

**FIVE YEARS' EXPERIENCE
OF THE *HUMAN RIGHTS ACT 2004* (ACT):
INSIGHTS FOR HUMAN RIGHTS PROTECTION
IN AUSTRALIA**

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I INTRODUCTION

On 1 July 2004, Australia's first legislative Charter of Rights, the *Human Rights Act 2004* (ACT) ('*HR Act*') came into effect. The adoption of the *HR Act* marked a significant milestone, overcoming an entrenched 'reluctance' about human rights,¹ which had consigned to failure numerous past attempts to establish a national Bill of Rights, whether by constitutional referendum or ordinary legislation.² In the five years since the *HR Act* came into effect, there have been significant developments in the Australian human rights landscape, with the passing of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'), and community and expert consultations recommending the adoption of human rights legislation in Tasmania and Western Australia.³

In 2008, the new federal Labor Government established a National Human Rights Consultation Committee ('NHRCC') to conduct a major consultation on the protection of human rights in Australia. The National Human Rights Consultation Report ('Report'), released in October 2009, recommended a range of measures to improve human rights protection, including the adoption of a

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1 Hilary Charlesworth, 'The Australian Reluctance about Rights' (1993) 31 *Osgoode Hall Law Journal* 195.

2 See generally George Williams, *A Charter of Rights for Australia* (UNSW Press, 3rd ed, 2007).

3 See Tasmania Law Reform Institute, *A Charter of Rights for Tasmania*, Report No 10 (2007); Consultation Committee for a Proposed Human Rights Act, Department of the Attorney-General (WA), *A WA Human Rights Act: Report of the Consultation Committee for a Proposed WA Human Rights Act* (2007).

federal Human Rights Act ('HRA').⁴ The model proposed by the NHRCC draws strongly on the human rights legislation in the Australian Capital Territory ('ACT') and Victoria.⁵ On 21 April 2010, the Attorney-General Robert McClelland announced a new national Human Rights Framework in response to the Report.⁶ This Framework does not include the enactment of a federal HRA, but contains some significant new measures, such as a legislative requirement for compatibility statements and a new Joint Committee on Human Rights, which have parallels in the *HR Act*.⁷ It also involves a commitment of \$12.4 million for human rights education. The Human Rights Framework will be reviewed in 2014, at which time the issue of a national HRA is likely to be revisited, and further consideration may be given to the recommendations of the Report.⁸

In this article, we consider the experience of the *HR Act* over its first five years and, and in our conclusion reflect upon the insights that may be drawn from this experience in improving the protection of human rights at a national level. While taking place on a relatively small scale, the gradual impact of the *HR Act* in the courts with a cautious flow of litigation, and the more immediate influence in the development of policy and legislation and in fostering human rights audits of correctional laws and detention practices highlights some of the paradigm shifts that may be brought about through legislative protection of human rights. Some of the theoretical issues, such as legislative interpretation approaches, remain to be fully resolved. There has been a growing difference of approach between the ACT and Victorian Courts of Appeal regarding the methodology to be applied under the interpretive obligation and whether any justification for limitations on human rights should be considered in the interpretive process. If it continues, this divergence is likely to present challenges in developing a shared body of human rights jurisprudence in Australia.

Reviews of the *HR Act* have proven critical because reform in the ACT followed the Attorney-General's Twelve-Month Review, which clarified the legislation, made human rights obligations directly applicable to public authorities, and created a freestanding right of action in the Supreme Court.⁹ The Five Year Review has commenced, and areas highlighted as requiring reform by the Australian National University ('ANU') ACT Human Rights Act Research Project in its report include: broadening the legal remedies available to include financial compensation; and establishing a complaint mechanism in the ACT

4 National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) xxxiv (Recommendation 18).

5 Ibid 377.

6 Robert McClelland, 'Launch of Australia's Human Rights Framework' (Speech delivered at the National Press Club of Australia, Canberra, 21 April 2010).

7 Australian Government, *Australia's Human Rights Framework* (2010).

8 See, eg, Australian Human Rights Commission, 'Important Steps to Better Protect Human Rights but Substantial Gaps Remain' (Media Release, 21 April 2010).

9 See generally ACT Department of Justice and Community Safety, *Twelve-Month Review of the Human Rights Act 2004* (2006).

Human Rights Commission ('ACT HRC').¹⁰ Other reforms such as ensuring that non-derogable rights, such as freedom from torture, are not able to be limited by legislation; and including economic, social and cultural rights, such as health, housing and education in the *HR Act*, have been recommended by the ACT HRC.¹¹ The ACT government response to these proposals for reform is not yet available.

II THE *HR ACT*

The *HR Act* was developed following a community consultation conducted by an independent Bill of Rights Consultative Committee ('Committee') formed in 2002, chaired by Professor Hilary Charlesworth.¹² The Committee found strong community support for a Bill of Rights and in its 2003 Report recommended that the ACT adopt a legislative Charter drawing on the 'dialogue model'.¹³ A central feature of the consultation was a deliberative poll of 200 randomly chosen Canberrans exposed to two days of debate by, and questioning of, experts with differing views, resulting in participants' knowledge based increasing by 5 to 50 per cent.¹⁴ Bills of rights in New Zealand ('NZ'),¹⁵ and the United Kingdom ('UK'),¹⁶ were fashioned to redress a perceived imbalance in stronger constitutional Charters, such as the United States Bill of Rights, which allocate ultimate power to determine human rights disputes to the courts.¹⁷ Under the dialogue model, each arm of government plays a role in considering human rights issues, but the legislature retains the final say over the balance to be struck between human rights and other community interests.¹⁸ The Committee recommended that the ACT go further in some respects than the other legislative Charters, by providing protection for economic, social and cultural rights (following the lead of the *Constitution of the Republic of South Africa Act 1996* (South Africa)) in addition to civil and political rights.¹⁹

10 See generally Australian National University ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009), tabled by the ACT Attorney General under s 41(2) of the *HR Act*.

11 ACT Human Rights Commission, Submission to ACT Government, *Five Year Review of the Human Rights Act 2004 (ACT)*, 4 November 2009, 4; ACT Human Rights Commission, Submission to ACT Government, *Review of the Human Rights Act 2004 (ACT)*, 24 May 2006, 13–14.

12 The other committee members were Larissa Behrendt, Elizabeth Kelly and Penelope Leyland.

13 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (2003) 62. See generally Peter W Hogg and Alison A Bushell, 'The Charter Dialogue between Courts and Legislatures' (1997) 35 *Osgoode Hall Law Journal* 75.

14 Before the deliberative poll, 47 per cent of participants favoured and 29 per cent opposed a Bill of Rights, whereas afterwards, these figures changed to 59 and 39 per cent respectively: Equality and Human Rights Commission, *Developing a Bill of Rights for the UK* (2010) 41–2.

