report'), a linkage project between the ANU and the ACT Department of Justice and Community Safety (JACS). This Report is an invaluable source of information and independent analysis regarding the impact and effectiveness of the HR Act in protecting human rights in the Territory over the first five years of its operation. The Research Report was tabled as the report of the Attorney-General's review of the operation of the HR Act under s.44(1) of the HR Act. In our view the process of public consultation is a vital part of this review process, and it is important that community input is reflected in the Government's response to the review.

Overall, the Research Report confirms that the HR Act has played an important role in enhancing the promotion and protection of human rights in the Territory over its first five years, but indicates that there are a range of measures that could be implemented to increase the effectiveness of the Act. The Report describes the positive impact of the HR Act in improving the quality of policy and law-making, by ensuring that human rights concerns are given due consideration in the framing of new laws and policies. Our first hand experience of the policy and law-making process, through the opportunities to comment on draft Cabinet Submissions, exposure drafts of legislation, inquiries and consultations supports this conclusion. However, the Report also highlights the uneven diffusion of human rights knowledge and expertise throughout the ACT Government, and the gradual progress towards a human rights culture, which also confirms our observations from working directly with a range of ACT agencies as well as the community.

Structure of this submission

In Part 1 of this submission we provide general comments on our experience of the operation and impact of HR Act, and make suggestions for reform that are not directly addressed by the Research Report. These comments are informed by our work with Government and the community, and by two online surveys conducted by the Commission. In Part 2 we offer our specific response to each recommendation of the Research Report, and provide particular comments on those recommendations that relate to the role of the Human Rights Commission.

Annexures to the submission

Annexure 1: Summary of Results of the Community Survey

Annexure 2: Summary of Results of the Government Survey

Annexure 3: Table compiling agencies' Annual Report extracts 2008/09

Annexure 4: Commission's advice on outlaw motorcycle gang laws

Summary

Over the first five years of its operation the HR Act has had a tangible and positive impact on the fulfilment of human rights of people living in the ACT by the Territory Government. The HR Act has led to improvements in laws and policies and is beginning to change the culture of the public service, particularly since the commencement of the direct obligations on public authorities, which came into effect on 1 January 2009. The profile of the HR Act is steadily increasing and community perceptions are generally supportive.

The Human Rights Commission supports the recommendations of the Research Report with some comments, additions and suggestions for implementation, set out in Part 2. These recommendations would significantly improve the fulfilment of human rights under the HR Act. In principle, we support the recommendation that the Commission be given a complaint handling role under the HR Act to investigate and conciliate complaints regarding breaches of the HR Act by a public authority. This function would provide a more accessible forum for redress for victims of unlawful acts by public authorities compared to Supreme Court litigation. The details of this role, and the delineation of these complaints and other categories of complaints handled by the Children and Young People Commissioner and the Health Services/Disability and Community Services Commissioner, (and other complaints handling bodies such as the ACT Ombudsman, Victims of Crime Coordinator, Privacy Commissioner) would need to be considered in more detail. In the event that this recommendation were to be adopted, it would be appropriate to limit this jurisdiction to civil matters, and not to criminal proceedings that are sub-judice. If the HR Act were to be amended (as we recommend) to include economic social and cultural rights, further thought would need to be given to whether any complaints handling mechanism should extend to these rights, such as the right to housing.

The Commission also makes further recommendations for reform:

1. Inclusion of Economic Social and Cultural Rights

Economic, social and cultural rights including the right to education, housing and health should be protected under the HR Act. If considered necessary, the application of these rights could be limited initially to the interpretive provisions (and potentially complaint provisions), delaying their operation in relation to the direct duty of public authorities and direct right of action to the Supreme Court, pending the detailed recommendations of the ESC Rights Research Project at the ANU. Indigenous cultural rights should be explicitly recognised immediately under s.27 of the HR Act.

2. Exclusion of Non-Derogable Rights from the Application of the Limitation Provision

Rights that are absolute under international human rights law, such as the right to protection from torture, should not be subject to limitation under s.28 of the HR Act.

3. Power to strike down incompatible subordinate legislation

The HR Act should be amended to clarify that subordinate legislation that is incompatible with human rights may be found to be invalid by the Supreme Court unless it is specifically contemplated by an authorising Act.

4. *Cross-reference Note to the Public Authority Obligations in the AD(JR) Act*
The *Administrative Decisions Judicial Review Act 1989* (ACT) should be amended to include a note referring to the human rights obligations on public authorities under s.40B of the *HR Act*.
5. *Increased Funding for Community Legal and Advocacy Organisations*
ACT community legal centres should be given specific funding to give legal advice, support and representation to people who consider that their human rights have been breached by a public authority. Community advocacy organisations also play a vital role in the implementation of the HR Act on a practical level and should be resourced to fully incorporate human rights into all aspects of their operations.
6. *Enhancement of Audit Powers to Meet the Requirements of the OPCAT*
As a party to the Optional Protocol to the Convention against Torture, Australia will need to establish inspectorates of places where people are in detention. The audit powers of the Commission and experience in conducting human rights audits of juvenile detention and adult correctional facilities mean that it is well placed to act as one of mechanisms for local enforcement of the OPCAT in the ACT. These powers and others, including inspection powers of the Human Rights Commissioner in the *Corrections Management Act 2007* would need to be enhanced to meet the specific requirements of OPCAT.
7. *Annual Compliance Reporting*
The Government could consider augmenting the functions of the ACT Human Rights Commission to report annually on governmental compliance with the HR Act, to enhance accountability for the implementation of the HR Act in ACT agencies. This function would require additional resources.

Part 1

A: The First Five Years of the HR Act

‘...there is an opportunity now after 5 years for the ACT to promote enshrined human rights on the basis that the sky hasn’t fallen; legislation is made; the rule of law is adhered to and criminals are successfully tried and punished.’

Respondent, ACT HRC Government Survey 2009.

The Human Rights Commission

The Human Rights Commission was established by the *Human Rights Commission Act 2005* in November 2006, amalgamating the former Human Rights Office and Community and Health Services Complaints Commission and incorporating substantive new functions relating to children and young people.¹ The Commission currently consists of the three Commissioners of equal status: the Human Rights and Discrimination Commissioner; Health Services and Disability and Community Services Commissioner; and the Children and Young People Commissioner. The HR Act gives the Human Rights and Discrimination Commissioner specific functions that are central to the implementation of the HR Act. However, the HR Act is the framework of the Commission’s operation as a whole, and informs the approach of all Commissioners.

In the first five years operation of the HR Act, the Commission has been in a unique position to observe the impact of this important legislation, as an independent agency taking on a number of roles to implement, oversee and monitor the progress of the HR Act. The Human Rights and Discrimination Commissioner has exercised formal powers of human rights audits, and court interventions under the Act. We have seen first-hand the impact of the HR Act within Government through involvement in the policy and legislative process, providing training to government agencies, engaging with the community and service providers, and in responding to individual human rights inquiries. The Commission has also played a central role in training and educating the community about human rights issues.

In 2009, the Commission conducted an online survey of ACT Government employees (Government Survey) (249 respondents, see Appendix 1), and an online survey of the ACT Community (‘Community Survey’) (100 respondents, see Appendix 2).

Our comments below set out our perceptions and observations of the impact of the HR Act and include some of the comments and statistics from our survey respondents.

Impact on Government

Creation of a Human Rights Culture

One of the most important objectives of the HR Act is to bring about a fundamental change across all levels of government to build a culture based on respect for human rights. While

¹ Although the *Human Rights Commission Act 2005* created the role of the Disability and Community Services Commissioner, the disability services functions continued the functions of the Community and Health Services Complaints Commission. The complaints handling role of the Disability and Community Services with respect to community services has not yet been operationalised in legislation.

we agree with the Research Report findings that there is a long way to go in the development of this culture, in our view, the amendment of the HR Act to introduce a direct duty on public authorities and a clear right of action to the Supreme Court, has been a significant step towards that objective.

The Commission has a statutory obligation and mandate to promote its role and increase understanding of the legislation the Commission administers, including the HR Act. In addition, the Human Rights and Discrimination Commissioner has a statutory obligation to educate the community about human rights and to advise the Attorney-General on anything relevant to the operation of the HR Act.² These obligations require the Commission to engage with the ACT community in a broad range of areas, utilising a variety of methods, to reach targeted client groups. In early 2009, the Commission developed a new Community Engagement Strategy, which identified key audiences for the Commission, and suitable mediums and messages for these audiences. The Strategy identified goals and actions over and above the work individual Commissioners undertake with their particular clients and stakeholders. The Commission also developed a corresponding Training Strategy which identifies key messages, training courses and information to be communicated to certain groups within the community. To fill an unmet need for specific training about the new public authority provisions from 2009, training is offered on a cost-recovery basis for government agencies, while general human rights training to the community continues to be free of charge.

When the HR Act began operation, the agreed approach of the Department of Justice and Community Safety (JACS) and the then Human Rights Office (HRO), was that the HRO would handle community training, and that the Department would be responsible for public sector training, including the judiciary, which was mainly outsourced to human rights legal experts. Over time, the HRO and now the Commission have taken primary carriage for human rights training for all sectors, including the public sector, without a corresponding increase in resources. It is for this reason the Commission has moved to a user-pays system for public sector training.

Our perception is that the level of knowledge across ACT Government about human rights is increasing as a result of the new public authority obligations, as more public servants receive training on how to consider human rights in decision making. In the lead-up to the amendments coming into effect on 1 January 2009, and in the subsequent months, the Commission has provided seminars and small group workshops on the public authority duty to approximately 800 participants from a wide range of agencies and organisations. Participants at tailored training workshops have included officers from diverse occupations, from executives and policy makers, to corrections officers and park rangers. This is in the context of the Commission's general community engagement work, with a performance measure requiring 4,000 participants per annum, as set out in Commission Annual Reports.

It has been encouraging to observe that the participants in our workshops have generally been very supportive of the HR Act and the new public authority obligations. This is consistent with the results of our online Government Survey, which found that almost all public servants surveyed were aware that the ACT had human rights legislation (95.1%), and were overwhelmingly positive about the fact that the ACT had the HR Act, with 81% stating

² See s.27 of the *Human Rights Commission Act 2005*.

they were 'positive', 14.1% stating they were 'neutral', and only 4.8% stating they were 'negative'. Comments on perceptions of the ACT HR Act include:

- 'Great to have an agreed set of values to work from';
- 'The ACT is in a unique position of having a controlled environment and therefore act as the watershed to possible national initiatives. The Human Rights Act 2004 is an important first step in showing our commitment to Human Rights'; and
- 'I think it is important that we have a framework for protecting the rights of the ACT Community'.

As yet the training provided by the Commission has only covered a fraction of the training needs across Government, and has placed significant demands on the Commission's small human rights team (currently two part-time lawyers). Our survey results confirm that only 27.8% of respondents had attended any training or seminars on the HR Act, and in comments, some referred to training by a Sydney barrister held almost five years previously. Respondents commented:

- 'The problem is I've attended as an interested person. Training for public servants needs to be mandatory, particularly given the application of the recent amendments to the HRA';
- 'Although some departments had adopted training, human rights training should be mandatory.'

In our view there is a clear need for widespread and ongoing training on the HR Act and public authority obligations, together with the systematic incorporation of human rights into all internal strategies, policies and procedures. This view is supported by the findings of the National Human Rights Consultation Committee Report (the Brennan Report). This report emphasizes the critical importance of education in the creation of a human rights culture and recommends a national plan to implement a comprehensive framework of human rights education across the public sector, in secondary and tertiary education and in the community generally.³

Options for Government to promote training include factoring human rights compliance into senior executives' performance criteria, and ensuring mandatory inclusion of human rights training in relevant staff professional development plans. The Commission notes for example that a range of training courses are either mandatory for staff working in the Department of Justice and Community Safety, or promoted strongly through the Department's training calendar. In the Commission's view, given the HR Act's role in legislative interpretation, all policy and professional officers require human rights training, which should be supported by increased funding if necessary.

We note that since the Commission has moved to a cost-recovery model for government training, some agencies (eg Corrective Services) have decided instead to conduct their own in-house human rights training for budget reasons. It is not clear that this is an effective use of resources across the whole of government, as to develop and provide high quality training requires a considerable investment of time and expertise. A specific allocation of

³ National Human Rights Consultation Report, September 2009, Recommendation 2.

funding to the Commission may be a more efficient way to ensure consistent standards of training for government agencies.

With the passage of the Victorian *Charter of Human Rights and Responsibilities 2006*, the Victorian Government committed \$6.5 million over four years in new funding for community education programs, training for key government agencies and new resources for the Equal Opportunity and Human Rights Commission, and the Human Rights Law Centre.⁴ In contrast, with the passage of the HR Act in the ACT, the total annual funding provided for the ACT Human Rights Office in 2004/05 was approximately \$250,000, to perform all of its human rights functions, including community education as well as legal, policy review, audits, promotion and compliance work.

Integration of human rights into service delivery

Survey responses, as well as feedback from the Commission's community engagement work provide an indication that the HR Act is fostering the growth of a human rights culture in the ACT, although this culture is not yet well developed. Survey results indicate that the ACT HR Act is being used in a range of different ways in the work of ACT Public Servants. For example, survey respondents commented that they had used the HR Act in varied areas including:

- 'When conducting an incident investigation into an area that has mental health consumers';
- 'In teaching migrants';
- 'in design of building';
- '...when making [a] decision on security and emergency management issues in the ACT';
- 'In undertaking my role as a prosecutor. I always ensure that I interpret relevant provisions in legislation, like the Bail Act, in a way which is consistent with the Human Rights Act'.

As the following comment illustrates, the HR Act has been used to guide not just government interaction with the community, but how they deal with matters internal to the organisation:

'An Aboriginal/Torres Strait Islander staff member attended a funeral for her brother's partner, and was absent for longer than permitted by the Certified Agreement. We needed to consider Indigenous cultural issues in this context.'

Respondents were also directly questioned on their views of the impact of ACT HR Act on their work and the culture of their organisation. Comments were generally positive:

- 'Human rights considerations have been a significant driver in the development of policy relating to security issues';
- 'As a social worker, human rights are central to the ethos of my profession and it is great that the ACT approaches this in a serious and pro-active manner';
- 'The Act has added a significant new dimension to my work'; and

⁴ See 2006/07 Victorian Government budget:
http://acthra.anu.edu.au/media/Victoria_Leads_the_Way_on_Human_Rights.pdf

- 'It is an important piece of legislature for the DHCS. It is a standard and guide for how we deal with clients, employees and the wider community'.

There were, however, comments that suggested that there is still significant work to do:

- 'Would prefer the impact to be more significant'; and
- 'A work in progress. In some instances it hasn't changed the culture but it is shifting in the right direction'.

The ACT Human Rights Commission provides a useful example of the integration of human rights across all aspects of the work of an agency. While the Human Rights and Discrimination Commissioner has specific functions under the HR Act, the work of the Children and Young People Commissioner and the Health Services/Disability and Community Services Commissioner is also informed by a human rights perspective, and this approach plays an important educative and substantive role in formal and informal interactions with service providers and the community.

For example, during Children's Week 2009, the Children and Young People Commissioner held a competition to invite children and young people to think about a situation where they have stood up for their rights, or the rights of someone else. The aim was to help young people conceive of human rights as being something real, and practical, and directly relevant to their lives.

The Children and Young People Commissioner and the Health Services/Disability and Community Services Commissioner have also been involved in the development of specific charters of rights for their constituents. The ACT Charter of Rights for Children in Care and the Australian Charter of Healthcare Rights give substance and meaning to the formal rights recognised in the HR Act. The Commission is currently contributing to the development of a charter of rights for ACT mental health consumers, and also contributed to the Homelessness Charter launched in 2008.