15 *New Zealand Bill of Rights Act 1990* (NZ).

16 *Human Rights Act 1998* (UK) c 42.

17 See generally James Allan, 'Bills of Rights as Centralising Instruments' (2006) 27 *Adelaide Law Review* 184.

18 ACT Bill of Rights Consultative Committee, above n 13, 67.

19 *Ibid* 90.

In its final form, the *HR Act* was a more conservative document than that proposed by the Committee, leading some critics to call it a 'Claytons Bill of Rights'.²⁰ The range of rights protected was limited to civil and political rights drawn from the *International Covenant on Civil and Political Rights*,²¹ and the *HR Act* did not initially include a direct duty on public authorities to comply with human rights. However, in other respects, it reflected the Committee's recommendations. While protecting rights from the *ICCPR*, the *HR Act* adopted a general limitation provision which provides that these rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.²²

The *HR Act* protects and promotes human rights through five key mechanisms:

1. *Compatibility Statements and Legislative Scrutiny*

The Attorney-General is required to certify whether each government Bill is, in his or her opinion, compatible with human rights;²³

Specific consideration of human rights consistency is added to the terms of reference of the Standing Committee on Legal Affairs (Scrutiny Committee);²⁴

2. *Interpretation of laws*

An obligation on courts and other decision-makers to interpret ACT laws to be consistent with human rights, so far as it is possible to do so consistently with the purpose of the law;²⁵

3. *Declaration of incompatibility*

A power given to the ACT Supreme Court to make a declaration of incompatibility where an ACT law cannot be interpreted to be consistent with human rights.²⁶ This declaration does not invalidate the law but is required to be tabled in the Legislative Assembly.²⁷ The Attorney-General is then obliged to provide a written response within six months.²⁸

4. *Human Rights Commissioner*

The creation of the role of Human Rights Commissioner,²⁹ which was added to the existing functions of the Discrimination Commissioner, with responsibility for promoting human rights through community

20 See Simon Bronitt, 'Two Visions of the *Human Rights Act 2004* (ACT): A 'Claytons' Bill of Rights or the New Magna Carta?' (Paper presented at the Forum on the National Implications of the ACT Human Rights Act, ANU, 1 July 2004).

21 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

22 *HR Act* s 28.

23 *Ibid* s 37.

24 *Ibid* s 38.

25 *Ibid* s 30.

26 *Ibid* s 32.

27 *Ibid* s 33.

28 *Ibid*.

29 Now set out in the *Human Rights Commission Act 2005* (ACT) ('*HRC Act*').

education,³⁰ advising the Attorney-General,³¹ conducting systemic human rights reviews,³² and the ability to intervene (with leave of the court or tribunal) in cases raising human rights issues.³³ The Attorney-General is also given a right to intervene in human rights cases, but no leave by the court or tribunal is required.³⁴

5. A direct duty on public authorities (effective from 1 January 2009) to take relevant human rights into account in decision-making and not to act in a way that would be incompatible with a human right. This duty is enforceable through a direct right of action in the Supreme Court, which may grant any remedy other than damages.³⁵

A 2008 Amendments to the *HR Act*

Following the first formal review of the *HR Act* (and probably stimulated by the enactment of the more progressive *Charter* in Victoria), the *Human Rights Amendment Act 2008* (ACT) ('*HRA Act*') included a direct duty on public authorities to comply with human rights in similar terms to section 38 of the *Victorian Charter*.³⁶ Under the new Part 5A, which came into effect on 1 January 2009, it is unlawful for a public authority to fail to take relevant human rights into account in decision-making, or to act in a way that would be incompatible with a human right.³⁷ The definition of a public authority is broad, extending to non-government entities carrying out government functions.³⁸ A unique provision of the *HR Act* enables agencies to 'opt in' to take on the obligations of a public authority under section 40D of the Act.³⁹ Despite speculation that this provision would never be used, three declarations under this provision have been sought by Companion House (a refugee support agency), the Women's Legal Centre and the Centre for Australian Ethical Research.⁴⁰

The amended *HR Act* goes further than the *Victorian Charter* in providing a direct right of action to the ACT Supreme Court for a breach of these obligations, and provides that the Court may order any remedy except damages.⁴¹ The *HRA Act* also introduced other provisions, effective from 18 March 2008, to clarify the

30 *HRC Act* s 27(2).

31 *Ibid.*

32 *HR Act* s 41.

33 *Ibid* s 36.

34 *Ibid* s 35.

35 *Ibid* ss 40B–C.

36 See *HRA Act* s 7.

37 *HR Act* s 40B.

38 *Ibid* s 40.

39 *Ibid* s 40D.

40 *Human Rights (Private Entity) Declaration 2009* (ACT) (for Companion House Inc); *Human Rights (Private Entity) Declaration 2010 (No 1)* (ACT) (for Women's Legal Centre); *Human Rights (Private Entity) Declaration 2010 (No 2)* (ACT) (for Centre for Australian Ethical Research).

41 *Ibid* s 40C.

operation of the interpretive provision,⁴² and provide specific criteria for determining when human rights can be limited by Territory laws.⁴³

III IMPACT IN THE DEVELOPMENT OF POLICY AND LEGISLATION

The *HR Act* has had its most immediate impact on the development of policy and legislation in the ACT. As noted in the Five Year Review:

One of the clearest effects of the HRA has been to improve the quality of law-making in the Territory. The development of new laws by the executive has clearly been shaped by the requirement to issue a statement of compatibility for each new bill, and the approach of government has been influenced by a robust dialogue with the legislature, the Scrutiny Committee and the Human Rights Commissioner.⁴⁴

A Compatibility Statements

Under section 37 of the *HR Act*, the Statements of Compatibility issued by the Attorney-General for each government Bill are not required to include reasons for the Attorney-General's opinion regarding consistency with human rights.⁴⁵ Despite a recommendation in the First Year Review of the *HR Act* that a summary of reasons should be provided where a Bill raises significant human rights issues,⁴⁶ and a commitment to provide reasoned statements in the Parliamentary Agreement between ACT Labor and the Greens in October 2008 (subject to resources),⁴⁷ there have been only a handful of reasons for compatibility statements published to date.⁴⁸ Where available, these reasons have stimulated fruitful interchanges between government and the Scrutiny Committee and thus improved the quality of human rights dialogue.⁴⁹ Compatibility statements are one important aspect of the NHRC Report which have been incorporated into the new Human Rights Framework announced by the Commonwealth Attorney-General. The Framework provides that:

The Government will introduce legislation requiring that each new Bill introduced into Parliament, and delegated legislation subject to disallowance, be accompanied by a statement which assesses its compatibility with the seven core UN human rights treaties to which Australia is a party.

42 *HRA Act* s 5; *HR Act* s 30.

43 *HRA Act* s 4; *HR Act* s 28(2).

44 Australian National University ACT Human Rights Act Research Project, above n 10, 27.

45 *HR Act* ss 37, 39.

46 ACT Department of Justice and Community Safety, above n 9, 22 (Recommendation 3).

47 See The Greens Australian Capital Territory, *ACT Greens-Labor Agreement* (31 October 2008) <<http://act.greens.org.au/learn/act-greenslabor-agreement>>.

48 Detailed Compatibility Statements were provided for the Mental Health (Treatment and Care) Amendment Bill 2008 (ACT), Crimes (Bill Posting) Amendment Bill 2008 (ACT) and Crimes (Murder) Amendment Bill 2008 (ACT).

49 See, eg, ACT Legislative Assembly, Standing Committee on Legal Affairs, Legislative Assembly for the ACT, *Comments on the Responses Scrutiny Report No 3* (2009).

Statements of compatibility will aid Parliamentary consideration of new laws against human rights principles. Statements of compatibility will provide a valuable assessment to assist the Joint Committee's work. The statements will be publicly available along with other explanatory materials which accompany legislation.⁵⁰

Both the Framework and the Report are silent on the content or author of these statements. In our view, it would be beneficial to include a clear legislative requirement to provide reasons for compatibility to foster a human rights debate that is more transparent to the community and to assist the development of a human rights culture. Bare statements of compatibility without reasons are less likely to provide assistance to the new Joint Committee to be established under the Framework regarding the human rights analysis undertaken by the government, and the justification relied upon for any limitations on human rights. The compatibility statements and the assessment of compatibility which will be developed under the Framework will necessarily be more complex than that undertaken in the ACT, however, as new laws will be assessed against seven human rights treaties, rather than against the smaller sub-set of civil and political rights currently protected in the *HR Act*. Reasons for compatibility statements will provide a useful insight into how this more complex process is undertaken at a national level.

It is not clear at this stage whether the Commonwealth Attorney-General will issue the statements of compatibility or if these will be provided by the responsible Minister introducing the legislation – the ACT takes the NZ approach of only having the Attorney-General issue them, whereas the responsible portfolio Ministers issue them in Victoria and the UK. In the ACT there has not yet been any statement acknowledging that a Bill is incompatible with human rights.⁵¹

Although the dialogue generated within the ACT executive by the compatibility certification process is not always obvious to the general public, it has played a significant role in shaping policy and legislation. The requirement to consider human rights has been incorporated into the Cabinet Paper Drafting Guide,⁵² and rights issues are considered in policy work on a daily basis and are canvassed regularly in legislative proposals. Examples of such issues that have been considered from a human rights perspective within the executive include sentencing laws, emergency electro-convulsive therapy, exclusion from public employment based on criminal history, voting rights of prisoners and the wearing of headscarves in ACT schools.⁵³ Human rights compatibility of proposed

50 Australian Government, above n 7, 8.

51 There have been few occasions when negative Compatibility Statements have been issued in the UK, but in NZ, there have been many Bills expressly acknowledged to be incompatible. See further Helen Watchirs, 'The ACT Human Rights Act 2004: A New Scrutiny Challenge' (Speech delivered at the Ninth Australasian and Pacific Conference on Delegated Legislation and Sixth Australasian and Pacific Conference on the Scrutiny of Bills, Legislative Assembly for the ACT, Canberra, 2 March 2005).

52 ACT Government, Cabinet Paper Drafting Guide, February 2009, 14.

53 Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (UNSW Press, 2009) 90.

legislation is assessed by the Human Rights Unit within the ACT Department of Justice and Community Safety, and comments on draft Cabinet Submissions are also provided by the ACT HRC when it has sufficient resources. In most cases, human rights considerations can be accommodated through minor modifications and redrafting of a Bill, but at times will act as a brake on policy proposals that would impose unjustifiable restrictions on human rights.

The difference made by the *HR Act* in the development of policy, and its limitations, is apparent in the approach to outlaw motorcycle gangs in the wake of a fatal brawl at Sydney Airport in March 2009. Following this high profile incident, South Australia and New South Wales immediately enacted coercive legislation in response to the perceived threat and the Standing Committee of Attorneys-General met to discuss legislative responses in all States and Territories.⁵⁴ Under the legislation passed in South Australia and New South Wales, a member of an outlaw motorcycle gang that is 'declared' could be prevented from working in certain occupations, associating with others, and attending specified areas, without having being convicted of any offence.⁵⁵ The Human Rights and Discrimination Commissioner provided advice to the Attorney-General concluding that these laws were inconsistent with a number of human rights, including the right to freedom of association, freedom of movement and rights in the criminal process. Ultimately, despite political pressure, the ACT and Victoria maintained that such laws were not a proportionate response to the perceived threat of these gangs, which could be dealt with under existing criminal laws. These two jurisdictions had human rights legislation as a benchmark against which the effect of proposed laws on human rights could be measured, and this made a clear difference to the policy outcome.⁵⁶ Nevertheless, the internal dialogue has not all been one-way. While the ACT avoided the worst excesses of these laws, the ACT government did eventually introduce legislation to increase police powers to deal with serious organised crime, despite objections about further emergency surveillance powers granted without judicial warrants raised by the Human Rights and Discrimination Commissioner.⁵⁷

54 Standing Committee of Attorneys-General, 'National Response to Combat Organised Crime' (Media Release, 16 April 2009).

55 See *Crimes (Criminal Organisations Control) Act 2009* (NSW); *Serious and Organised Crime (Control) Act 2008* (SA). The South Australian legislation was subsequently held to be invalid in part as its scheme for control orders was found inconsistent with the *Constitution* in *Totani v State of South Australia* (2009) 105 SASR 244.

56 See generally Lorana Bartels, *The Status of Laws on Outlaw Motorcycle Gangs in Australia* (12 March 2010) <<http://www.aic.gov.au/publications/currentper cent20series/rip/1-10/02.aspx>>. For a discussion of the impact of the *HR Act* on the development of anti-terrorism laws, see Andrew Byrnes and Gabrielle McKinnon, 'The ACT *Human Rights Act 2004* and the Commonwealth *Anti-Terrorism Act (No 2) 2005*: A Triumph for Federalism or a Federal Triumph?' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 361–77.

57 See Simon Corbell, 'ACT Police to Benefit from New Surveillance Powers' (Media Release, 25 February 2010); Ewa Kretowicz, 'New Laws "Breach Rights": Watchirs', *The Canberra Times* (Canberra) 26 February 2010.