The need for human rights to be further integrated into the work of all government agencies is evidenced by the improving, but still relatively weak, reporting on HR Act measures in Annual Reports, discussed further in Part 1B of this submission.

Development of Policy and Legislation

The HR Act has had a significant impact in the development of policy and legislation in the ACT. Through the involvement of each of the Commissioners in commenting on draft Cabinet Submissions and making submissions to parliamentary committees and government consultation processes, we have seen an ongoing and real improvement in the consideration given to human rights issues in the construction of policy proposals and draft legislation since the introduction of the HR Act. In general we have found that agencies take a constructive approach to addressing human rights concerns raised during consultations.

For example, in a situation where the Government sought the feedback of the Children and Young People Commissioner on the design of facilities in a public space in a neighbourhood (bike paths, parks, playspaces, etc), it became apparent that the Department had not

incorporated consultations specifically with children and young people. The Commissioner wrote to the Department, reminding them that it is not only good practice to consult widely, and it will help them achieve a better outcome, but that children and young people have the right to express their opinion on issues which affect them, and to have their views seriously considered. We suggested that they design consultation processes that are flexible and accessible to children and young people.

Similarly the Disability and Community Services Commissioner raised concerns with ACT Health about compliance with the United Nations Convention on the Rights of Persons with Disabilities, and its obligations as a public authority, when moving some of its operations to new premises and concerns were raised about access for people with a disability.

The positive difference made by the HR Act in the development of policy was illustrated at a recent Standing Committee of Attorneys-General meeting, which legislative responses to Outlaw Motorcycle Gangs ('OMCG') were considered in all States and Territories. In response to the perceived threat of OMCGs, South Australia and New South Wales enacted coercive legislation that breached a number of basic rights, such as the right to freedom of association, and rights in criminal proceedings.⁵ A member of an OMCG that is 'declared' in NSW can be prevented from working in certain occupations, associating with others, and attending certain areas, all without having being convicted of any specific offence. Other states were under pressure to follow suit, with some arguing that unless the remaining States and Territories enacted similar legislation, they would become a 'haven' for gang-related crime and violence.⁶ The ACT Attorney-General sought advice from the Human Rights and Discrimination Commissioner on the compatibility of NSW and South Australian OMCG laws with the HR Act, which is attached as Annexure 4. The ACT and Victoria maintained the position that such coercive laws were not the most proportionate response to the perceived threat of OMCGs. These two jurisdictions had human rights legislation as a benchmark against which the effect of proposed laws on human rights could be measured, that made a clear difference to the policy outcome. Our previous submission to the first review of the HR Act sets out extensively the Commissioner's advices on anti-terrorism laws.

Human Rights Audits and Reviews

The Human Rights and Discrimination Commissioner has conducted two human rights audits under s.41 of the HR Act. The first audit involved the former ACT youth detention centre, Quamby in 2005, and the second audit related to ACT remand facilities in 2007. In addition, the Health Services Commissioner conducted a services review of the Psychiatric Services Unit at the Canberra Hospital in 2009 in partnership with ACT Health, pursuant to s.48 of the *Human Rights Commission Act 2005*. This review was informed by the HR Act and drew upon international human rights standards for mental health facilities, eg providing consumers with information about their rights and ensuring privacy and protection from assaults. The focus on using these powers has been to 'shine a light' on the practices, policies and procedures of closed environments such as youth and adult detention centres and secure mental health facilities, for which Government has total responsibility. It is in

⁵ Note that parts of this legislation were overturned by the South Australian Supreme Court on Appeal.

⁶ See for example, the views of the Australian Federal Police Association as set out in Louis Andrews, 'ACT could become a bikie oasis', *Canberra Times*, 1 April 2009.

these closed environments that people can be at their most vulnerable to human rights abuses and violations. The review function has been the most powerful in achieving systemic change at legislative as well as practical levels. The Chief Minister commented on the impact of the Human Rights & Discrimination Commissioner's audit of Quamby Juvenile Detention Centre at the fourth Human Rights Community Forum convened by the then Human Rights Office 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. '

More recently, the Chief Minister commented that:

Our Human Rights Commissioner issued a scathing human rights audit of our juvenile detention centre. The Government responded – not because it had to, but because it was the right thing to do. A similar audit of remand facilities was just as sobering. The opening of the ACT's first prison seeks to remedy the identified failings."⁷

The HR Act proved a vital catalyst for both audits conducted to date: having the human rights standards clearly set out in ACT legislation provided a clear, unambiguous and relevant framework from which to analyse the operation of youth and adult detention in the ACT. It is unlikely that reviews would have been as comprehensive without the HR Act. In the case of Quamby, a private legal consultancy conducted a general audit beforehand, but unlike the Human Rights Audit it did not notice that there was a problem with the legislative basis of the facility, which the Government needed to quickly redress.

Audit of correctional facilities

The Human Rights and Discrimination Commissioner exercised the power under s.41(1) of the *Human Rights Act 2004* to produce the Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation, which was tabled by the Attorney-General on 21 August 2007. It was conducted prior to the opening of the ACT's new prison, the Alexander Maconochie Centre ('AMC'), and presented a snapshot of the treatment of detainees at ACT's remand centres, the Belconnen Remand Centre ('BRC') and the Symonston Temporary Remand Centre ('STRC'), identifying issues that were relevant to the operation of AMC.

The Audit assessed the legal framework, policies and procedures using international human rights benchmarks. It was an ideal opportunity to document human rights compliance in physically inadequate remand facilities, with a view to the establishment of the new AMC by recommending improvements and avoiding any systemic human rights problems. The focus of the Audit was on remandees as a closed population – they have the right to be presumed innocent, but are often detained for long periods. The AMC also houses sentenced prisoners and it has the primary goal of rehabilitation rather than simple punishment, with humane treatment being a core function of staff.

⁷ Canberra Times 4 November 2009, p11.

Some of the problems identified in the Audit requiring urgent attention included:

- addressing overcrowding at the Periodic Detention Centre impacting primarily on women, who were bussed to and from the BRC on weekends, resulting in less humane conditions of detention, including additional strip searches and fewer privileges;
- avoiding the excessive lock-downs; and
- offering a program of organised activities for detainees currently on remand.

The Audit recommended detailed general improvements in many areas including:

- equivalence to health care in the community – pilot of a needle and syringe program to prevent disease transmission, improved privacy and other protection for medical appointments and limits on restraints used in hospitals;
- humane treatment – changes to cell searches, drug testing, visits, privacy and hygiene in cells, access to legal advice, media, and information about rights;
- systemic discrimination – increased sensitivity to women’s special needs and cultural, language and other issues for minority groups; and
- corrections culture – de-escalation and anti-bullying training, better maintenance and coverage of recording devices (eg videos & digital footage of incidents subject to investigations, such as use of force).

The ACT Government response was released on 12 February 2008. Of the 98 recommendations the Government agreed in full with 70, ‘in principle’ with 10, ‘in part’ with four, and ‘noted’ a further 10. It did not agree with the following four recommendations:

4.3.4.1 – ceasing to chain seriously ill prisoners to hospital furniture and requiring that the use of restraints be recorded and notified to the Health Services Commissioner;

3.1.1. – ensuring that women prisoners are only guarded by women at night, reflecting the UN Standard Minimum Rules for the Treatment of Prisoners;

2.7.1 – enabling remand prisoners to wear their own clothing as set out in the UN Standard Minimum Rules for the Treatment of Prisoners and in compliance with the then current *Remand Centres Act 1976*;⁸ and

2.12.2 – providing more verbal information on rights to detainees at induction.

Overall, the Commission was encouraged by the response to the Audit. The preparedness to make changes where needs have been identified is indicative of the genuine concern for prisoner welfare. For example, after the audit, activities officers were quickly appointed and offer detainees meaningful activities, which assisted them to cope better with custody. The delay in the opening of the AMC until early 2009, as well as the refusal by NSW to take more ACT prisoners because its own facilities were full, caused overcrowding at existing remand facilities. The Human Rights Commissioner inspected under the Corrections Management Act and recommended to the Corrections Minister that the old Quamby site be redeveloped to temporarily accommodate adult detainees to relieve this overcrowding.

⁸ The law has since been repealed by the *Corrections Management Act 2007* which came into force in December 2007.

The Attorney-General has requested that the Commission repeat the Audit when the AMC has been in operation for 12 months. The Commission is keen to perform this work, but will need more resources in order to assess whether human rights compliance has improved, and the extent to which its recommendations have been implemented.

Impact in the Courts

Prior to the enactment of the HR Act, critics predicted that it would be a litigious feast for lawyers, a rogue's charter favouring the rights of criminals over victims, or would have no impact on court decisions at all. None of these criticisms have been realised in practice — there has been no avalanche of cases pursued by lawyers, or of criminals escaping justice through human rights loopholes. In 2007 the then Director of Public Prosecutions confirmed that the practice of criminal law 'had not been revolutionised,' and that

'[T]here have been no more acquittals or technical defeats for the prosecution than before the Act, nor an express reliance on the Act in ways that are different from the common law.'⁹

Importantly, there is increasing evidence that the HR Act is being used as an advocacy tool for individuals in their dealings with the ACT Government, similar to the documented use of the UK Human Rights Act and Victorian Charter.

There have been 110 reported cases citing the HR Act since the Act came into force. The great majority of these cases have been in the ACT Supreme Court and Court of Appeal, with a small number in the Magistrates Court, Children's Court and Tribunals. Approximately 60% of the matters involved issues of criminal procedure, where the HR Act has given renewed focus to the requirements of a fair trial, and the need to avoid undue delay in prosecution.¹⁰ The HR Act has also been applied in a wide variety of civil proceedings, including public housing and private tenancy matters, discrimination, adoption, care and protection, personal injury and planning matters. In many cases the HR Act has been used to support a conclusion which would likely have been reached on other grounds, but it has been a decisive consideration in some significant cases.¹¹ The matters which have come before the courts and tribunals have, until recently, related mainly to the interpretive power in s.30 of the Act. However, the direct duty on public authorities which came into effect on 1 January 2009 has already been considered in relation to the obligations of the Legal Aid Commission,¹² and is likely to be the subject of further test cases in the Territory.¹³ The direct right of action to the Supreme Court under s.40C of the HR Act is likely to be much more straight-forward in its operation than the remedy provision in s.39(1) of the Victorian Charter, which makes access to the court contingent on pre-existing causes of action.

⁹ Richard Refshauge, 'Impact on criminal law and procedure', paper presented to the 2007 *Protecting Human Rights Conference*, Melbourne, available at http://acthra.anu.edu.au/articles/Richard_Refshauge%202007.pdf.

¹⁰ See eg *R v Fearnside* [2009] ACTCA 3, *R v Griffin* [2007] ACTCA 6, and *R v Upton* [2005] ACTSC 52.

¹¹ For example: *Commissioner for Housing in the ACT v Y* [2007] ACTSC 84, *Perovic v CW No CH 05/1046*, *R v YL* [2004] ACTSC 115.

¹² *Imran Hakimi v Legal Aid Commission (ACT); The ACT (Intervener)* [2009] ACTSC 48 (12 May 2009).

¹³ As it has in Victoria - see landmark decision of *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009).

A key case that demonstrates the more sophisticated jurisprudence now developing in the Territory is *R v David Arthur Fearnside*.¹⁴ The ACT Court of Appeal considered the construction of s.68B (1)(c) of the Supreme Court Act, which requires that an election must be made 'before the court first allocates a date for the person's trial', in light of the right to a fair trial in the HR Act. Justice Besanko endorsed a three step framework to apply the interpretive principle and its interaction with the limitation provision in s.28, which has also since been used by the ACT Civil and Administrative Tribunal (ACAT) in *Thomson v ACTPLA*:¹⁵

1. Does the legislation enliven a human right?
2. If yes at Step 1, is the limit on the human rights reasonable under s.28?
3. If yes at Step 1 but no at Step2, then consider and apply s.30 interpretative provision.

Justice Besanko supported the six step approach of the NZ Supreme Court in *Hansen v The Queen*:¹⁶

- Step 1. Ascertain Parliament's intended meaning of legislation.
- Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
- Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit.
- Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails.
- Step 5. If Parliament's intended meaning represents an unjustified limit, the Court must examine the words in question again, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
- Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, Parliament's intended meaning should be adopted.

However, in the ACT, the last step would further involve the Supreme Court considering whether to issue a Declaration of Incompatibility under s.32 of the HR Act, which is not expressly provided for in the NZ Bill of Rights Act 1990. Justice Besanko also considered the scope of the amended interpretive principle, noting that s.30:

'[A]ppears to give the Court a broader power to adopt an interpretation of a Territory law which is consistent with a relevant human right. ... I think s.30 would enable a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose.'¹⁷

¹⁴ [2009] ACTCA 3.

¹⁵ [2009] ACAT 38.

¹⁶ [2007] 3 NZLR 1.

¹⁷ At para 89.

Cases on the application of the ACT HR Act

Single mother allowed to stay on public housing list

Commissioner for Housing in the ACT v Y [2007] ACTSC 84

Relevant right(s): Right to a fair trial (s.21, HR Act)

A single mother of two young children had her special circumstances taken into account in determining her income and was allowed to remain on the priority list for public housing as a result of the *Human Rights Act*. The applicant and her children were living in emergency accommodation as she could not afford to rent privately. The Commissioner for Housing had initially refused the applicant's request for special consideration, finding that her commitment to an expensive car lease (the only one she could get as a single mother) could not be considered in assessing her income. The Commissioner suggested that the applicant could send the children, aged 4 and 9 years, to childcare and school by public bus. The Commissioner also argued that this decision was not reviewable by the Court. The Supreme Court rejected this narrow reading of the Housing Program, finding that the right to a fair trial under the *Human Rights Act* meant that such important decisions should be reviewable, and that the discretion should be exercised broadly, in favour of the applicant in this case.

Suspended sentence inadequate for disproportionate use of force

Lukatela v Birch [2008] ACTSC 99

Relevant right(s): Protection from torture and degrading treatment (s.10, HR Act); Right to humane treatment when deprived of liberty (s.19, HR Act)

A police station watch house sergeant had intentionally and unlawfully used capsicum foam on numerous people in custody who were drunk or un-cooperative, but posed no threat to anyone present. In several cases the detainees were already handcuffed. The officer had been given a total of a three month suspended sentence of imprisonment, and a good behaviour bond for nine offences. The Supreme Court reviewed this sentence and found that it was manifestly inadequate, citing the detainees' rights under the Human Rights Act to protection from torture and degrading treatment, and to humane treatment when deprived of liberty.

Injured student allowed to make an insurance claim out of time

Hanan Al – Rawahi v Mohammad Ali Niazi [2006] ACTSC 84

Relevant right(s): Right to a fair trial (s.21, HR Act)

An overseas student had suffered serious injuries when struck by a car on a pedestrian crossing. She retained a solicitor, but there were various delays in serving documents on the driver's insurer, and the insurance company rejected the claim as being out of time. The Supreme Court found that the delay had been unreasonable in an objective sense, but nevertheless decided to exercise its discretion to allow the claim to proceed, having regard to the interests of justice and the right to a fair trial in the Human Rights Act. The Court considered that where a claimant's right to bring an action for damages for personal injury is at stake, if there is any doubt, the right to a fair trial suggests that the Court should err in favour of the claimant being allowed to pursue the claim.