B Scrutiny of Legislation

Under the new national Framework on Human Rights, the Commonwealth government has committed to introduce legislation to establish a Parliamentary Joint Committee on Human Rights which ‘will provide greater scrutiny of legislation for compliance with Australia’s international human rights obligations under the seven core UN human rights treaties to which Australia is a party’.⁵⁸

The *HR Act* has similarly incorporated human rights into the terms of reference of the bi-partisan Standing Committee on Legal Affairs (Scrutiny Committee) of the Legislative Assembly. Under section 38 of the Act, the Scrutiny Committee is required to report to the Legislative Assembly about human rights issues raised by Bills presented to the Assembly.⁵⁹ The Scrutiny Committee, assisted by its legal advisers, conducts an independent analysis of the human rights consistency of all instruments presented to the Assembly, and routinely devotes many pages of its reports to human rights issues.

As a result of this enhanced scrutiny of legislation, amendments may be made to Bills and other instruments to improve human rights compliance, serving as an additional check on the Attorney-General’s compatibility assessment. In 2008 for example, the Scrutiny of Bills Committee made comments in relation to the ACT Civil and Administrative Tribunal Bill recommending that the Bill be amended to include notes explicitly preserving the privilege against self-incrimination in the new Tribunal. The government agreed to the amendment. At other times the comments of the Scrutiny Committee have been used by the Opposition to push for amendments during final debates. In the case of the Health Legislation Amendment Bill 2006 (No 2), although the government had initially rejected human rights concerns raised by the Scrutiny Committee regarding a potentially coercive warrant and detention power given to the Health Professions Tribunal, the Committee’s comments gave the Shadow Attorney-General Bill Stefaniak powerful ammunition with which to criticise the government during debate, and the amendments were agreed to.⁶⁰

The ACT experience suggests that multiple mechanisms that foster consideration of the human rights implications of policy and legislation will provide greater protection for human rights in law-making than a single scrutiny process. In the context of a very tight timetable for review of draft Cabinet submissions and legislative scrutiny, the Human Rights Unit, the Human Rights and Discrimination Commissioner and the Scrutiny Committee each provide a

58 Australian Government, above n 7, 8.

59 *HR Act* s 38.

60 In describing the role of the Committee’s comments in her decision-making, Minister Katy Gallagher stated that

I was happy for s 59A to proceed. It had been given the tick through the human rights audit [an independent audit conducted by the Castan Centre for Human Rights]. It had been given the tick through our own human rights process, through JACS ... However, the scrutiny report raised the argument with me. I had another look at it yesterday and thought, ‘All right. I will accept the scrutiny of bills committee’s argument on this. I will listen to what the Assembly is saying to me.’

ACT, *Parliamentary Debates*, Legislative Assembly, 14 November 2006, 3423 (Katy Gallagher).

filter for detecting disproportionate limitations on human rights that might otherwise be overlooked. The internal dialogue that this generates, and the scrutiny reports which inform the Legislative Assembly, can both assist in improving the quality of laws from a human rights perspective.

IV APPLICATION OF THE *HR ACT* IN THE COURTS

Although critics of the *HR Act* predicted that it would result in a flood of lawsuits,⁶¹ the effect of the Act in generating litigation has been modest, and has not appreciably added to the workload of the courts and tribunals. Since the *HR Act* came into effect in 2004, there have been at least 122 decisions in the ACT courts and tribunals in which the Act has been mentioned, the majority of these being in the ACT Supreme Court (86 cases) and the Court of Appeal (12 cases).⁶² These numbers are relatively small in the context of the total of 6235 cases (civil and criminal) finalised by the Supreme Court alone in the period 2004/05 to 2008/09,⁶³ although they represent a higher proportion of the 170 Court of Appeal decisions published since the commencement of the Act.⁶⁴ There has apparently been very little documented use of the *HR Act* in the Magistrates Court, with only five reported decisions in five years in which the Act has been mentioned. There has been one reported decision in the Children's Court. The remaining cases were in the old Administrative Appeals Tribunal (6 cases), Residential Tenancies Tribunal (4 cases) and Discrimination Tribunal (1 case), with seven cases in the new conglomerate ACT Civil and Administrative Tribunal which commenced in 2009.⁶⁵

The subject matter of these cases has been wide ranging, from criminal law procedure and evidentiary issues, which make up the majority of the *HR Act* cases, to civil matters such as discrimination, adoption, care and protection of children, private and public residential tenancies and planning law. The *HR Act* was deliberately framed to recognise only the rights of human beings, rather than corporations, to avoid the use of the Act to protect corporate interests, such as

61 See, eg, the comments of Steve Pratt regarding the development of a 'litigation culture': ACT, *Parliamentary Debates*, Legislative Assembly, 2 March 2004, 456 (Steve Pratt); and the warnings of Bill Stefaniak that the Act was 'potentially [the] most dangerous legislation we have ever seen in this territory': ACT, *Parliamentary Debates*, Legislative Assembly, 25 November 2003, 4577 (Bill Stefaniak, Shadow Attorney-General).

62 Based on the cases compiled in the ANU ACT Human Rights Act Research Project case database as at 13 April 2010: Australian National University, *Australia's First Bill of Human Rights* (2010) ACTHRA Project and ACT ESCR Project <<http://acthra.anu.edu.au>>.

63 Compiled from yearly statistics of finalised civil and criminal matters in the ACT Supreme Court provided to the ACT Human Rights Commission by the ACT Supreme Court Registry.

64 Supreme Court of the Australian Capital Territory, *ACT Court of Appeal Judgments from 2002–* (13 April 2010) <<http://www.courts.act.gov.au/supreme/search/judgmentsca.asp>>.

65 Based on cases compiled in the ANU ACT Human Rights Act Research Project case database: see above n 62.

freedom of commercial speech.⁶⁶ In the vast majority of cases, the law has been invoked to protect the rights of individuals. Nevertheless, it remains possible for the *HR Act* to have a horizontal effect to provide a level of indirect protection to corporations through the general obligation imposed on the courts to interpret legislation consistently with human rights. This occurred in *Capital Property Projects (ACT) Pty Ltd v ACT Planning & Land Authority*,⁶⁷ in which the corporate plaintiff benefited from a more liberal interpretation of criteria for interlocutory appeals, as the Court applied a construction which reflected the right to a fair trial under section 21 of the *HR Act*.⁶⁸ However, the scope of this indirect protection is limited, as it would not be available where a statutory provision (such as the enforced tobacco warnings and advertising restrictions struck down in Canada)⁶⁹ is aimed squarely at corporations and commercial interests, and does not restrict the human rights of individuals. Corporations are also excluded from using the direct remedy for a breach of human rights by a public authority, as standing is only given to a person whose human rights have been breached.⁷⁰

Despite the concentration (approximately 60 per cent)⁷¹ of cases involving criminal law, in practice the *HR Act* has generally been applied conservatively in these matters and has tended to reinforce important common law principles, rather than significantly expanding them.⁷² For example, while earlier cases suggested that criteria for bail might be applied more leniently in the wake of the *HR Act*, the approach actually taken in these cases did not diverge from accepted principles.⁷³ In the 2009 bail application of *Re Application for Bail by Massey [No 2]*,⁷⁴ Penfold J emphasised that the *HR Act* does not require any change in approach unless a clear case can be made that specific bail provisions impose disproportionate limitations on human rights:

It is not an inevitable consequence of the passage of a Human Rights Act that earlier interpretations of ‘special or exceptional circumstances’, including those

66 See ACT Bill of Rights Consultative Committee, above n 13, 93–4, citing *RJR-MacDonald Inc v A-G (Canada)* [1995] 3 SCR 199 (‘*RJR-MacDonald*’).