Criminal proceedings against a child permanently stayed because of delay in prosecution

Perovic v CW No CH 05/1046, Unreported decision of Magistrate (1 June 2006)

Relevant right(s): Children in the criminal process (s.20, HR Act)

The Children's Court found that an unjustifiable delay by police in charging a child with a criminal offence, and in pursuing the prosecution, amounted to a breach of the child's right under the Human Rights Act to be brought to trial as quickly as possible. The Court found that this delay had led to such injustice both to the child and the complainant that the matter should not continue, and granted a permanent stay of proceedings.

Decision respects wishes of children to stay together with their father

A v Chief Executive of Department of Disability, Housing & Community Services [2006] ACTSC 43

Relevant right(s): Protection of family and children (s.11, HR Act)

A family of seven children was allowed to stay together with their father in the family home, after the Supreme Court found that previous care orders had not given due regard to the importance of the family unit and its entitlement to protection under the Human Rights Act. The Court found that orders excluding the father from the family home were not justified by the evidence and did not respect the express wishes of the children to have an ongoing relationship with their father. Such orders were inimical to the right to protection of the family unit as they were likely to result in the children being separated and sent to different foster homes. The Supreme Court varied the orders to provide that parental responsibility for the children would be shared by the Chief Executive and both parents.

Court approves request of a child to be adopted by her stepfather

Re Adoption of TL [2005] ACTSC 49

Relevant right(s): Protection of family and children (s.11, HR Act)

The Supreme Court rejected a narrow reading of the *Adoption Act* taken by the Department of Disability, Housing and Community Services, and approved the adoption of a 15 year old girl by her stepfather. The child's natural father had died, and she was concerned to ensure that she would remain in her stepfather's care should anything happen to her mother. The Court found that given the wishes of the child, adoption was preferable to an order for custody or guardianship and that this would be consistent with the right of the family unit to protection under the Human Rights Act.

Rent reductions should not discriminate against low income earners

Peters v ACT Housing [2006] ACTRTT 6

Relevant right(s): Recognition and equality before the law (s.8(c), HR Act)

A public housing tenant of ACT Housing received a rental rebate, which was only a percentage of the market rental of the premises due to low income. The Tribunal found that essential repairs and maintenance to the properties had not been carried out by the ACT Housing over a long period of time, and that the tenants had suffered significant inconvenience and loss of enjoyment of the properties. A rent reduction was ordered, and Housing ACT argued that rent reduction ordered on a rebated rent should only be applied in so far as the reduction exceeded the difference between the market value and the rebated rent. Section 8 of the HR Act (equality before the law and non-discrimination) was used to argue that this was an unacceptable interpretation of the relevant legislation as it would result in tenants receiving different levels of compensation for identical breaches depending on whether they were paying market or rebated rent. The member accepted this as one of the reasons for rejecting Housing ACT's submission.

Human Rights & Discrimination Commissioner's intervention in proceedings

Section 36 of the HR Act provides the Human Rights Commissioner with the power to seek leave to intervene in a case before a court or tribunal. Under s.34 of the HR Act, the Commissioner is notified of proceedings which involve questions of the application of the HR Act. However, the Commissioner does not have the resources to intervene in every case. The Commissioner has developed Guidelines for the use of the Intervention Power,¹⁸ which provide that the Commissioner will consider seeking leave to intervene in proceedings where:

- A. The human rights issues are significant and not peripheral to the proceedings; and/or
- B. The decision that could be made in the proceedings may significantly affect the human rights of persons who are not parties to the proceedings; and/or
- C. The proceedings may have significant implications for the ongoing interpretation or operation of the statutory provision being interpreted in light of the *Human Rights Act 2004* and/or the Human Rights Act itself.

In September 2008, the ACT Supreme Court granted the Human Rights and Discrimination Commissioner leave to intervene in the cases of *Morro, N & Ahadizad v ACT*,¹⁹ which were unlawful detention matters heard concurrently. These cases involved decisions by the ACT Sentence Administration Board to revoke the plaintiffs' periodic detention orders and committed them to full-time imprisonment. A key issue in dispute in these cases was whether breach of the plaintiffs' right to liberty (s.18 HR Act) gave rise to an independent statutory right to compensation under s.18(7) HR Act. Justice Gray rejected the government's argument that the right in s.18 (7) was declaratory only, and accepted the submission of the Commission that the HR Act conferred a substantive independent right to compensation.²⁰

¹⁸ See <http://www.hrc.act.gov.au> for a copy of full guidelines.

¹⁹ [2009] ACTSC 118.

²⁰ At 42.

In June 2009, at the request of the Tribunal, the Commissioner provided written submissions in the case of *Thomson v ACTPLA*,²¹ relating to the human rights interpretative obligations of the ACAT and the rights to a fair trial and privacy in relation to a decision by the ACT Planning and Land Authority to approve a development application.

The Commissioner also intervened in proceedings involving the interpretation of s.51A of the *Domestic Violence and Protection Orders Act 2001* ('DVPO Act'), which enabled an interim protection order against a child to be finalised without a hearing in *SI bhnf CC v KS bhnf IS*.²²

Human rights in advocacy

The development of a human rights culture in the ACT has been assisted by many community initiatives, including ACT Shelter and the ACT Council of Social Service's joint campaign of 'Housing is a Human Right' in 2006 which promoted human rights in the non-government sector, particularly in relation to service delivery. Many community organisations have actively embraced a human rights framework. The Commission is aware of a number of examples of the ACT HR Act being as an advocacy tool in the community, including in the de-identified case studies set out below. As these case studies demonstrate, having human rights standards set out in legislation can prove a highly effective non-adversarial way to encourage organisations to develop more effective public policy, practice and services.

Housing lease changed to daughter's name after mother passed away

Relevant right(s): Protection of the family and children (s.11, HR Act)

Following the death of her mother, a woman found that she and her children were not entitled to remain in her mother's public housing property, as the lease had been in her mother's name. The children had always lived in the house and had close contacts with the local community, especially their school and nearby friends. The mother was in contact with care and protection and there was a risk the children would be taken from her care if she did not have a home for them. In submissions to Housing ACT the woman's advocacy service raised the right to protection of family life to successfully negotiate for the lease to be transferred from her mother's name to her own name thus avoiding potential homelessness.

²¹ [2009] ACAT 38

²² [2005] ACTSC 125.

Family able to stay together through more flexible application of rules

Relevant right(s): Protection of the family and children (s.11, HR Act)

A woman was homeless and temporarily living with one of her children in a caravan without electricity in NSW. The other child was living with her grandmother in the ACT in order to attend school. The woman was not eligible for priority housing as she had outstanding debts to Housing ACT from a previous tenancy. The woman's advocacy service used the right to protection of family life to advocate for flexibility in applying the allocation rules. The client was housed as a priority candidate prior to arranging repayments on the debts.

Modifications to public housing allowed in order to protect privacy

Relevant right(s): Protection of privacy and reputation (s.12, HR Act)

A vulnerable female who lived in public housing expressed concerns to her advocacy service that she was being intimidated by a neighbour. With the assistance of the advocacy group she sought Housing ACT's permission to modify her rented property to improve her privacy. The submission to Housing ACT relied on, amongst other things, the client's right to privacy under s.12 of the HR Act, and permission to make the modifications was granted.

Use of the HR Act as an advocacy tool is not just limited to cases involving an individual taking action against government. One responded to the Government Survey commented:

'I have worked with young people so using the Human Rights Act to advocate for their rights has been a very rewarding exercise for me'.

Perceptions in the Community

Five years after the commencement of the HR Act, the Commission's view is that community support for the HR Act remains strong, based on the media (for example, feature articles and letters to the editor in the Canberra Times and on radio) as well as the Commission's interaction with the community at education and outreach sessions, and at community events and forums. A majority of 84.5% of respondents to the Community Survey stated that they felt 'positive' about ACT having the HR Act. One respondent to the Community Survey commented:

'I feel proud that the ACT is one of the leading jurisdictions in promoting and legislating human rights. Having been an advocate for 4 years I know the usefulness of having the Act in place for meeting the needs of vulnerable people in the ACT.'

Another respondent stated:

'Human rights issues touch everyone on this planet. In particular there are those in the ACT community that are marginalized and need support. The ACT Act provides one avenue of support.'

Adequate and appropriate community human rights education across a range of occupations, professions and areas is one of the most important factors in ensuring human rights legislation is effective. To work effectively, people must know about the HRA, how it works, when it can be used and the likely outcomes it can achieve. One Community Survey respondent identified the role that human rights legislation itself plays in educating the community about human rights.

‘... [the HR Act] is an important step towards better human rights protection in the ACT. I mean this not only in a legal sense but also to raise the awareness of human rights in the community.’

This supports the Commission’s experience that the ACT HR Act has provided a powerful impetus to engage with the community about human rights in a range of forums – from the Commission’s annual Community Forum on International Human Rights Day (10 December) and topical seminars and conferences, with over 100 people usually in attendance, to providing human rights training of small interactive sessions for public officials such as staff of Corrections ACT and ACT Health.

Education must cover a range of sectors, but particularly the public service, the legal profession, community advocacy groups and the judiciary (judicial education must be independent of the Executive).

B: Areas for Reform: additional recommendations

In this section, we comment on issues for reform not directly covered by the Research Report. These recommendations are set out in summary form on p.3 of this submission. We provide comments on the Research Report recommendations in Part 2.

1. Inclusion of Economic, Social and Cultural rights

The absence of economic, social and cultural (ESC) rights in the HR Act remains an area for reform. The ACT Bill of Rights Consultative Committee considered that the following ESC rights should be included in the HR Act, because of the indivisible and universal nature of these rights.

- 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.

In recognising that ESC rights would be more challenging to put into practice than some of the civil and political rights, the Committee recommended that the ESC rights be subject to progressive implementation, and that the courts should be required to consider the financial implications of decisions relating to ESC rights.²³ Whilst ESC rights were not included initially, during debates about the Human Rights Bill, Chief Minister Stanhope stated:

‘I remain very much alive to the desirability at a later date of incorporating economic, social and cultural rights into the Human Rights Act. I see that as one of the building blocks that we may in time choose to incorporate.’²⁴

We understand that the Research Report did not consider the case for inclusion of economic, social and cultural rights in the HR Act as this issue is the subject of a further ongoing joint research project between JACS and the ANU. We welcome this initiative and look forward to the results and recommendations of the ESC rights research project.

The Commission strongly supports the inclusion of ESC rights in the HR Act. In our view, after five years of the operation of the HR Act, the arguments initially raised against the inclusion of ESC rights are much less forceful. The HR Act has not led to a significant increase in litigation, and the ACT courts and tribunals have adopted a cautious approach to the application of civil and political rights under the HR Act. There is no reason to suggest that the inclusion of ESC rights would have more than a modest and appropriate impact in strengthening protections for these fundamental rights in the Territory.

A common argument cited against protecting ESC rights in legislation is that it would involve the judiciary in questions of resource allocation, and would be too costly. A dialogue model of human rights ensures that it is the parliament, not the court that gets the final say on

²³ Hilary Charlesworth et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003), Appendix 4, 23.

²⁴ Australian Capital Territory, *Legislative Assembly Debates*, 2 March 2004, 532 (Jon Stanhope, Chief Minister).

legislation, and thus questions of resource allocation are ultimately left for parliament to decide. It is erroneous to suggest that the judiciary do not already engage in decision-making that impacts upon resource allocation.

Indivisibility of Human Rights

The distinction between the rights contained in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) is an artificial one, influenced by historical political divisions when the treaties were drafted during the Cold War. Human Rights are universal, inherent, inalienable and indivisible.²⁵ Rights in the ICCPR should not be seen as more important or more relevant than the rights in the ICESCR. Newer treaties such as the Convention on the Rights of the Child and Convention for the Elimination of all forms of Racial Discrimination do not distinguish between categories of rights. Nor should the HR Act, which is an important mechanism for domestic implementation of our international human rights obligations. Under the ICCPR, rights are framed in stronger language of obligation and must be implemented immediately,²⁶ and the Optional Protocol to the ICCPR provides for individual complaints to be made to the Human Rights Committee. Under the ICESCR, rights are more open textured,²⁷ and must be achieved progressively to the maximum of a State Party's resources.²⁸ This means to:

‘take steps... to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’²⁹

Notwithstanding the principle of ‘progressive realisation’, the UN Committee on Economic, Social and Cultural Rights has commented on the lack of legal protection of economic, social and cultural rights in Australia:

‘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.’³⁰

Given the indivisible nature of human rights, civil and political rights have been used in the ACT under the HR Act to present arguments about what are essentially economic, social and cultural rights. This indicates a need for a broader protection of rights in the ACT, and broad protection federally. In a number of cases under the HR Act, advocates have used existing ICCPR rights in the HR Act to support ESC rights. For example, in the case of *Peters v ACT Housing*,³¹ tenancy advocates relied on the right to equality to indirectly protect the right to housing, arguing that public housing tenants should be compensated to the same extent as

²⁵ See Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 14-25 June 1993, A/CONF.157/24 (Part I), Chapter III.

²⁶ Article 2, ICCPR.

²⁷ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996), 15.

²⁸ Article 2, ICESCR.

²⁹ ICESCR, Article 2.1.

³⁰ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia. 01/09/2000. E/C.12/1/Add.50, 15.

³¹ [2006] ACTRTT 6.

private tenants where the property owner had failed to carry out essential maintenance work to ensure that the properties were habitable.

In his commentary on the operation of the HR Act, Peter Bailey notes:

‘Many of the significant cases have indirectly involved ESC rights through s 11 [the right to protection of the family and children], and these suggest the real need for further declaration of ESC-based rights.’³²

Importance of ESC rights to the Community

In the Commission’s Human Rights Community Survey the following question was put:

‘The ACT Human Rights Act 2004 currently covers civil and political rights. It does not include economic, social and cultural rights such as the right to health, housing and education. Do you think these rights should be included in the ACT Human Rights Act 2004?’

Respondents were overwhelmingly in support of including ESC rights in the HR Act, with 82.6% responding in favour of inclusion. A number of respondents to the ACT online Community Survey specifically referred to the right to housing, including:

‘Public housing is an issue that needs support in the ACT. I believe many people do not appreciate the effects that unemployment, illness and domestic violence may have on a family’s ability to keep housing.’

The 2009 Report of the National Human Rights Consultation, involved the Committee commissioning research in 2009 that found ESC rights were most important to Australians:

‘The research the Committee commissioned demonstrated that economic, social and cultural rights are at the top of the list of rights that are considered most important to the Australian community.’³³

ESC rights also fall squarely within the responsibilities of the Territory/State Governments:

‘[T]he way they are protected and promoted has a major impact on the lives of many Australians. The right to adequate housing, the right to the highest attainable standard of physical and mental health, and the right to education are particular priorities for the community.’³⁴

It is important to note that people who experience violations of economic, social or cultural rights often also have limited capacity to exercise their civil and political rights. The Commission has had contact with many vulnerable members of the community who continue to experience these difficulties, and in many cases it is related to homelessness or lack of adequate housing. For example, in one case, a woman who was apprehended for an offence was not granted bail as she could not provide a permanent address and so had to remain in detention.³⁵ The Commission is very experienced in handling service complaints from areas of key significance, such as health, disability and children and young people.

³² Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009) 199.

³³ At pXV.

³⁴ At p96.

³⁵ In other cases, people without a permanent address may have difficulties exercising their right to vote in elections because they may not be on the electoral roll.

Justiciability of ESC Rights

Some argue that legislative protection of economic, social and cultural rights is untenable because it requires courts to make policy judgments second guessing government decisions about allocation of resources. The Brennan Report takes a cautious approach to the issue of justiciability. However, it is important to acknowledge that under the common law, Judges often formulate law and policy. Changes to the common law can also have an immense impact on resources – for example, in the area of native title. Judicial law-making has shaped concepts and principles with crucial policy content, such as the law of negligence, discrimination and natural justice.³⁶ A decision ordering a re-trial will result in significant expense for the Crown, but this does not deter judges from making such decisions in respect of respecting the civil right to a fair trial. As former High Court Chief Justice Murray Gleeson has said in relation to human rights and the common law:

‘There is an inconsistency between an assertion that the common law makes legislative protection of human rights unnecessary and a complaint that legislative protection of human rights will empower judges who apply the legislation to make decisions about matters that are inappropriate for judicial decision making. People who believe our rights are sufficiently protected by the common law may or may not be correct, but they should keep in mind that the common law comes from the courts.’³⁷

Justiciability is a fluid, contingent and evolving notion, but essentially it means that a right is capable of being invoked in a legal action and thus a suitable basis on which to conduct judicial or administrative review by a court or tribunal.³⁸ The Committee on Economic, Social and Cultural Rights in a General Comment supports the view that ESC rights can be justiciable:

‘In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary presumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions... There is no Covenant right which could not, in the great majority of systems, be considered to possess at least some justiciable dimensions.’³⁹

Right to education

While the report of the ESCR Research Project will provide important analysis and detailed recommendations regarding the implementation of ESC rights, steps should be taken to begin the incorporation of ESC rights immediately. The right to education is a key right that could be included in the HR Act in the short term. We note that the Solicitor General’s supplementary opinion, annexed to the Brennan Report, distinguishes education as a right that is more likely to represent a judicially manageable standard.⁴⁰ This right is protected in

³⁶ Paul Hunt, *Reclaiming Social Rights: International and Comparative Perspectives* (1996) at p66.

³⁷ AM Gleeson, ‘Legal interpretation—the bounds of legitimacy’ (Speech delivered at Sydney University, 16 September 2009), cited in the Brennan Report at p.350.

³⁸ C Scott and P Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution’ (1992) 141 *University of Pennsylvania Law Review* 1.

³⁹ General Comment 9, UN Doc E/1999/22.

⁴⁰ Brennan Report, p451. The Solicitor General stated that ‘we note, however, that the elaboration in Arts 7 and 13 of the “right[2] of everyone” to “the enjoyment of just and favourable conditions of work” and “education” includes some more specific rights that may represent judicially manageable standards.

the UK HRA, and it has been 'cautiously' interpreted by the UK judiciary.⁴¹ It is generally accepted that the enjoyment of a number of civil and political rights as well as other economic, social and cultural rights are dependent on the right to education. The right to vote, freedom of expression, freedom of information, freedom of association and labor rights are all intrinsically linked to a minimal level of education having been achieved.

Article 2 of Protocol No. 1 of the *European Convention on Human Rights* provides:

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

The content of the right to education was identified to include a right to an effective education:

- a right of access to existing education institutions;
- a right to be educated in the national language; and
- a right to obtain official recognition of completed studies.

Given the negative formulation of the right in the European context, it has been held that states are not obliged to establish or subsidize a particular form of education at any particular level. However, state parties are required to ensure a *right of access* to the educational facilities that already exist at the given time.⁴² This includes the right to access primary, secondary and tertiary education.⁴³ Given that the Territory already has a well-developed education system, a similar right inserted into the HR Act would merely oblige the ACT government to guarantee that individuals could take advantage of the existing means of education.

Indigenous Cultural Rights

The HR Act already includes a right of minorities to enjoy their culture under s.27. In our view this provision should be immediately amended to include a specific recognition of Indigenous culture, similar to s.19 (2) of the Victorian *Charter of Human Rights and Responsibilities*. This would give greater recognition to the special significance of human rights to Indigenous people, which is currently acknowledged in the preamble to the HR Act but not in the substance of the rights protected under the Act. Section s.19 (2) states:

Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-

- (a) to enjoy their identity and culture; and
- (b) to maintain and use their language; and
- (c) to maintain their kinship ties; and
- (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

⁴¹ Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, 'Submission to the Review of the *Human Rights Act 2004 (ACT)*', Australian National University Human Rights Act Research Project, 22 May 2006. Available online at <http://acthra.anu.edu.au/publications/index.html> (accessed 26 May 2009).

⁴² *Belgium Linguistics Case (No 2)* (1968) 1 E.H.R.R. 252 at 280-281 (paras 3-5).

⁴³ *R. (Douglas) v North Tyneside MBC* [2004] 1 All E.R. 709.

Next Steps

In 2004 the ACT took an historic step in enacting the first legislative bill of rights in Australia, overcoming entrenched resistance to the domestic enforcement of human rights. The example set by the HR Act has been critical in paving the way for the Victorian *Charter*, and consultations in many States and Territories, and now at national level. The Brennan Report takes a cautious approach to the incorporation of ESC rights in a federal charter, primarily because key ESC services are provided by State and Territory governments. After five years of experience of the operation of the HR Act, the Territory is in a unique position to exercise leadership on this issue, to provide protection for the substantive rights that have greatest meaning for the most disadvantaged in our community.

If necessary, the application of ESC rights under the HR Act could be limited to the original mechanisms of enforcement of human rights under the Act such as compatibility statements and the interpretation/declaration powers of the courts. Extension of the application of these rights to the direct duty on public authorities and direct right of action to the Supreme Court could be considered when the ESCR research project is completed in 2010.

2. Application of the limitation provision to non-derogable rights

The rights currently protected under the HR Act include a number of rights drawn from the ICCPR that are absolute and non-derogable at international law (meaning that they cannot be limited, even in emergency situations), namely:

- the right to life (s.9);
- protection from torture and cruel, inhuman or degrading treatment (s.10);
- freedom from slavery or servitude (s.26(1));
- rights against retrospective criminal laws (s.25);
- freedom from imprisonment for inability to fulfil a contractual obligation (s.18(8)) and
- freedom from coercion or restraint in relation to religion and belief (s.14 (2)).

However, the limitation provision in s.28 technically applies to these rights, as well as to derogable rights. Although the non-derogable nature of the right may be taken into account as a factor in determining whether any limitation is reasonable under s.28 (2), the HR Act does not expressly prohibit the limitation of these rights. In our view it would serve an important educative role, particularly for public authorities, for those rights that are non-derogable to be clearly excluded from the operation of s.28. We note that this approach of distinguishing derogable and non-derogable rights, with a limitation provision applying only to derogable rights, is also recommended in the Brennan Report for a national charter of rights.⁴⁴ The ACT Human Rights Commissioner made this recommendation in a submission to the first review of the HR Act.

⁴⁴ p372.

3. Power to strike down incompatible subordinate legislation

Under administrative law principles, a subordinate law may be struck down as *ultra vires* where it exceeds the scope of the authorising provision of the principal legislation. In accordance with s.30 of the HR Act, it is strongly arguable that an authorising provision should not be interpreted to contemplate a subordinate law that is incompatible with human rights, unless expressly provided in the authorising provision. Accordingly, under existing law it is likely that the courts have the power to strike down subordinate laws that are incompatible with human rights, unless expressly permitted by the authorising legislation. However, this analysis has not always been clearly applied by the ACT Courts and Tribunals.⁴⁵ For clarity, it would be preferable for the HR Act to be amended to provide that the Supreme Court may declare subordinate legislation to be invalid where it is incompatible with human rights, unless this is specifically contemplated by the authorising legislation.

4. Administrative Decisions (Judicial Review) Act 1989

The new public authority provision in s.40B of the HR Act imposes both substantive and procedural obligations on public authorities in administrative decision making. These obligations may be relevant to judicial review of administrative decisions under the *Administrative Decisions (Judicial Review) Act 1989* (ACT) (ADJR Act), as well as to a direct action under s40C of the HR Act. Including a note in the ADJR Act specifically referring to these obligations in the HR Act would serve a useful educative function, particularly for legal practitioners.

5. Increased support for community legal centres and advocacy organisations

The Commission's view is that human rights legislation can be a vital tool to protect and promote the rights of the most disadvantaged in society. However, it is these groups that often need the most assistance in enforcing their rights or seeking redress if their rights have been violated. Community legal centres and services such as Women's Legal Centre, Welfare Rights and Legal Centre, Youth Law Centre and the Aboriginal Justice Centre play a vital role in assisting the most disadvantaged to have a voice and stand up for their rights. Even with the possible introduction of a conciliation-based model for human rights complaints recommended by the Research Report (see our discussion of recommendation 18 in Part 2), legal advice and assistance would still be required to facilitate the use of a complaints mechanism, particularly for more complex matters.

In Victoria the implementation of the Charter has been greatly assisted by a dedicated legal centre focusing on human rights law. The Human Rights Law Resource Centre has played a very important role in providing legal resources for practitioners on human rights, contributing to debates on policy issues and conducting major test case litigation under the Charter.

We consider that existing community legal centres and services in the ACT should be given specific funding to support the implementation of the HR Act, and to give advice, assistance

⁴⁵ See eg Evans, C, 'The Human Rights Act and Administrative Law' (Paper presented to the Conference, Assessing the First Year of the Human Rights Act, ANU, 29 June 2005), p 6-7 available at <http://acthra.anu.edu.au/publications/index.html>

and representation to people who consider that their human rights have been breached by a public authority.

Community advocacy organisations and peak bodies such as Health Care Consumers Association, ACT Disability Aged and Carer Advocacy Service, Advocacy for Inclusion, the Mental Health Consumers network, SHELTER ACT, the Youth Coalition of the ACT and ACTCOSS also play a vital role in the implementation of the HR Act. These organisations are often the first contact for people whose human rights have been breached, and these organisations may be in a position to resolve human rights issues directly with service providers, without recourse to legal action, by framing advocacy in human rights terms. It is important that this role is properly recognised and adequately resourced, to ensure that advocacy organisations are able to integrate human rights into every aspect of their work.

In the event that ESCR are recognised in the HR Act, and that those rights become enforceable in court, there may be an impact on a wider range of advocacy organisations and these would also need to be considered.

6. Enhancement of Audit powers to meet the requirements of the OPCAT

The Optional Protocol to the UN Convention Against Torture was signed by Australia in March 2009. It requires regular inspections by domestic agencies (as well as occasional inspections by the UN Committee), of a range of facilities where people are detained. The Australian Human Rights Commission is likely to be utilised as the National Preventative Mechanism, so would be a focal point to co-ordinate local bodies at State and Territory Level. The ACT Human Rights Commission's audit power may be an appropriate mechanism for conducting inspections pursuant to OPCAT in the ACT. The Commission is likely to be considered to have the necessary level of functional independence from Government required under the Optional Protocol, but would need to be adequately funded to conduct regular inspections.

Article 20 of the OPCAT requires a National Preventive Mechanisms ('NPM') to have:

- (a) Access to all information concerning the number of persons deprived of their liberty in places of detention as defined in article 4, as well as the number of places and their location;
- (b) Access to all information referring to the treatment of those persons as well as their conditions of detention;
- (c) Access to all places of detention and their installations and facilities;
- (d) The opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person who the national preventive mechanism believes may supply relevant information;
- (e) The liberty to choose the places they want to visit and the persons they want to interview; and
- (f) The right to have contacts with the Subcommittee on Prevention, to send it information and to meet with it.

While the audits that have been conducted by the Commission to date have been done co-operatively with government, it may be necessary to provide the Commission with further powers under the HR Act and the Corrections Management Act to comply with the OPCAT

inspection requirements. The Report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan on the implementation of OPCAT recommends that in developing the NPM model for itself and offering guidance to the States and Territories, the Commonwealth should note that the *Inspector of Custodial Services Act 2003 (WA)* provides a strong template.⁴⁶ The Commission's 2007 Audit of ACT Correctional Facilities likewise favoured the WA inspection model of accountability.

7. Annual Compliance Reporting Function

In our view, although there has been an improvement since early years, it is not clear that the requirement for ACT Government agencies to report on HR Act compliance in Annual Reports is playing a significant enough role in encouraging accountability. While the quality and quantity of reporting is generally better, these sections appear to be compiled at the end of the reporting year for technical compliance, rather than prompting systematic action throughout the year. Annexure 3 to this submission is a table compiling the statements by ACT agencies on human rights compliance from their 2008/09 Annual Reports. The Human Rights Commissioner's submission to the first review of the HR Act also attached a compilation of 2004/05 Annual Report extracts on the measures taken to respect, protect and promote human rights required by s.5(2) of the *Annual Report (Government Agencies) Act 2004*. In those initial reports some agencies reported attending discrimination training as evidence of taking human rights measures. In at least one case this was training mandated under an agreement lodged with the Discrimination Tribunal to settle a complaint of unlawful discrimination made at the former Human Rights Office.

In the latest Annual Reports, many have extensive sections on human rights, however, others still have only brief sections asserting human rights compliance without real engagement with the HR Act or demonstrable action taken to meet this requirement. For example the following statement has been repeated in an agency's annual report since the commencement of the HR Act:

'Our Human Rights Policy Statement outlines our commitment to respecting and protecting human rights and applies to all operations and functions. There were no reports of matters or activities which contravened the Act during the year.'

(The Human Rights Policy Statement is not available on the agency's website.)

An alternative model would be for the Commission to be given a function of annually monitoring agency compliance, following the model of the Victorian Human Rights and Equal Opportunity Commission. The reports of VHREOC have been an important catalyst for the implementation of the Victorian Charter. Under this model agencies would still be responsible for preparing reports, but these would be submitted to the Commission. This system would allow the sharing of information about best practice, and would encourage agencies to take action to ensure compliance with public authority obligations. If this option were implemented, the Commission would require additional resources. The Commission recognises that providing it with an annual reporting function as well as potentially a complaints handling function (see response to Recommendation 18 at pages 34-35) would

⁴⁶ *Implementing the Optional Protocol to the Convention against Torture : Options for Australia*

A report to the Australian Human Rights Commission by Professors Richard Harding and Neil Morgan (Centre for Law and Public Policy, The University of Western Australia), available at http://www.humanrights.gov.au/human_rights/publications/opcat/index.html.

have significant resourcing implications. It may be necessary to prioritise these functions if resources are insufficient to fund both.

Part 2: Specific comments on the Research Report recommendations

The report makes 30 specific recommendations for reform to improve the effectiveness of the HR Act. With some minor qualifications and suggestions, discussed below, we fully support these recommendations. We offer the following comments in relation to each of the recommendations:

Recommendation 1

With respect to the definition of a public authority, consideration should be given to removing the ability to prescribe an entity as a court through regulation as it can potentially be used to expand the list of exempted bodies, contrary to the intention of the amendments.

Comment: Agreed. Although as yet no additional entities have been prescribed as courts and thus excluded from public authority obligations, it would be preferable for any future prescriptions to be made transparently through the legislative process, so that the full implications of the exclusion can be considered by the Legislative Assembly.

Recommendation 2

In our view, the policy rationale for partially excluding courts does not apply to tribunals and we recommend that tribunals should be fully included in the definition of public authorities. If there are sound reasons for their exemption, those should be explained.

Comment: Agreed. We note that the adoption of a broad concept of ‘administrative capacity’ following decisions such as *Kracke v Mental Health Review Board & Ors (General)* [2009] VCAT 646 (23 April 2009) would have the effect of extending the public authority obligations to most of the functions (including determinations) of tribunals. This approach was followed in the recent decision of *Thomson v ACTPLA* [2009] ACAT 38. However, it may be useful to clarify this issue through an amendment to the HR Act.