67 (2008) 2 ACTLR 44.

68 Ibid 54. Human rights arguments were also raised unsuccessfully by corporations in *Capital Property Projects (ACT) Pty Ltd v Planning & Land Authority* (2006) 152 LGERA 132 (interpretation of planning review rights), *Bragon Traders Pty Ltd v ACT Gambling & Racing Commission* [2006] ACTAAT 3 (7 February 2006) (interpretation of gaming regulations) and *Vosame Pty Ltd and ACT Planning & Land Authority* [2006] ACTAAT 12 (2 May 2006) (review of a decision ordering the demolition of a fence).

69 *RJR-MacDonald* [1995] 3 SCR 199.

70 *HR Act* s 40C.

71 Based on our review of the 122 ACT cases reported in the ACT HRA Research Project database, 73 deal with criminal matters: see above n 62.

72 One notable exception is the case of *Perovic v CW* (Unreported, ACT Children’s Court, Magistrate Somes, 1 June 2006), where the Children’s Court permanently stayed proceedings against a child where there had been a breach of the right of children to be brought to trial as quickly as possible.

73 See *R v Le* (Unreported, Supreme Court of the Australian Capital Territory, Connolly J, 13 August 2004); *R v Rao* (Unreported, Supreme Court of the Australian Capital Territory, Gray J, 11 May 2006) and the comments of Refshauge J in *Re Application for Bail by Nuno Rodrigues* [2008] ACTSC 50 (14 May 2008) [20].

74 [2009] ACTSC 70 (26 June 2009) (‘*Massey*’).

from jurisdictions without a Human Rights Act, will have little ongoing significance – rather, the suggestion that pre-Human Rights Act interpretations must be abandoned in favour of new ones would need to be made out, case by case, by substantive arguments demonstrating that those earlier interpretations are incompatible with human rights and cannot be ‘demonstrably justified in a free and democratic society’.⁷⁵

Overall there is little evidence that the *HR Act* has become a ‘rogue’s charter’ as detractors had warned.⁷⁶ In 2007, the then Director of Public Prosecutions, Richard Refshauge (now a judge of the ACT Supreme Court), 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’.⁷⁷

A more potent criticism of the Act may be its very gradual impact in bringing about advances in human rights protection through the court system. While there have now been a number of important decisions which give detailed consideration to the provisions of the *HR Act*, and others where the Act has been decisive in the outcome, it has taken the best part of five years for the ACT Supreme Court to elucidate a clear approach to the application of the Act. In a great many cases, particularly in the initial years, the *HR Act* was merely mentioned, without any real examination of the content of the rights raised, or used to support a conclusion arrived at through the application of existing common law principles.⁷⁸ This slow start is not solely the responsibility of the judiciary, but also reflects the lack of considered human rights arguments being made by the ACT legal profession. Indeed it is often judges who identify human rights issues and arguments for the parties where the *HR Act* has been raised in a very general way.⁷⁹

A Approach to the Interpretive Power

Until the amendment of the *HR Act* to include directly enforceable obligations on public authorities, the primary way in which the *HR Act* could be raised in litigation was through the interpretive power in section 30 of the Act. As originally enacted, the interpretive provision lacked clarity, as its direction to prefer an interpretation of an ACT law that was consistent with human rights was expressly subject to the requirement of section 139 of the *Legislation Act 2001* (ACT) (*‘Legislation Act’*) to prefer an interpretation which best served the

75 Ibid [36].

76 See, eg, the Attorney-General’s comments that ‘detractors of the *Human Rights Act* would have us believe that all human rights are absolute and serve only to benefit the criminals. They claim that human rights are nothing other than a rogues’ charter which ties the hands of authorities and endangers the safety of the community’: ACT, *Parliamentary Debates*, Legislative Assembly, 24 June 2009, 2863 (Simon Corbell).

77 Richard Refshauge, ‘Impact on Criminal Law and Procedure’ (Paper presented at the 2007 Protecting Human Rights Conference, University of Melbourne, 25 September 2007) 13.

78 See, eg, *R v JA* (2007) 1 ACTLR 126, 132.

79 See, eg, *Hakimi v Legal Aid Commission (ACT)* (2009) 3 ACTLR 127, 133 [23], 134 [32]–[34]; *R v Khajehnoori* (2005) 156 A Crim R 197, 202.

purpose of the legislation being considered. Following the recommendation of the Attorney-General's Twelve-Month Review of the Act,⁸⁰ the interpretive provision was amended to remove the express reference to the *Legislation Act*. Section 30 of the *HR Act* now mirrors the equivalent provision (section 32) of the *Victorian Charter*. It states that '[s]o far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights'.⁸¹

Detailed consideration was given to this revised interpretive provision by the ACT Court of Appeal in the case of *R v Fearnside*⁸² in 2009. This was an appeal from the decision of Higgins CJ to vacate a hearing date in order to allow a defendant (a police officer charged with unlawfully administering capsaicin spray on a woman in custody) to elect to have his case heard by judge alone.⁸³ The appeal turned on the construction of section 68B(1)(c) of the *Supreme Court Act 1933* (ACT) ('*SC Act*'), which requires that such an election must be made 'before the court first allocates a date for the person's trial'.

One important question to be resolved in the approach to the new interpretive provision was the interaction between the permissible limitations provision in section 28 of the *HR Act* and the interpretation of legislation. In essence, the issue is whether the court should seek, in all cases, as far as possible, an interpretation of legislation which imposes the least limitation on human rights, or conversely, should only interfere with the ordinary interpretation of legislation if it would impose unjustifiable limitations on human rights. These divergent approaches were illustrated in the New Zealand cases of *Moonen v Film and Literature Board of Review [No 1]*⁸⁴ and *Hansen v The Queen*⁸⁵ respectively.⁸⁶

In *Fearnside*, the ACT Court of Appeal squarely followed the approach of the majority in *Hansen*, which begins with the ordinary construction of the legislation and considers whether any restrictions on human rights imposed under this construction are justifiable limits.⁸⁷ Justice Besanko adopted a three step framework proposed by the Attorney-General, who intervened in this case, to determine whether a legislative provision may be re-interpreted under section 30:

First, it is necessary to consider whether [the legislation] 'enlivens' a human right. Secondly, if, but only if, the answer to the first question is yes, it is necessary to consider whether [the legislation] contains a limitation which is reasonable within s 28. Thirdly, if, but only if, the answer to the first question is yes and the answer to the second question is no, it is necessary to consider and apply the interpretative principle in s 30.⁸⁸

80 ACT Department of Justice and Community Safety, above n 9, 3 (Recommendation 5).

81 *HR Act* s 30.

82 (2009) 3 ACTLR 25 ('*Fearnside*').

83 *Ibid* 35–6.

84 [2000] 2 NZLR 9 ('*Moonen*').

85 [2007] 3 NZLR 1 ('*Hansen*').

86 See generally Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 98–109.

87 *Fearnside* (2009) 3 ACTLR 25, 49. However the Court left open the question of whether this will be the best approach in every case.

88 *Ibid* 48.

Applying these principles the Court of Appeal found that, although the time frames mandated by section 68B(1)(c) of the *SC Act* could lead to a 'harsh result where, as in this case, it may be accepted that the respondent did not exercise his right to elect within the prescribed time due to error or inadvertence',⁸⁹ this provision did not limit the right to a fair trial protected under the *HR Act*, as a jury trial would satisfy the core content of this human right.⁹⁰ The Court was thus not required to consider alternative interpretations of this provision.

Although earlier *Victorian Charter* cases suggested that the Victorian courts would likewise follow the *Hansen* approach,⁹¹ in the recent case of *R v Momcilovic* the Victorian Court of Appeal explicitly rejected the methodology of the majority in *Hansen*.⁹² It stated that compliance with the interpretive obligation in the *Victorian Charter* meant 'exploring all "possible" interpretations of the provision(s) in question and adopting that interpretation which least infringes *Charter* rights'.⁹³ The Court held that any justification for a limitation is not relevant to the exercise of interpretation, but becomes relevant (for the purpose of considering a declaration of inconsistent interpretation) only after the meaning of the challenged provision has been established.⁹⁴

The reasoning in *Fearnside* has since been applied by the ACT Civil and Administrative Tribunal ('ACAT') in *Thomson v ACT Planning and Land Authority*.⁹⁵ The *Hansen* methodology adopted in the ACT has the advantage of providing a clear and practical approach which begins on familiar ground, using ordinary principles of statutory construction.⁹⁶ This contrasts with the more complex and uncertain task mandated by *Moonen*, which requires the court to identify at the outset all interpretations of a legislative provision that are 'properly open' and to select the one which least limits rights.⁹⁷ Nevertheless, by limiting the application of the interpretive power to instances where a standard interpretation imposes a disproportionate limitation on rights, it is possible that opportunities may be lost to develop nuanced interpretations of legislative provisions through subtle recalibrations of settled meanings, which could enhance the protection of human rights. Chief Justice Elias raised a similar concern in her Honour's dissenting judgment in *Hansen*, arguing that this approach

distorts the interpretative obligation ... from preference for a meaning consistent with ... rights and freedoms in Part 2 to one of preference for consistency with the

89 Ibid 43.

90 Ibid 50.

91 See, eg, Nettle J in *RJE v Secretary to the Department of Justice*, (2008) 21 VR 526, 554–7 ('*RJE*') and Bell J in *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [71]–[74].

92 [2010] VSCA 50 (17 March 2010) [107] ('*Momcilovic*').

93 Ibid [103].

94 Ibid [105]. The Court explicitly rejected the Victorian Attorney-General's and the Victorian Equal Opportunity and Human Rights Commission's submissions in favour of the Human Rights Law Resource Centre's submission on this issue.

95 [2009] ACAT 38 (3 October 2009) [37] ('*Thomson*').

96 See *Hansen* [2007] 3 NZLR 1, 37.

97 *Moonen* [2000] 2 NZLR 9, 16.

rights as limited by a s 5 justification. ... It risks erosion of fundamental rights through judicial modification of enacted rights according to highly contestable distinctions and values.⁹⁸

It remains to be seen whether the diverging approaches to methodology which have now been taken in Victoria and the ACT will affect the substantive outcomes in similar cases under the *HR Act* and the *Victorian Charter*. However, if these differing approaches are maintained it will make it more difficult to develop a body of shared jurisprudence between the two jurisdictions with legislative Bills of Rights. As the smaller jurisdiction the ACT stands to benefit particularly from the growing number of cases under the *Charter*, and the advantages of comity may encourage a continuing dialogue between the ACT and Victorian courts.

B Justification of Limits

For as long as the *Hansen* approach continues to be followed in the ACT, the analysis of permissible limitations, and the rigour with which limitations are tested for proportionality, takes on a particular significance. The allocation of the onus for establishing proportionality and the standard of evidence required are issues yet to be fully resolved in the ACT case law. The reasoning in *Massey* might suggest a minimalist ‘business as usual’ approach to interpretation, which places the onus on the party invoking the *HR Act* to establish ‘by substantive arguments’ both that the existing (or ordinary) construction limits a right and that the limitation cannot be justified under section 28.⁹⁹ In *Fearnside*, the Court found no limitation on the right to a fair trial and thus was not required to consider section 28.¹⁰⁰ However, Besanko J noted that in applying these criteria assistance would be provided by overseas authorities that have considered the issue, citing the Canadian decision of *R v Oakes*,¹⁰¹ which imposes a stringent standard of justification on the party seeking to rely on the limitation.¹⁰²

In the Victorian decision of *Re Application under the Major Crime (Investigative Powers) Act 2004*,¹⁰³ Warren CJ clearly follows the *Oakes* approach, stating that:

The onus of ‘demonstrably justifying’ the limitation ... resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high. It requires a ‘degree of probability which is commensurate with the occasion’. ... It follows that the evidence required to prove the elements contained in s 7 should be ‘cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit’. The party seeking to justify the limitation must satisfy each of the factors [in the limitation provision] which broadly correspond to the proportionality test identified in *Oakes*.¹⁰⁴

98 See *Hansen* [2007] 3 NZLR 1, 9.

99 *Massey* [2009] ACTSC 70 (26 June 2009) [36].

100 *Fearnside* (2009) 3 ACTLR 25, 50.

101 [1986] 1 SCR 103 (‘*Oakes*’).

102 *Ibid* 136; *Fearnside* (2009) 3 ACTLR 25, 50.

103 [2009] VSC 381 (7 September 2009) (‘*Major Crime (Investigative Powers)*’).

104 *Ibid* [147]–[148], citing *Oakes* [1986] 1 SCR 103.