Recommendation 3

The opt-in provision in s.40D should be publicised to the private sector, including information on how it works and the benefits of opting-in to the HRA. Consideration should be given to including the ‘opt-in’ provision as a specific requirement in government contracts. However, the preference should be to tailor contracts to specify the human rights obligations of contractors upfront.

Comment: Agreed. The Brennan Report confirms that the role of corporations in fulfilling human rights is a significant concern to the community, and that the Government should take an active approach to fostering a corporate culture of human rights compliance. We support the options noted in the Report to:

- incorporate human rights provisions in government contracts,
- require business to produce a compliant human rights policy, implementation plan and/or compliance reports as a condition of doing business with government
- include requirements for human rights impact assessments for large projects involving public–private partnerships.

The Brennan Report also noted growing evidence of economic benefits from adopting a human rights based approach. This included work from the Victorian Equal Opportunity and Human Rights Commission identifying a number of evidence-based indicators for this view, including service user satisfaction, improved outcomes for service users, job satisfaction for staff and the ease and quality of staff decision making.⁴⁷

It is pleasing to note that the opt in provision has now been used for the first time, with the community based organisation Companion House choosing to take on the obligations of a public authority under s.40D of the HR Act. There have not yet been any private sector corporations opting in to the obligations of a public authority under s.40D. We understand that other community organisations, such as the Women’s Legal Centre, are also actively considering opting in under the HR Act.

Recommendation 4

Consideration should be given to amending s.28 to allow reasonable limits to be set ‘under law’ instead of only by ‘Territory laws’. This would enable proportionality to be factored into public authority conduct where referable to legal sources other than Territory laws.

Comment: We agree that it would be appropriate to amend s.28 to allow reasonable limits to be set under law rather than only by Territory Laws. However, we note that the interaction between the duties of public authorities under s.40B and the limitation provision in s.28 is complex, and this amendment may not completely clarify the situation for public authorities. On a literal reading, s.28 could be interpreted to preclude any limitations on human rights except where specifically provided by Territory laws.⁴⁸ In accordance with international human rights principles, human rights may be subject only to limitations determined by law (for example as recognised in Article 29(2) of the Universal Declaration of Human Rights.) Nevertheless, in practice, the limitation of human rights by public authorities in decision-making may be unavoidable, particularly where there is a conflict between two or more protected human rights. In many cases there may be a general legislative authority or discretion which provides a legal basis for the actions of a public authority, but which does not specifically require a human right to be limited in a particular case. In our view, provided that a limitation is generally authorised or contemplated by a law, it is appropriate for public authorities to use the methodology of proportionality to assess the lawfulness of any specific limitation, using the criteria in s.28 of the HR Act. For public authorities grappling with their new obligations under the HR Act, it would be helpful if the link between s.40B and s.28 was made more explicit, by defining the word “incompatible” in s.40B(1)(a) by reference to the test of proportionality in s.28. For example, a further provision could be added which states:

⁴⁷ See p279.

⁴⁸ See the discussion of this issue by Jeremy Gans: <http://charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights/>. See also the comment of Justice Refshauge in *Hakimi v Legal Aid Commission (ACT)*; [2009] ACTSC 48 at [92], noting the “contentious issue, identified in Byrnes A, Charlesworth H and McKinnon G, *Bills of Rights in Australia, History, Politics and Law* (UNSW Press, 2008) at p120, of whether the justifiable limits permitted in s.28 of the Human Rights Act to restrict a human right are available to be relied upon by public authorities absent a Territory law (ie an Act or statutory instrument: Dictionary to the Human Rights Act).” Justice Refshauge was not required to determine this issue in the *Hakimi* case.

‘A public authority does not act in a way that is incompatible with a human right under s.40B(1) if that act is authorised under law, and places a reasonable limitation on a human right in accordance with s.28 of this Act.’

Recommendation 5

Training programs for public authorities should explicitly spell out the steps required to comply with the obligation to properly consider human rights in decision-making processes. Training programs should also include practical guidance on how to integrate proportionality in decision-making processes. Existing human rights resources on the JACS website – in particular the Guidelines for ACT Departments: Developing Legislation and Policy - should be updated to provide guidance on these new obligations. This should be done as a matter of urgent priority.

Comment: Agreed. The Human Rights Commission has developed a training package on public authority obligations which aims to provide explicit and practical guidance on the use of the proportionality methodology. Legislative clarification of the relationship between the public authority obligations and the proportionality criteria (discussed in relation to 4. above), would assist in this regard. The Commission offers this training for government agencies on a cost recovery basis, and free general training for individuals and community organisations. The Commission has published a Fact Sheet on the obligations of public authorities which is available on our website at:

<http://www.hrc.act.gov.au/assets/docs/public%20authorities%20factsheet.pdf>

Recommendation 6

The Supreme Court should be given a limited power to award damages similar to that provided under the UK Human Rights Act 1998 (UK HRA), and as reflected in the ACT Consultative Committee Model Bill. Additionally, consideration could be given to allowing a person who obtains a declaration of incompatibility from the Supreme Court to apply to the government for an ex gratia payment of compensation.

Comment: Agreed. Although in many cases non-monetary orders will provide a sufficient remedy for a breach of human rights by a public authority, there will be exceptional cases where an order for damages is the only adequate way to vindicate a claimant’s human rights. We note that the ACT Supreme Court in *Morro, N & Ahazidad v ACT* recently accepted the submission of the Commission that the right to liberty and security of person under s.18 of the HR Act confers a substantive right to compensation where a person has been unlawfully detained.⁴⁹ The Brennan Report also recommends that damages should be available as a remedy under a proposed federal Human Rights Act, following the UK *Human Rights Act model*, in addition to specific protection for the right to compensation for wrongful conviction.⁵⁰

At international law, ‘effective remedy’ has been interpreted broadly to include restitution, rehabilitation, public apologies, guarantees of non-repetition, and changes in laws and practice. The Commission’s view is that damages should be available as a remedy for the breach of any of the rights protected under the HR Act by a public authority. This remedy

⁴⁹ [2009] ACTSC 118 (10 September 2009).

⁵⁰ Brennan Report at p377 and p370.

should be available at the discretion of the court, only where no other remedy is appropriate. This could be set out in an express remedies clause as exists in the UK's *Human Rights Act 1998*, which provides at s.8(3):

'No award of damages is to be made unless, taking account of all the circumstances of the case, including—

- (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
- (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.'

The Commission's view is that excluding the possibility of damages being awarded has the potential to deter would-be claimants, including those with meritorious claims, from bringing them to court because of the cost and emotional stress associated with litigation. Although these individuals are often aware of potential benefits of a successful claim, such as a public apology or the court ordering a change in agency policy, the time and emotional strain of bringing an action to court weighs against taking action against the public authority, even in cases where pro bono legal assistance is available. Where pro bono assistance is not provided, or is limited, the balance swings further against taking action against a public authority to seek a remedy. We refer also to our discussion regarding legal costs under recommendation 30.

Damages have been awarded very sparingly by the courts in the United Kingdom s.8 of the *Human Rights Act 1998*, and this cautious approach would be likely to be followed by the ACT Supreme Court. Nevertheless, the availability of damages in the ACT would assist genuine claimants who may otherwise be deterred by the cost and time involved in pursuing test case litigation.

Recommendation 7

JACS should review its resourcing and structure of the Human Rights Unit (HRU) to better determine the level of staffing and skills needed to meet the changed environment since 1 January 2009. Greater emphasis should also be given to seeking personnel with qualifications and/or practical experience in human rights and also to staff with the capacity to deliver training on human rights to government agencies.

Comment: Generally agreed. The Human Rights Commission is also able to deliver training on human rights to government agencies. While the Commission has moved to a cost-recovery basis in recent times, in our view it would be more effective for the Commission to be allocated specific funding to provide this training, rather than agencies developing their own in-house training. This would avoid duplication of efforts and would ensure that the standard of training is of a suitable quality and is delivered by human rights experts.

Recommendation 8

JACS should reconvene the Inter-Departmental Committee on Human Rights to oversee the implementation of the amendments imposing obligations on public authorities, and the Human Rights Commissioner should be invited to participate in this forum.

Comment: Agreed. The Human Rights Commission would welcome the opportunity to participate in an Interdepartmental Committee on Human Rights. We recommend that representatives be senior enough to develop and implement action plans or strategies.

Recommendation 9

Measures should be put into place to support community organisations subject to the 'public authorities' provision. This could be in the form of funding for them to seek training, or the provision of free training from the Human Rights Commission. Organisations that currently provide HR Act training (such as the Welfare Rights and Legal Centre) should also be provided with targeted funding.

Comment: Agreed. The Human Rights Commission currently offers free places to the community sector in our general training courses. However, at this stage we do not have the resources to fully meet the high demand for free tailored on-site training sessions for individual community organisations, and so have been providing this training at a reduced cost. Specific funding for these sessions would be helpful.

Recommendation 10

Self-represented litigants should be provided with support materials by the Supreme Court in relation to the direct right of action.

Comment: We agree that support materials for civil and criminal cases would be a useful starting point for self-represented litigants. However, such materials are no substitute for legal representation where complex issues are in dispute. In our view there is a clear need for a properly resourced referral system for pro bono or legally aided representation for litigants with legitimate human rights claims. As discussed below under recommendation 30, the risk of an adverse costs order is also a significant deterrent for individuals who might bring legal action against public authorities, even if representation can be secured. We also note that if recommendation 18 were to be adopted, the option to make a complaint to the Human Rights Commission, with recourse to the ACT Civil and Administrative Tribunal (ACAT) where a matter cannot be conciliated, would be likely to provide more substantive access to justice for disadvantaged people.

Recommendation 11

The HRU should clarify to instructing agencies that the compatibility statement and Scrutiny Committee reports perform different functions under the HR Act; Ministers should be encouraged to take the Committee's concerns back to their departments for reconsideration, rather than relying on the compatibility statement as proof of compatibility.

Comment: Agreed.

Recommendation 12

The requirement to explain non-responses to Scrutiny Committee reports should extend to both government and private members' bills.

Comment: Agreed.

Recommendation 13

All amendments introduced on the floor of the Assembly should be referred to the Scrutiny Committee unless they are urgent, minor or in response to a Scrutiny Committee report.

Comment: Agreed.

Recommendation 14

The terms of reference for the Scrutiny Committee should be amended to require it to report on the HR Act issues raised by subordinate legislation.

Comment: Agreed.

Recommendation 15

Exposure drafts should include an outline of the human rights implications of the draft bill, so that the community is able to consider and respond to these views.

Comment: Agreed. We note that under the Parliamentary Agreement between ACT Labor and the Greens, exposure drafts of all major pieces of reform legislation are to be made available in a timely manner for community comment and consideration. The inclusion of explanatory material regarding human rights implications would allow greater community input into the human rights dialogue on such significant legislation.

Recommendation 16

A statement of reasons should continue to be included with each compatibility statement. The statement should adopt a clear s.28 framework as the requisite standard for assessing compatibility. Where a statement of reasons is not provided, its omission should be explained. Where relevant, all reasons behind compatibility statements should be made publicly available, including advice sought from external sources.

Comment: Agreed. The Commission's view is that detailed compatibility statements improve the human rights dialogue between the three arms of government. These statements are also important in giving the community access to the dialogue, and in serving an educative role about the human rights reasoning process adopted by government. We note that statements of compatibility with detailed reasons have been tabled with some recent bills in accordance with the Parliamentary Agreement with the Greens, but are not yet publicly available on the legislation register (<http://www.legislation.act.gov.au/>). Reasoned statements of compatibility should be provided for all bills that raise human rights issues and these reasons should be available on the legislation register with the compatibility statement and explanatory statement. It would be preferable for reasons to be required under a legislative obligation on the Attorney-General who tables the compatibility statement, rather than these reasons being dependent on the agreement of the Government and cross-bench of the day.

The Commission appreciates that providing statements of reasons with every compatibility statement would have significant resource implications for the Human Rights Unit in JACS. One option may be to consider allocating administrative responsibility for the drafting of statements of reasons to the agency responsible for the bill, subject to the oversight of the Human Rights Unit. This would ensure that all agencies will become more familiar over time

with the requirements of the HR Act and their obligations as public authorities. However, for consistency, we favour the retention of the current model where the Attorney- General is ultimately responsible for compatibility decisions, rather than moving to the UK or Victorian model whereby the responsible minister tables the compatibility statement.

Recommendation 17

The five year review should canvass the different options for amending the HR Act to include compatibility assessments for private members' bills.

Comment: Agreed.

Recommendation 18

Given the relative inaccessibility of Supreme Court proceedings for most people, the Human Rights Commissioner should be given a complaints-handling function, provided that the Human Rights Commission is adequately resourced to undertake such a function. Alternatively, consideration could be given to providing a complaints-handling function to the ACT Ombudsman, similar to that provided under the Victorian Charter to the Victorian Ombudsman. In the interim, we recommend a fact sheet should be prepared about how the HR Act can be used in complaints before the ACT Ombudsman in relation to maladministration.

Comment: The Commission supports this recommendation in-principle and considers that it would improve access to justice for those people whose human rights have been breached. Although the remedy provision in the HR Act is a significant improvement on the Victorian model by providing a freestanding cause of action, for most complainants, the option of instigating proceedings in the Supreme Court is not an accessible remedy. Many individuals will be deterred by the prospect of litigation in the ACT Supreme Court, particularly if they do not have legal representation. We note that the Brennan Report has similarly recommended that the functions of the Australian Human Rights Commission be augmented "to provide the same remedies for complaints of human rights violations... as for unlawful discrimination, permitting determination by a court when settlement cannot be reached by conciliation."⁵¹

As one respondent to the Commission's Government Survey commented:

'I am disappointed that the HR Act is not more enforceable and that people who feel that their human rights have been violated in the ACT have little practical redress. Most cannot afford to take the matter to court and are intimidated by this process.'

The Commission thus supports exploring approaches to provide individuals with alternatives to expensive litigation.

Since the introduction of the direct obligation on public authorities which came into effect on 1 January 2009, the Commission has received a significant volume of human rights

⁵¹ *National Human Rights Consultation Committee Report 2009*, Recommendation 13, p197. We note that in the ACT the ACAT would have jurisdiction as this does not raise a Constitutional issue regarding the exercise of federal judicial power under s.71 of the Constitution, cf: *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

enquiries raising complaints against public authorities. On many occasions these will be complaints that come within the jurisdiction of the Children and Young People Commissioner or the Health Services/Disability and Community Services Commissioner. In relation those matters that are solely human rights complaints, the Human Rights and Discrimination Commissioner is presently only able to provide information and referrals, although, where possible, will endeavour to follow up issues at a systemic level through audit and intervention powers. For example, the Human Rights and Discrimination Commissioner intervened in the cases of *Morro, N & Ahadizad v Australian Capital Territory*,⁵² which raised important issues regarding the availability of compensation for unlawful detention under the HR Act.

One alternative, as noted in the recommendation, is to provide the Human Rights and Discrimination Commissioner with a complaint handling function in relation to breaches of human rights by public authorities. A conciliation-based civil complaint handling function could be a first point of call for individuals to raise human rights issues in a non-adversarial environment. It could operate along a similar model to that which exists for complaints of unlawful discrimination under the *Discrimination Act 1991*. Under this model, a complaint in this jurisdiction could be dealt with under the Commission's investigation and conciliation powers.

Breaches of human rights in the course of criminal proceedings could not be dealt with through a conciliation-based complaints model because of the legal rule that matters that are, or are likely to come before a court cannot be commented on by a non-judicial body (*sub judice*). Instead, the human rights issues associated with criminal proceedings would need to be raised as part of existing criminal proceedings before the court.

The details of any complaints handling mechanism, and the delineation between human rights complaints and other categories of complaint currently handled by the Commission, would need to be carefully considered. For example, health complaints, disability service complaints, complaints about services for older people, complaints in relation to services for children and young people, and any "community services" complaints that might be given to the Disability and Community Services Commissioner,⁵³ will in many cases overlap with complaints that could be classified as human rights complaints. Indeed, people often frame their complaints as human rights complaints, simply because they are sending them to the Human Rights Commission, when they fall under the jurisdiction of Commissioners other than the Human Rights and Discrimination Commissioner. Further issues will arise if economic, social and cultural rights are incorporated into the HR Act as we have recommended.

The interaction between human rights complaints and other complaint handling or oversight agencies, such as the ACT Ombudsman, the Victims of Crime Coordinator, the Public Advocate and the Privacy Commissioner would also need to be determined.

⁵² [2009] ACTSC 118.

⁵³ While the position of Disability and Community Services Commissioner is created by the Human Rights Commission Act, the Act does not provide the Commissioner with any community services functions. This issue will need to be addressed in any future review of the Act.

Whatever model is designed, the Commission considers that it should have the benefits of clarity and accessibility for consumers, whilst minimising opportunities for forum shopping and duplication of effort by complaint handling and oversight agencies. We would welcome the opportunity to discuss these issues with Government if this recommendation is accepted.

Consideration might also be given to including human rights compliance as a relevant factor for the ACT Auditor-General when conducting audits.⁵⁴ In 2003, the United Kingdom Audit Commission, responsible for auditing local government bodies, released a report on improving public service delivery using human rights. The Report analysed progress in agencies taking human rights into account in decision making, and noted the cost and reputational damage to organisations from human rights breaches, and the benefits human rights could bring to service users.

Recommendation 19

The role of the HRU should be enhanced, with more staff and resources to provide a centralised focus of expertise on human rights which can be drawn upon by other agencies. The HRU should be primarily responsible for arranging training for other agencies and for providing and maintaining human rights resources. The different roles and responsibilities of the HRU and the Human Rights Commissioner should be made clear to all agencies.

Comment: We fully support the enhancement of the Human Rights Unit within JACS to provide a centralised focus of expertise on human rights. However, we note that while the Human Rights Commission initially only trained the community in general human rights, it has now taken on the role of providing human rights training to government agencies on a cost recovery basis as resources have not been allocated for this purpose to the Commission. There is currently more demand for training from government and community organisations than can be met by the existing staff at the Commission, who are already overcommitted with existing responsibilities. Additional funding for dedicated training staff would allow us to conduct more frequent training, and to tailor training to the needs of particular Government agencies and community organisations.

Since the Commission has moved to a cost-recovery model for government training, some agencies have decided instead to conduct their own in-house human rights training for budget reasons. It is not clear that this is an effective use of resources across the whole of government, as to develop and provide high quality training requires a considerable investment of time and expertise. A specific allocation of funding to the Commission may be a more efficient way to ensure high quality and consistent standards of training for government agencies.

Recommendation 20

Intensive and ongoing training on the HR Act should be implemented across all levels of government. To be most effective, this training should be tailored to specific agencies and roles and should provide detailed and practical examples of the application of the HR Act to the particular work of those agencies and officers. This training should cover the new public

⁵⁴ Audit Commission (UK), *Human Rights: Improving Public Service Delivery*, Public Sector National Report, 2003, <http://www.audit-commission.gov.uk/nationalstudies/localgov/Pages/humanrights.aspx>.

authority obligations and also support the guidelines for departments' annual reports, so that there are more sophisticated HR Act reports.

Comment: Agreed. We refer to our comments above.

Recommendation 21

An accessible and up to date resource should be created to assist public servants to understand human rights principles and developments. This resource could complement formal training sessions. This could build upon existing materials available on the JACS website, and should be intelligible to those without formal legal training. This resource could also provide a guide to research and links to other sources of more detailed information and human rights cases from Australia and overseas (for example: <http://www.hrlrc.org.au>).

Comment: Agreed. This resource could be created and maintained by the Commission, but we would need to be adequately resourced to perform this function.

Recommendation 22

Each government agency should be strongly encouraged to audit its legislation and policies for human rights compliance, and to identify practices which may be inconsistent with human rights. Human rights compliance should be integrated into the practices and procedures of each agency, and should be incorporated into induction training.

Comment: Agreed. The new obligations on public authorities mean that it is vital for all government agencies to develop a strategy to ensure compliance with the HR Act. This will require the integration of human rights into all practices and procedures, and into the training of all existing and new staff.

Recommendation 23

JACS should explore opportunities for the ACT and Victoria to establish a regular bilateral dialogue at officials' level on the operation of HR Act and Victorian Charter. Such a dialogue would be useful for identifying areas of common interests which could be achieved more efficiently collaboratively than if each jurisdiction were to pursue them independently. One way to take this forward would be for the Attorneys-General to meet to agree on the terms of reference, as it would be useful to have the dialogue established at the ministerial level; such a meeting could be scheduled into the margins of a SCAG meeting. The agenda should include opportunities for collaboration and information-sharing on training (including training of judges), workshops, and current developments.

Comment: We agree that regular opportunities for human rights dialogue between public service officers in the ACT and Victoria would be valuable. Further consideration may need to be given to the best way to facilitate this dialogue.

Recommendation 24

The Human Rights Commission's public survey on the impact of the HR Act is a useful model to base a longitudinal study of human rights awareness in the ACT. A similar process to the Australian Electoral Study could be established within the ACT electoral cycle, or to generate additional data points, twice within this cycle (that is, one every two years). Because it would

take some years for meaningful trend data to be generated, it would be important that such a program should commence sooner rather than later.

Comment: Agreed. The Commission would welcome the opportunity to be involved in the development of such a survey.

Recommendation 25

In addition to reporting against the issues identified in the revised annual report guidelines, agencies should also be required to report on reviews of procedures and policies for compliance; whether and how they have managed their HR Act obligations when outsourcing services, for example, whether contracts and tenders include a requirement for HR Act compliance; whether they have developed guidelines and checklists for incorporating the HR Act in decision-making; whether they have disseminated information about their human rights obligations to their client groups; and whether they have developed a rights framework for complaints handling.

Comment: Agreed. In general, we have found agency compliance with annual reporting guidelines on human rights to be cursory, although there has been some improvement in the latest Annual Reports (see Annexure 3). The identification of specific matters to report against may encourage a more thorough approach. Another option to improve accountability of government agencies would be to adopt the Victorian model, where the Victorian Equal Opportunity and Human Rights Commission is funded to report on government agencies' compliance with human rights. The annual reports of the Victorian Commission have been an effective mechanism for monitoring the implementation of the Charter within the Victorian Government and highlighting areas for improvement. The Human Rights Commission would be well placed to take on this role in the ACT, but would require funding for additional staffing resources.

Recommendation 26

Agencies should be strongly encouraged to use the revised annual report framework to initiate a process for benchmarking their performance and setting progressive goals with the view to continuous improvement. This process could be usefully initiated in conjunction with the five year review.

Comment: See our comment in relation to Recommendation 25 above.

Recommendation 27

The HR Act should be amended to provide for ongoing reviews of its operation by the Attorney-General on a five yearly cycle.

Comment: Agreed. In our view it is vital that there be ongoing review of the operation of the HR Act to continue to monitor the Act and improve its effectiveness. In particular, if not implemented in this review cycle, the issue of the inclusion of economic social and cultural rights in the HR Act must stay on the review agenda. Also the ACT Government should lead a consultation process to consider whether environment rights should be included in the HR Act.

Recommendation 28

The new ACT Civil and Administrative Tribunal should establish a system to monitor and identify cases where HR Act issues are mentioned.

Comment: Agreed.

Recommendation 29

The judiciary should be provided with training that focuses on the methodology of applying amended s 30, the direct right of action provision, and sources of international human rights jurisprudence. Training programs need to be ongoing to keep up to date with current developments and include opportunities for regular refresher courses. Targeted funding should also be provided for training programs for the legal profession.

Comment: Agreed. The Commission could provide training to legal practitioners, but would need funding (or to charge fees) to do this. The National Judicial College would be the most appropriate forum to train judges, magistrates and tribunal members.

Recommendation 30

Consideration should be given to amending court procedure rules to provide for cost capping orders in HR Act proceedings where there is a substantial imbalance between the financial positions of the parties.

Comment: Agreed. The possibility of an adverse costs order is likely to be a significant deterrent to a victim of an unlawful act by a public authority. The legal costs involved in a Supreme Court case can be considerable, particularly where a case raises complex legal issues, such as the boundaries of the definition of a functional public authority. Capping orders may be an appropriate way to address this issue, although it may be difficult for a plaintiff to determine in advance whether the Court will grant such an order. A general presumption that each party bear their own legal costs may be another means to make court proceedings a more accessible remedy. In the interim, government agencies and other public authorities could be encouraged to adopt a policy of not pursuing costs against individuals in genuine 'test case' human rights litigation under the public authorities provision.

Annexure 1: Summary of Results of the Community Survey

See attached

Annexure 2: Summary of Results of the Government Survey

See attached

Annexure 3: Table compiling agencies annual report extracts

Agency	Human Rights Compliance Measures
<p>ACT Auditor General's Office</p>	<p>The Audit Office's operating practices and policies are consistent with the aims of the <i>Human Rights Act 2004</i> and the Office has ensured that human rights principles are integrated into its operations.</p> <p>Examples of how the Audit Office has achieved this are as follows:</p> <p>The Audit Office is a proper authority for the receipt of disclosures under the <i>Public Interest Disclosure Act 1994</i>. Disclosures received by the Office may identify human rights concerns. The Office has sound procedures in place for handling these disclosures appropriately and fairly.</p> <p>The Audit Office ensures procedural fairness is maintained and natural justice is afforded to those affected by the reporting of audit findings and recommendations.</p> <p>Management has promoted an organisational culture that is inclusive, respectful and responsive to staff and auditees. Staff are provided with various mechanisms and forums to raise any issues or concerns regarding the operations of the Office including human rights matters. Staff may also raise concerns at meetings, directly with the Auditor-General or other senior executives, or with a staff representative, or may provide information and suggestions through the Office's annual staff survey, or anonymously. Management responds openly to all staff suggestions and concerns. The 'Auditor-General's Office Union Collective Agreement 2007-10' incorporates ACT public sector wide conditions of employment. The Agreement recognises the need to balance work and life responsibilities and provide a safe and healthy working environment.</p> <p><u>Legislative and policy based reporting</u></p> <p>The Office has 'Equity and Diversity Guidelines' in place and a 'Workplace Discrimination, Harassment and Bullying' policy to support a diverse and non discriminatory workplace where different cultures and talents of staff are recognised and valued.</p>
<p>ACT Building & Construction Industry Training Fund Board</p>	<p>The authority is aware of the requirements under the <i>Human Rights Act 2004</i>, to respect, protect and promote human rights in all aspects of its roles and functions as it administers the provisions of the <i>Building and Construction Industry Training Levy Act 1999</i>. The Authority's staff is also aware of the Government's commitment to build a human rights culture in the ACT and ensure that <i>the authority's</i> staff are working within a human rights framework.</p> <p><i>The authority</i> has an ongoing implementation strategy on the principles of the <i>Human Rights Act 2004</i>. This has included:</p> <ul style="list-style-type: none"> • Providing staff with a copy of the <i>Human Rights Act 2004</i>. • An internal workshop discussing the human rights principles. • Dissemination of information to staff on the legislative scrutiny process. • Liaising when required with the Bill of Rights Unit on human rights principles.

Agency	Human Rights Compliance Measures
ACT Department of Disability, Housing and Community Services	<p>The Department has formed an internal committee to meet its obligations under the <i>Human Rights Amendment Act 2008</i> (the Act). The purpose of this committee is to determine implications for the Department and community partners, ensure processes are in place to enable proper consideration of relevant human rights in decision making, and to determine an approach to support funded community organisations to meet their obligations under the Act where applicable.</p> <p><u>ACT Homelessness Charter</u></p> <p>In April 2008, Minister Katy Gallagher launched the ACT Homelessness Charter – A Statement of Rights. The ACT Homelessness Charter acknowledges that people who are experiencing homelessness have the same basic human rights afforded to the community but often lose their sense of these rights and can sometimes be denied their basic human rights. The Charter recognises the right of Inclusion, rights to Dignity, Respect and Non-discrimination, and rights to Safety and Freedom as particularly important to people experiencing homelessness.</p> <p>The ACT Homelessness Charter – A Statement of Rights, is prominently displayed in Homelessness and Housing services to ensure that the members of the public are made aware of them and all staff are reminded to uphold them in their everyday work. Each new service funding Agreement with Non Government Organisations has a built in requirement that the organisation will implement the Charter of Rights and a Service Guarantee for people who are homeless in the ACT. Disability ACT is working with other States and the Northern Territory to progress a number of priorities under the National Disability Agreement, which is a principal tool in the implementation of the United Nations Convention on the Rights of Persons with Disabilities.</p> <p>Disability ACT provides training to support staff on the human rights principles and an overview of other legislation. Disability ACT recognises that the valued status of people with disabilities is enhanced when we respect:</p> <ul style="list-style-type: none"> • each client has the right to make decisions and to express choices; and • a person’s racial, cultural, linguistic, and religious differences and when they are represented in positive ways and treated with dignity in all aspects of their lives. <p>Disability ACT disseminated updates on the Human Rights Act through team meetings and email communication.</p> <p><u>Office for Children, Youth and Family Support - Youth Directorate</u></p> <p>The <i>Human Rights Act 2004</i> and international human rights instruments, such as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, were incorporated into the design, construction and commissioning of Bimberi Youth Justice Centre. Policies and procedures developed for Bimberi were also informed by the <i>Human Rights Act 2004</i> and international human rights requirements.</p>

Agency	Human Rights Compliance Measures
ACT Department of Education and Training	<p>The <i>Human Rights Act 2004</i> commenced operation on 1 July 2004. From that date all public officials are required to interpret legislation under which they operate consistently with human rights, unless the Territory law clearly authorises otherwise.</p> <p>On 1 January 2009, amendments to the <i>Human Rights Act 2004</i> gave individuals the right of action where their human rights have been breached by a government agency.</p> <p>Staff education, training and resources</p> <p>The Department's commitment to human rights is demonstrated by various elements of the departmental processes designed to raise awareness of human rights issues and ensure human rights compatibility.</p> <p>Under the Department's <i>Equity and Diversity Plan 2007-2009</i>, the Department has appointed a number of staff equity contact officers to keep staff informed about human rights issues and to provide an avenue for these issues to be discussed and for complaints to be channelled appropriately. Induction training and quarterly network meetings were organised by the Department for the equity contact officers. The Australian College of Educators developed a training program which was delivered at the induction and network meetings.</p> <p>Professional learning workshops in the area of Indigenous education undertaken during the year included a program on engaging Indigenous students through online resources, a network meeting for teachers of Indigenous students, and workshops conducted by the Department's Literacy and Numeracy Team focusing on developing cultural awareness in respect of Indigenous people. Information regarding ACT Human Rights Commission workshops is made available to all staff through directors and all staff bulletins. The workshops attended by staff during the reporting period included an introduction to the <i>Discrimination Act 1991</i>, an introduction to the <i>Human Rights Act 2004</i>, contact officer training, discrimination, harassment and bullying, discrimination in employment, and disability discrimination.</p> <p>All processes and templates for the development of legislative, Cabinet and policy documents highlight the need to consider human rights issues.</p> <p>Liaison on human rights issues</p> <p>Departmental officers are members of the whole of government working party that is developing an ACT Indigenous Justice agreement.</p> <p>The Department consults with the Human Rights Commissioner and the Children and Young People Commissioner in the preparation of departmental policies. Their feedback is valuable in ensuring that human rights issues are taken into account and embedded in policy.</p>
ACT Department of Justice and Community Safety	<p>The Department is the lead agency for implementing the <i>Human Rights Act 2004</i>. It is responsible for providing advice on the statutory responsibilities of the Attorney General in relation to human rights. The Department also provides ongoing advice to ACT Government agencies on the development of legislation that is consistent with the Human Rights Act.</p> <p>The Department is responsible for scrutinising all Government Bills and advising the Attorney General on whether they are compatible with the Human Rights Act.</p> <p>During 2008-09, the Department scrutinised 44 Government Bills for compatibility with the HRA, and provided significant input during the</p>