The framework adopted in this case, and affirmed in *Momcilovic* (in the context of the consideration of a declaration of inconsistent interpretation)¹⁰⁵ sets a suitably high standard for justification of limits on human rights, which will be particularly important where the laws under consideration involve potentially serious limitations on fundamental human rights, such as in criminal proceedings. In other areas of social policy, it is possible that the requirement for empirical evidence to prove the relationship between the objective and the means adopted to achieve it may require some flexibility, while retaining a commitment to reasoned justification. Choudhry argues that the Canadian jurisprudence following *Oakes* represents a process of coming to terms with the imperfect information often available to government in making policy choices and notes that:

what is striking about the comparative reception of *Oakes* is that neither the narrative nor counter-narrative of the legacy of the judgment appears to have travelled outside of Canada. Foreign courts would be wise to grapple with these difficulties with the benefit of two decades of reflection by Canadian courts instead of simply applying the *Oakes* test in its original and undeveloped form.¹⁰⁶

It is notable that while section 28 of the *HR Act* was initially modelled on section 1 of the *Canadian Charter of Rights and Freedoms*,¹⁰⁷ the specific criteria in section 28(2) added in 2008, mirror those in the *Victorian Charter*, which were in turn derived from the South African *Bill of Rights*.¹⁰⁸ However, as yet, there has been no detailed consideration of any differences in approach under the South African case law.¹⁰⁹

A further issue which has yet to be resolved is whether the limitation provision in section 28 should have any application to those rights protected under the *HR Act* that are recognised under international human rights law to be absolute and non-derogable, such as the right to protection from torture and the right to life. Although on its face, section 28 allows limitations of all of the rights, it is arguable that the nature and content of these rights preclude any restrictions. This distinction is recognised in the NHRC Report, which recommends two separate categories of human rights, with only those rights that are derogable being subject to proportionate limitations.¹¹⁰ There have been very few cases raising non-derogable rights in the ACT, and the question of limiting

105 *Momcilovic* [2010] VSCA 50 (17 March 2010) [144]–[146].

106 Sujit Choudhry, 'So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the *Canadian Charter*'s Section 1' (2006) 34 *Supreme Court Law Review* 501, 535.

107 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

108 *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2. See Human Rights Consultation Committee, *Rights Responsibilities and Respect* (2005) 47.

109 The South African decision of *M v The State* [2007] ZACC 18 was cited by Refshauge J in *R v Avis, Bonfini and Pyke* (SCC No 133 of 2009, SCC No 134 of 2009, SCC No 137 of 2009), and *R v McLaughlin* (SCC No 222 of 2008).

110 National Human Rights Consultation Committee, above n 4, xxxv–xxxvi (Recommendations 24–5).

these rights has not been specifically considered.¹¹¹ While in practice an application of the limitation criteria to these rights is likely to confirm that any limitation would be disproportionate, for clarity we consider that the *HR Act* should be amended to specifically exclude the application of the limitation provision to these non-derogable rights.

The ACT HRC recommended this distinction be made in both submissions to the Attorney-General on the first and fifth year reviews of the *HR Act*.¹¹²

C Scope of the Interpretive Power

Where the interpretive obligation is engaged, it is necessary to consider the scope of the power to reinterpret laws to be consistent with human rights. The Explanatory Statement to the Human Rights Act Amendment Bill 2007 (ACT) noted the intended effect of the amended interpretive provision in section 30 of the *HR Act* that

unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*. It also draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza* ...¹¹³

The case of *Ghaidan v Godin-Mendoza*¹¹⁴ is notable for the strong pronouncements of the House of Lords on the scope of the interpretive obligation in section 3 of the *Human Rights Act 1998* (UK) c 42 ('*UK Human Rights Act*'), which is held to be of 'an unusual and far-reaching character' which 'may require a court to depart from the unambiguous meaning the legislation would otherwise bear'.¹¹⁵ It may also require the court to depart from the intention of the Parliament which enacted the legislation.¹¹⁶ As Geiringer argues, this case is significant in sanctioning the departure from both the wording of the law and legislative intention in the search for a rights-consistent interpretation:

111 One case in which a possible limitation on the right to life was raised and rejected was *Australian Capital Territory v JT* (2009) 232 FLR 322, where the Chief Justice refused to make an order that it would be lawful for health providers to cease force feeding a patient who suffered from mental illness and lacked capacity to make the decision to refuse nutrition.

112 See ACT Human Rights and Discrimination Commissioner, Submission to ACT Government, *Review of the Human Rights Act 2004 (ACT)*, 24 May 2006, 13–14; ACT Human Rights Commission, Submission to ACT Government, *Five Year Review of the Human Rights Act 2004 (ACT)*, 4 November 2009, 4.

113 Explanatory Statement, Human Rights Act Amendment Bill 2007 (ACT) cl 5.

114 [2004] 2 AC 557 ('*Ghaidan*').

115 *Ibid* 571.

116 *Ibid*.

although the judicial act of statutory interpretation has never been an entirely passive one, the twin anchors of parliamentary intention and statutory text have provided outer perimeters beyond which the courts cannot stray. If both those anchors are simultaneously cast adrift, the character of what remains has surely been fundamentally transformed.¹¹⁷

The latitude recognised in *Ghaidan* is not unlimited, but the restrictions identified are open-textured. Interpretations must 'go with the grain' or 'underlying thrust' of the legislation, and must not be inconsistent with a 'fundamental feature of legislation'.¹¹⁸ Interpretation cannot venture into making decisions of policy for which the courts are not equipped.¹¹⁹

Despite the reference to *Ghaidan* in the Explanatory Statement, the ACT Supreme Court has distinguished the *Ghaidan* approach, based on the express reference to legislative purpose in section 30 of the *HR Act*. In *Fearnside*, Besanko J accepted that the amended section 30 went further than the original interpretive provision, but considered that it did not go as far as the *UK Human Rights Act*:

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. On the other hand, I do not think s 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*. There is no reference to purpose in s 3(1) of the *United Kingdom Act* and the primary constraint in that subsection is stated in terms of what is or is not possible. By contrast, under s 30 in the *HRA* the purpose ... of the legislative provision must be ascertained through well-established methods, and the interpretation adopted by the Court must be consistent with that purpose ...¹²⁰

While the Victorian courts and tribunals initially seemed to be more open to the *Ghaidan* approach in applying the interpretive provision in the *Victorian Charter*, which is almost identical in form to section 30 of the *HR Act*,¹²¹ the Victorian Court of Appeal in *Momcilovic* definitively rejected the *Ghaidan* approach.¹²² The Court of Appeal held that the interpretation obligation in the *Victorian Charter* does not create a 'special' rule of interpretation which would authorise a departure from the meaning which would be arrived at by application of ordinary principles of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question.¹²³ The Court stated that when determining 'possible' interpretations, the scope of '[w]hat is "possible"' is determined by the existing framework of interpretive rules, including of course the presumption against

117 Claudia Geiringer, 'It's Interpretation, Jim, But Not as We Know It: *Ghaidan v Mendoza*, The House of Lords and Rights-Consistent Interpretation' (2005) 3 *Human Rights Research Journal*, 16 <<http://www.victoria.ac.nz/NZCPL/HRRJ/vol3/Geiringer.pdf>>.