Agency	Human Rights Compliance Measures
	<p>development of a number of major pieces of Government legislation, including the following Bills:</p> <ul style="list-style-type: none"> • ACT Civil and Administrative Tribunal Legislation Amendment Bill 2008 • Corrections Management Amendment Bill 2008 • Crimes (Bill Posting) Amendment Bill 2009Crimes (Controlled Operations) Bill 2008 • Crimes (Murder) Amendment Bill 2009 • Crimes Legislation Amendment Bill 2008 • Freedom of Information Amendment Bill 2008 • Road Transport (Mass, Dimensions and Loading) Bill 2009 • Sexual and Violent Offences Legislation Amendment Bill 2008 • Work Safety Bill 2008 <p>On 1 January 2009, amendments to the HRA came into effect which introduced an obligation on public authorities to act consistently with human rights. In response to this obligation, also introduced was a direct right of action to the Supreme Court for any alleged breach of human rights by a public authority.</p> <p>If a breach is found, the Court can grant relief other than damages, for the contravention. Two executive level workshops on the new obligation were conducted by the Department to explain the obligation to agency managers.</p> <p><u>Linkage Project with the Australian National University</u></p> <p>The ACT Government, represented by the Department, is an industry partner with the Australian National University in monitoring and evaluating the ongoing impact of the HRA. This project was largely funded by the Australian Research Council and concluded on 30 June 2009.</p> <p>A report on the findings of the five year study was tabled in the Legislative Assembly in August 2009. The report will form the basis of further work to be undertaken during 2009-10 on the five year review of the HRA. A second Australian Research Council linkage grant was awarded in March 2009 to examine the possible inclusion of economic, social and cultural rights in the Territory's human rights system. The grant is under a partnership agreement between the Australian National University, the University of NSW and the Department. The project has commenced and will report its findings in the latter half of 2010.</p> <p>The Department has commenced preliminary discussions with the Human Rights Commission for the purpose of developing a Memorandum of Understanding (MOU). The MOU will outline the procedures for dealing with human rights inquiries and complaints received by the Human Rights Commission in relation to the operations of ACT Corrective Services.</p> <p>All policies and procedures for the AMC comply with human rights legislation - it is the first prison in Australia to do so.</p>

Agency	Human Rights Compliance Measures
ACT Department of Territory and Municipal Services	<p>The Human Rights Act 2004 (the Act) commenced operation on 1 July 2004 and is part of the government’s commitment to build a human rights culture in the ACT and to ensure that Territory managers are working within a human rights framework. All public officials have a duty to interpret legislation under which they operate consistently with human rights, unless the Territory law clearly authorises otherwise.</p> <p>In 2008–09, TAMS continued to obtain advice from the Bill of Rights Unit of the Department of Justice and Community Safety about the human rights implications of proposed operational policy and legislation. Statements of compatibility were provided for all new Bills within the Department’s responsibility introduced in the Legislative Assembly.</p> <p>In particular, the Department worked closely with the Unit in developing the Crimes (Bill Posting) Amendment Bill 2008.</p> <p>In June 2009, the TAMS Senior Managers Forum (which comprises approximately 140 senior officers and senior executives from the Department), was addressed by a representative of the Human Rights Commission, to help raise awareness of the Act, with particular emphasis on the amendments to the Act which commenced in January 2009.</p> <p>The Cabinet handbook requires that all Cabinet Submissions must provide details of any human rights implications. TAMS complied with this requirement.</p>
ACT Department of Treasury	<p>Treasury complies with the human rights requirements introduced from 1 July 2004 following enactment of the <i>Human Rights Act 2004</i> (HRA). The HRA imposes a duty on all public officials to operate within a human rights framework and to interpret legislation consistent with the HRA.</p> <p>All pro-formas and guidance material regarding legislative and Cabinet processes includes advice on meeting the requirements of the HRA. Treasury consulted with the Human Rights Unit of the Department of Justice and Community Safety in the preparation of legislation and obtained compatibility statements for twelve pieces of legislation passed by the Legislative Assembly during 2008–09. The Human Rights Unit raised no issues requiring attention. Staff are briefed on the requirements of the HRA through Legislation Training Seminars. ACT Human Rights Commission courses are available to all staff to attend.</p> <p>The Territory’s tax laws and subsidiary instruments engage with the Human Rights Act where they provide for strict liability offences. For example, the criminal offences in the <i>First Home Owner Grant Act 2000</i> are strict liability offences whereby the prosecution is not required to prove knowledge, intention, recklessness or negligence. So long as the prosecution establishes that a person or organisation failed to comply with the Act, the person or organisation is likely to be convicted.</p> <p>Strict liability is employed in the First Home Owner Grant Scheme to ensure the integrity of its regulatory aspects and to protect the public revenue. Provisions such as the above are, on balance, considered to meet the requirements of proportionality, access to review, and equity in application and accordingly they do not conflict with the Human Rights Act.</p> <p>In addition, a warning is included on all relevant revenue circulars and forms advising members of the public that providing false and misleading information is an offence under the <i>Criminal Code 2002</i>.</p> <p>ACT subordinate tax laws proposed to be made under instrument and</p>

Agency	Human Rights Compliance Measures
	<p>regulation-making powers, and powers to institute concession and waiver arrangements through disallowable instruments, are reviewed by the Human Rights Unit during their preparation and before they are presented for enactment. These provisions relate to coercive powers exercisable by inspectors to authorise entry, search and seizure, and the production of documents. They are mandated in situations requiring protection of the public revenue where the consent of the taxpayer is not forthcoming.</p>
ACT Health	<p>ACT Health is committed to building a human rights culture in the delivery of health services and to ensuring that ACT Health managers work within a human rights framework. Staff of ACT Health continue to be supported in their access to internal and external training opportunities relating to human rights issues. The Human Rights Commission provides regular training sessions on human rights matters for all ACT Health employees, which are widely advertised within the agency. Further dissemination of training is undertaken by ACT Health staff using a ‘train the trainer’ approach. Staff are encouraged to attend training sessions, which are provided to them free of charge. In addition, representatives from the Human Rights Commission attend both ACT Health managers and staff orientation induction modules and provide information on the human rights responsibilities of staff. This year human rights training has been particularly important to ensure that staff are aware of the implications of the <i>Human Rights Amendment Act 2008</i>, which commenced on 1 January 2009. The key provisions of the amended Act provide that it is unlawful for ACT public servants to act in a way that is incompatible with a human right or to fail to give proper consideration to a relevant human right when making a decision. Any victims of alleged violations of human rights can commence legal proceedings if these obligations are not observed. In order to minimise any liability for ACT Health, it is essential that staff are aware of their statutory obligations under the <i>Human Rights Act 2004</i>. ACT Health, in conjunction with the Human Rights Commission, has developed and published two brochures dealing with the <i>Health Records (Privacy and Access) Act 1997</i>. The brochures have provided consumers and record keepers with information about their rights and responsibilities under this legislation. The right to privacy of individuals regarding their health records and personal health information is an important human right protected by this legislation. Five hundred copies of these brochures were provided to the Department of Justice and Community Safety (JACS) for dissemination, and a further 90 copies were distributed to key stakeholders involved with the GP Taskforce initiative. Liaison with the Human Rights Unit of JACS is initiated where staff experience uncertainty about human rights issues in the development of legislation and for the routine vetting of draft bills. Issues identified in any ACT Health bills as a result of the Legislative Assembly’s scrutiny process are also brought to the attention of relevant staff. In 2008–09, ACT Health prepared 14 Cabinet submissions on these. One related to a legislative proposal, and a human rights compatibility statement was issued for that legislative proposal. There were no unresolved issues requiring further consultation with the Human Rights Unit of JACS. All ACT Health legislation is audited for consistency with the <i>Human Rights Act 2004</i>. The majority of ACT Health legislation has been found to be consistent with the principles and rights protected by the <i>Human Rights Act 2004</i>. Where legislation has been found to be inconsistent,</p>

Agency	Human Rights Compliance Measures
	<p>amendments have been made. The outstanding matters covered by the legislation audit are being implemented as part of the legislative reviews undertaken periodically by ACT Health. This year, for example, ACT Health has continued to undertake a major review of the <i>Mental Health (Treatment and Care) Act 1994</i>, which raises a number of significant human rights issues. These issues are being addressed as part of this review. In addition, ACT Health has been considering and consulting on the development of legislation for the national registration and accreditation scheme for regulated health professionals, which also raises human rights issues in respect of individuals' privacy. These issues have been referred to the Human Rights Unit of JACS for consideration and report. Likewise, the <i>Transplantation and Anatomy Act 1978</i>, which was also identified as requiring legislative review as a result of the human rights audit, has been subject to further consideration under the National Reform Package on Organ and Tissue Donation for Transplantation. ACT Health is working with the Australian Organ and Tissue Donation and Transplantation Authority to identify legislative barriers to improving organ and tissue donation rates in the ACT while at the same time balancing important human rights issues in the formulation of any recommendations for legislative changes. There was no litigation on major human rights issues for ACT Health in 2008–09.</p>
ACT Long Service Leave Authority	<p>The Authority takes human rights principles into consideration when administering the Act and is of the opinion that none of its current procedures and practices contravenes any provision of the Human Rights Act 2004.</p> <p>The Authority liaises with the Chief Minister's Department in supporting any departmental policy relating to the Human Rights Act 2004 and is able to participate in any education and staff training supplied by the Department.</p>
ACT Planning and Land Authority	<p>ACTPLA recognises and supports the government's commitment to building a human rights culture in the ACT.</p> <p><u>Education and training</u></p> <p>During 2008–09 ACTPLA staff attended two human rights training sessions run by the ACT Human Rights Commission. A senior officer from the Human Services area of the agency attended a four-hour session on discrimination in employment to ensure that all agency recruitment, selection and the ongoing employment relationship complies with the <i>Human Rights Act 2004</i>.</p> <p>Also, six staff attended a full-day session with the ACT Human Rights Commission on the role of contact officers within the agency. By attending this seminar, these staff are qualified to act as contact officers. A contact officer is an independent person, able to offer impartial advice to a staff member who feels that their rights under the Human Rights Act have been violated. With this training, ACTPLA has increased its contact officers from two to six—that is, three men and three women who are drawn from each branch.</p> <p>Two senior officers from Corporate and Human Services and Development Services also attended a four-hour training session run by the Employee Relations Unit of ACT Shared Services. This training, while broader than just the Human Rights Act, emphasised the need to adhere to the Act in any workplace incident.</p> <p>To ensure that staff are aware of their rights and obligations under the</p>

Agency	Human Rights Compliance Measures
	<p>Human Rights Act, information on appropriate behaviour and how to make a complaint is included in induction sessions run for new employees.</p> <p><u>Dissemination of information</u></p> <p>Information about human rights and the obligations that arise for all staff is distributed via ACTPLA's internal staff e-newsletter, <i>InShape</i>.</p> <p>Human Rights Act—legislative scrutiny</p> <p>ACTPLA made no amendments to legislation requiring review by the Human Rights Commissioner or requiring a Human Rights Compatibility Statement as part of any process changes.</p> <p><u>Legislative audits</u></p> <p>There were no legislative audits conducted during 2008–09 to assess consistency with human rights provisions.</p> <p>In developing the 2009–10 audit program, ACTPLA will schedule a legislative compliance audit and ensure that the audit includes an assessment of consistency with human rights provisions.</p> <p><u>Litigation</u></p> <p>ACTPLA had no cases of litigation associated with human rights issues initiated during the year.</p>
ACTEW Corporation Ltd	<p>ACTEW's <i>Human Rights Policy Statement</i> outlines the Corporation's commitment to respecting and protecting human rights and applies to all operations and functions. There were no reports of matters or activities which contravened the Act during the year.</p>
Canberra Institute of Technology	<p>During 2008, the CIT has continued to strengthen the culture of human rights within the organisation. The CIT has adopted a range of different approaches during 2008 that further show our commitment to these important principles:</p> <ul style="list-style-type: none"> • During the development of the CIT's Strategic Plan key discussions were held at focus group meetings on the importance of the organisations values and respect for staff and students; • Cultural awareness training was delivered to members of the CIT Advisory Council and Institute Centre Directors. In addition, Cultural • Awareness training continued to be provided to all staff within the Institute by the Yurauna Centre; • A new program to assist disabled persons access job opportunities within • CIT was developed. Implementation of the program will begin in early 2009 and will involve the promotion of all job vacancies through a registered employment service under the Disability Employment Program; • All CIT policies, publications and information sources that were developed or reviewed during 2008 were consistent with the principals of human rights; • CIT continues to support its Equity and Diversity Contact Officer Network that manages staff issues and Student Equity Coordinators that assist students with gender equity, people with disabilities and migrant issues; • The CIT has been in consultation with the Human Rights Office which will run a workshop on the <i>Human Rights Act 2004</i> at the CIT Developing Us 2009 day.

Agency	Human Rights Compliance Measures
ACT Chief Minister's Department	<p>During the year the Department held two education sessions for staff on human rights principles. A session was held in September 2008 on <i>Equal Access to Public Information – Your Responsibility as a Web Publisher</i>. The session was designed to raise awareness of staff involved in web publishing of their legal obligations regarding web accessibility and was attended by 12 staff.</p> <p>The second session held in February 2009 was a <i>Discrimination in Employment Workshop</i> that provided participants with a general understanding of the purpose, scope and operation of the <i>Discrimination Act 1991</i>. Discussion included the difference between direct and indirect discrimination and any exceptions that may apply, and consideration of strategies to prevent unlawful discrimination. The session was attended by 17 staff. Both sessions were provided by officers from the Human Rights Commission.</p> <p>Public Sector Management sought advice from the Government Solicitor’s Office to ensure specific policies it was developing were consistent with the <i>Human Rights Act 2004</i>.</p> <p>The Office of Industrial Relations prepared a number of new pieces of legislation in consultation with the Human Rights Unit, including:</p> <p>Work Safety Policy</p> <p>Human rights compatibility statements were issued for the following work safety legislation:</p> <ul style="list-style-type: none"> • <i>Work Safety Bill 2009</i>; and • <i>Work Safety Legislation Amendment Bill 2009</i>. <p>After consultation with the Human Rights Unit the main issues that needed to be resolved were:</p> <ul style="list-style-type: none"> • the justification and structure of the strict liability offences; • the use of reverse onus provisions; • the structure and operation of the “use of protected information” provisions; • the protection of people carrying out functions under the Act from criminal and civil liability; and • penalty levels. <p>Industrial Relations Policy</p> <p>Human rights compatibility statements were issued for the <i>Long Service Leave (Portable Schemes) Bill 2009</i>. After consultation with the Human Rights Unit, there were no issues that needed to be resolved.</p> <p>Workers Compensation Policy</p> <p>Human rights compatibility statements were issued for the following workers compensation legislation:</p> <ul style="list-style-type: none"> • <i>Workers Compensation (Terrorism) Amendment Bill 2009</i>; and • <i>Workers Compensation (Default Insurance Fund) Amendment Bill 2009</i>. <p>After consultation with the Human Rights Unit, there were no issues that needed to be resolved.</p>

Agency	Human Rights Compliance Measures
ACT Land Development Agency	<p>Under section 40 of the <i>Human Rights Act 2004</i> the LDA and its employees are public authorities. The majority of the LDA's functions involve commercial relationships with business entities. The LDA discharges those functions in accordance with its obligations under section 40B of the <i>Human Rights Act 2004</i> whereby it is unlawful to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.</p> <p>In its interactions with individuals, primarily through land sales, the LDA applies clear and transparent sale processes to protect the rights of all parties. It also provides comprehensive pre-sale material to intending purchasers that fully informs them of all relevant issues. In all its dealing with staff, members of the public and the business community, the LDA acts in a way that takes into account and is respectful of human rights.</p>
Office of the Commissioner for Sustainability and the Environment	<p>Our Office has a responsibility to be the advocate of human rights for the public with regards to environmental concerns.</p> <p>This role is outlined in the <i>Commissioner for the Environment Act 1993</i> and usually takes the form of a response to a submitted complaint from a member of the public about the management of the environment by Territory agencies.</p> <p>In 2008-09 our staff did not undertake any formal course in relation to human rights principles. Staff members are scheduled for training in July and August 2009.</p>
Rhodium Asset Solutions	<p>Rhodium promoted a working environment which recognised human rights principles.</p> <p>Internal practices were implemented to: ensure equality, value and diversity; protect privacy; encourage active participation in office management; and ensure the safety and security of all staff.</p> <p>Rhodium had no challenges to its operation during 2008-2009 with respect to human rights violations.</p>
Legal Aid ACT	<p>The Commission, anticipating the amendments to the <i>Human Rights Act 2004</i> that became operational on 1 January 2009, sought independent legal advice to ensure that the guidelines and procedures particularly around decision making are compliant with human rights.</p> <p>To remove any doubt the Guidelines adopted by the Commission were amended to include specific provision for a grant of legal assistance where a real issue concerning human rights is involved.</p> <p>The Commission has also confirmed that all guidelines will be applied in the context of upholding the applicant's human rights.</p> <p>Staff of the Commission, both legal and non-legal, are trained in human rights principles.</p> <p>The lawyers regularly refer to the <i>Human Rights Act 2004</i>. Many cases conducted by our lawyers involve interpretation of the Act and the application of human rights jurisprudence.</p> <p>The internal continuing legal education program incorporates discussion of human rights, particularly for staff of the criminal law practice.</p> <p>These education sessions occur on a regular (usually fortnightly) basis. Information concerning the legislative scrutiny process is readily available to staff of the Commission. Brochures and publication from a range of organisations including the Human Rights Commission and the Department of Justice and Community Safety are provided through our</p>

Agency	Human Rights Compliance Measures
	<p>community legal education area.</p> <p>Legal Aid ACT lawyers keep up to date with developments in human rights law through research in individual cases, reference to international developments when preparing matters, reviewing websites and journals, encouraging lawyers to join relevant human rights mailing lists and participating in community discussion. The Deputy Chief Executive Officer is a member of the Human Rights Project Reference Group. In our response to cabinet submissions, or when making comment regarding law reform proposals, any relevant human rights issues are discussed. A human rights law committee was formed and prepared a response to the National Consultation regarding human rights in Australia.</p> <p>The Commission has agreed to a lawyer being seconded to work at the Human Rights Commission. We benefitted from the secondment of one of our criminal lawyers to the HRC last year, and anticipate that the experience a junior lawyer who has been working in our community legal education area will gain through a temporary part-time placement will also provide the Commission with greater human rights expertise.</p> <p>We provide links to the Human Rights Commission in our publications. During the year, the Commission responded to two applications in the Supreme Court that challenged its procedures on human rights grounds. In the matter of <i>Hakimi v The Legal Aid Commission (ACT)</i> the applicant contended that the Work Allocation Guideline was not compliant with section 22 of the <i>Human Rights Act 2004</i>.</p> <p>The court dismissed the application. In the second case, a serious criminal proceeding, the Commission was granted leave to become a party to respond to an application challenging the validity of the decision by the Commission to impose a contribution as a condition of the grant of assistance. The challenge alleged the decision was not compliant with the <i>Human Rights Act 2004</i>. That application was also dismissed.</p>
ACT DPP	<p>Prosecutors are defenders of human rights. As “ministers of justice”, they are obliged to ensure as far as they can that the criminal justice system respects the human rights of those involved in its processes. This traditional role of the prosecutor is re-enforced by the <i>Human Rights Act 2004</i>.</p> <p>The <i>Human Rights Act 2004</i> guarantees everyone involved in the criminal process – accused persons, the community (on whose behalf the Director prosecutes), victims and others – the right to a fair trial.</p> <p>The Director has taken the following steps to respect, protect and promote human rights:</p> <ul style="list-style-type: none"> • during training sessions, prosecutors are reminded of the ethics and obligations of the prosecutor and, in particular, the terms of the <i>Human Rights Act 2004</i>; • the DPP’s library has a collection of material relevant to human rights that is available as a resource to assist prosecutors in the discharge of their duties; • prosecutors ensure that the trials of persons alleged to have committed criminal offences are fair and accord with human rights law; • the employment of witness assistants in the Office recognises the need to ensure that the rights of victims are respected;

Agency	Human Rights Compliance Measures
ACT Public Trustee	<p>• the Director publicly promotes human rights values.</p> <p>Perhaps the strongest demonstration of our commitment to Human Rights is our achievement of socially responsible and socially supportive outcomes through the Capital Region Community Foundation (GreaterGood). Through GreaterGood, we have amassed a growing corpus of \$5.1M which is invested and the yield is donated to charitable causes. Some \$800K has been distributed to (mostly local) charity since establishment of the scheme. Significant outcomes from these donations include the acquisition of software for sight impaired people, the facilitation of Outward Bound Navigator courses for disadvantaged youth and the Spastic Centre’s “Get out There” program for 14-18 years with a physical disability. Through GreaterGood we have helped to build significant social capital, developing a strong facilitative network through which we can “link good people with good causes” to achieve productive social outcomes for the needy. The pleasing aspect of GreaterGood is that it is entirely compatible with our business as trustees.</p> <p><u>OUR ROLE AS DECISION-MAKER FOR FINANCIAL AND PROPERTY MATTERS</u> The Public Trustee is appointed as Financial Manager, by the Guardianship and Management of Property Tribunal for persons with impaired decision-making ability in approximately 50% of cases. This appointment brings with it a discipline to constantly balance the need for intervention in people’s lives against their perceived wishes. We seek to impose the minimal impact necessary, mindful of the rights of represented persons and encourage protected persons to live in the general community as independently as possible.</p> <p><u>EDUCATION AND TRAINING OF STAFF ON HUMAN RIGHTS PRINCIPLES</u> It is vital that our people understand human rights issues and respect the rights of our clients. We recognise the stresses experienced by our people in their challenging work and actively promote human rights issues amongst staff.</p> <p>During the reported year, training was provided by the Human Rights Unit JACS to PTACT staff in human rights issues. Additionally, the Mental Health Unit in ACT Health provided our staff with training in mental health issues.</p> <p><u>LEGISLATIVE AND POLICY BASED REPORTING DISSEMINATION OF INFORMATION ABOUT HUMAN RIGHTS</u> Information and policy documents relating to the legislative scrutiny process and such human rights/discrimination issues as workplace discrimination, harassment and bullying prevention was circulated to Public Trustee staff during the reported year. The Public Trustee is represented on the Justice and Community Safety Workplace Consultative Committee through which human rights information is disseminated to staff.</p> <p>In a whole of JACS staff survey conducted in late 2008, PTACT staff reported high satisfaction levels, equal to or greater than benchmark, in respect to freedom from bullying/harassment.</p> <p><u>LEGISLATIVE SCRUTINY</u> The Public Trustee has not developed any legislative proposals during the year requiring consultation with the Human Rights Commissioner.</p> <p><u>LEGISLATIVE AUDITS</u> The Public Trustee has not undertaken any legislative audits during the</p>

Agency	Human Rights Compliance Measures
	<p>reported year.</p> <p>The Public Trustee is a member of the Australian Guardianship and Administration Council and through this committee is apprised of and influences, human rights issues relating to Guardianship, Administration and Public Trustee matters in other Australian and international jurisdictions.</p>
Electoral Commission ACT	<p>Respect for human rights is a key driver behind the Commission's statutory functions and its organisational mission and goals.</p> <p>The focus on customer service contained in Elections ACT's mission, key goals and training programs is intended to ensure that all staff respect, protect and promote human rights in the course of their duties.</p> <p>The Commission considers that its conduct of elections under the Electoral Act gives effect to section 17(b) (Taking part in public life) of the <i>Human Rights Act 2004</i>, which provides that every citizen has the right, and is to have the opportunity, to vote and be elected at periodic elections that guarantee the free expression of the will of the elector.</p> <p>Human rights principles are taken into account in the Commission's regular reviews of the electoral legislation. The JACS Human Rights Unit is consulted on proposals to amend the electoral legislation.</p>
ACT Ombudsman	<p>The ACT Ombudsman continued to work collaboratively with the ACT Human Rights Commission and the ACTCS on issues concerning the new ACT prison. The Ombudsman's office also plays an active role in human rights protection. The right to complain is both a right in itself, implicit in the civil and political rights listed in the Human Rights Act, and one of the best mechanisms to ensure that all other rights can be protected. It establishes a fundamental status for the individual in his or her dealings with government. The existence of bodies such as public sector ombudsmen minimises the inequality of power, resources and information that can prevent this right, and those available through it, from being exercised.</p> <p>There was no litigation against the ACT Ombudsman in relation to the Human Rights Act.</p>
ACT Public Advocate	<p>Section 10 of the <i>Public Advocate Act 2005</i> requires the PA ACT to act as an advocate for the rights of children and young people and adults suffering a condition that could render them vulnerable to abuse, exploitation or neglect. In undertaking this function, the PA ACT continued to operate in a manner consistent with the principles of the <i>Human Rights Act 2004</i>. During the reporting period, PA ACT staff attended information and education sessions conducted by the Human Rights Commission and staff liaised with the Human Rights Commission regarding a number of individual matters, as well as a number of issues of systemic concern.</p>
Victim Support ACT	<p>Victim Support ACT is committed to respect, protect and promote human rights in the ACT, and to the delivery of services that uphold Part 2 section 4(a) of the <i>Victims of Crime Act 1994</i>.</p> <p>A special training session for staff on the Human Rights Act 2004 was delivered in 2008-09.</p> <p>Consistent with this Victim Support ACT has reviewed its statement of client rights and responsibilities and produced a new publication outlining these.</p>

Agency	Human Rights Compliance Measures
The Victims of Crime Coordinator	<p>The VoCC is committed to respect, protect and promote human rights in the ACT, and to the delivery of services that uphold Part 2 section 4(a) of the <i>Victims of Crime Act 1994</i>.</p> <p>A special training session for staff on the Human Rights Act 2004 was delivered in 2008-09.</p>
Department of Environment Climate Change, Energy, and Water.	<p>The Human Rights Act 2004 commenced on 1 July 2004. Under this Act all public officials are required to interpret legislation under which they operate consistently with human rights, unless the Territory law clearly authorises otherwise. Section 40B, which creates a duty on public authorities to act consistently with human rights, commenced on 1 January 2009.</p> <p>The Department is committed to ensuring its staff comply with the Human Rights Act 2004.</p> <p><u>Education and Training</u></p> <p>To increase staff understanding of the Human Rights Act 2004 and its impact on how and what they do, the Department's Legal Officer held a Human Rights familiarisation seminar in June 2009. This session was attended by 12 staff members (seven policy officers and five operational staff). The session focused on s40B of the Act and ways in which staff members could consider human rights in their daily decision making. The Checklist for Human Rights Compliance developed by the Human Rights Commission was provided to staff at this time, and also provided by email to all staff. Staff were encouraged to attend training courses offered by the Human Rights Commission.</p> <p>Brochures and flyers from the Human Rights Commission are made available to staff.</p> <p><u>Liaison</u></p> <p>The Department has had ongoing discussions with the Human Rights Unit in the Department of Justice and Community Safety about human rights issues and procedures, including the seminar presented to departmental staff. The Human Rights Commission was consulted during the development of the Department's Workplace Discrimination, Harassment and Bullying Prevention Policy.</p>
ACT Policing - AFP	<p>As part of the AFP, we are subject to a dual system of accountability and safeguards at the Commonwealth and Territory levels. For example, Commonwealth and Territory legislation set out the circumstances under which a person may be arrested, detained and questioned or the circumstances in which we may use listening devices to obtain information during the course of criminal investigations.</p> <p>In addition, the AFP has a comprehensive internal corporate governance framework which is a hierarchy of Instruments providing direction and guidance on required employment practices and behaviour in the AFP. The framework has a legislative base provision to invoke disciplinary action in the event that Instruments are contravened. The framework seeks to balance accountability with empowerment and is used to support corporate and individual decision making processes.</p> <p>Internal corporate governance documentation is subject to regular review. The Ombudsman and other key stakeholders have input into the revision of key policy documents which may potentially impact on human rights including those relating to Use of Force, Care and Protection of Intoxicated</p>

Agency	Human Rights Compliance Measures
	<p>Persons and Exhibit Handling.</p> <p>As discussed in Sections B.1—Community Engagement, C.19—ACT Multicultural Strategy 2006–2009 and C.20—Aboriginal and Torres Strait Islander Reporting, we maintain close connections with many communities and groups within the ACT. This approach of engagement and cooperation enables us to ensure emerging issues are identified and community concerns about possible encroachments on human rights are understood and addressed openly.</p>
ACT TAB	<p>ACTTAB acknowledges the role and functions of the ACT Human Rights Commission and fully appreciates the role of the Corporation in incorporating human rights standards into its business operations.</p> <p>ACTTAB supports human rights through a number of ways, in terms of day to day operations and administrative decision making. In relation to workplace harassment and discrimination, ACTTAB has advocated a policy position of zero tolerance, and this is supported through periodic training programs and through incorporating the zero tolerance approach into the Corporations’ Workplace Agreement.</p> <p>In their employment, ACTTAB staff operate in a consultative environment with processes in place that facilitate consultation and participative decision making. In this way, employees are assured the right to speak out confidently about workplace/industrial issues that may affect or impact upon them.</p> <p>ACTTAB gathers a vast amount of personal information from employees and from the public, and has established practices in place to ensure the necessary safe keeping of private information.</p> <p>In terms of legislative processes, while ACTTAB is not directly responsible for legislative proposals, and operates under commonwealth and ACT legislation, the Corporation is mindful of its obligation to ensure that legislative provisions are applied having full regard to the human rights of each individual.</p> <p>ACTTAB understands that the Human Rights Act applies to natural persons (rather than the Corporation itself) and is evolving to ensure due regard to human rights in all aspects of business.</p>

Annexure 4: Commission's advice on outlaw motorcycle gang laws