118 *Ghaidan* [2004] 2 AC 557, 572.

119 *Ibid* 577.

120 *Fearnside* (2009) 3 ACTLR 25, 46. See also *Casey v Alcock* (2009) 3 ACTLR 1, 22 ('*Casey*').

121 *Kracke v Mental Health Review Board* [2009] VCAT 646 (23 April 2009) [216]; *R J E v Secretary to the Department of Justice* [2008] VSCA 265 (18 December 2008) [114] (Nettle J).

122 *Momcilovic* [2010] VSCA 50 (17 March 2010) [69].

123 *Ibid* [33]–[35].

interference with rights'.¹²⁴ It went on to equate the interpretive obligation to a codification of this common law presumption, enhanced only to the extent that 'the rights which the interpretive rule is to promote are those which Parliament itself has declared'.¹²⁵ While these views were expressed to be tentative,¹²⁶ they do not accord with the robust re-interpretation undertaken by Warren CJ in the *Major Crime (Investigative Powers)* case, which extended, by implication, the legislative protection given to those compelled to give self-incriminating testimony, from the direct use of their answers, to include a derivative use immunity.¹²⁷ *Momcilovic* suggests an even narrower view of the scope of the interpretive obligation than the 'somewhat restricted' approach of the ACT Court of Appeal in *Fearnside*¹²⁸ which recognises that the interpretive obligation may authorise an interpretation which does not 'best achieve' the legislative purpose, but is consistent with it.¹²⁹

While the delineation of a further boundary of permissible interpretation may avoid criticism that the interpretive obligation encourages judicial activism, which has been a damning theme of media coverage,¹³⁰ if narrowed too far it may rob the interpretive provision of meaningful effect.

In our view this limitation is evident in the earlier decision of the ACT Administrative Appeals Tribunal ('AAT') in *Raytheon Australia Pty Ltd v ACT Human Rights Commission*.¹³¹ In that case the Human Rights and Discrimination Commissioner had refused to grant an application to defence company Raytheon Australia Pty Ltd for an exemption from a prohibition against racial discrimination in employment, which it sought in order to comply with contractual obligations imposed by the United States ('US') International Traffic in Arms Regulations. In reaching this determination the Commissioner construed the exemption power under the *Discrimination Act 1991* (ACT) ('*Discrimination Act*') to be subject to an implied limitation so as to be consistent with the *HR Act*.¹³² In the ACT HRC's view, the profound and damaging effects of automatic race discrimination suffered by employees born in countries proscribed by the US had not been given sufficient regard by tribunals considering similar issues in other jurisdictions, which had placed significant weight on generalised security concerns. The ACT HRC considered that more diplomatic efforts were required in treaty negotiations to seek to modify the discriminatory effect of the US regulatory regime, and that Raytheon should apply for individual employee security clearances using the authorisation process of the Director of Defence

124 Ibid [103].

125 Ibid [104].

126 Ibid [101]. The Court noted that no argument was addressed to the Court on this question and the further exploration of the scope of s 32(1) must await an appropriate case.

127 *Major Crimes (Investigative Powers)* [2009] VSC 381 (7 September 2009) [177].

128 The interpretive approach in *Fearnside* was described by Refshauge J in *Travini v Starczewski* (2009) 169 ACTR 1, 11.

129 *Fearnside* (2009) 3 ACTLR 25, 46.

130 See, eg, Elise Parham, *Behind the Moral Curtain: The Politics of a Charter of Rights* (2010) 15–16.

131 [2008] ACTAAT 19 (24 July 2008) ('*Raytheon*').

132 Ibid.

Trade Controls on behalf of the US Department of State.¹³³ The AAT overturned the Commissioner's decision and granted the exemption to Raytheon based on complex national security considerations, and to be consistent with exemptions granted in other Australian jurisdictions (despite only Victoria having human rights legislation which, at that stage, had not come fully into effect).¹³⁴ In considering whether it was possible to re-interpret a broadly stated exemption provision under section 109 of the *Discrimination Act* to be more consistent with the right to equality, the Tribunal found that

it is not [the] purpose [of the Discrimination Act] to exclude all forms of discrimination and that in relation to the forms of discrimination to which it applies it confers a broadly-based discretion to exempt persons from the application of its provision.¹³⁵

Thus, the Tribunal concluded that the interpretive obligation of the *HR Act* had no effect of limiting an open-ended discretion, even where the exercise of that discretion could sanction a clear breach of the human right to racial equality. The Human Rights Commissioner sought leave to appeal to the Supreme Court so that the scope of the interpretive obligation could be further considered, but this application was refused.¹³⁶

D Right of Action against Public Authorities

Part 5A of the *HR Act*, which imposes direct duties on public authorities for breaches of human rights, was intended to provide a more direct avenue of redress for people aggrieved by a breach of their human rights. In proposing these amendments, the ACT Attorney-General, Simon Corbell, anticipated that these provisions would encourage more human rights litigation:

In time, the government looks forward to the growth in the number of cases and the depth of argument on the issues. In due course, we may see the trickle of human rights case law turn into a stream. This stream will be the evidence of the growing awareness of human rights in this jurisdiction and the strength of the underlying legal principles.¹³⁷

This stream is not yet in full flow. Since coming into effect, only three cases have been decided under the remedy provision in section 40C of the *HR Act*, although the first case is notable for its rigorous approach. *Hakimi v Legal Aid Commission (ACT)*¹³⁸ involved an application brought under section 40C at the direction of Refshauge J to resolve an impasse that had been reached regarding legal representation of a defendant in serious criminal proceedings. The Legal Aid Commission had determined that Mr Hakimi was eligible for legal assistance, but that representation would be provided by a Commission lawyer, rather than funding his chosen private solicitor.¹³⁹ Mr Hakimi's solicitor

133 Ibid.

134 Ibid [82].

135 Ibid [80].

136 *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 (15 May 2009).

137 ACT, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4031 (Simon Corbell).

138 (2009) 3 ACTLR 127, 129 ('*Hakimi*').

139 Ibid.

maintained that funding for a lawyer of choice was required by section 22 of the *HR Act*, which provides, relevantly, that:

Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else: ...

- (d) to be tried in person, and to defend himself or herself personally, or through legal assistance chosen by him or her; ...
- (f) to have legal assistance provided to him or her, if the interests of justice require that the assistance be provided, and to have the legal assistance provided without payment if he or she cannot afford to pay for the assistance ...¹⁴⁰

In determining how to approach the section 40C application, Refshauge J further developed a five step methodology proposed by the Attorney-General, to encompass the following seven steps:

1. What is the act or decision which is the subject of challenge?
2. Is the entity engaging in the relevant act or making the relevant decision a public authority under sections 40 and 40A?
3. What is the human right engaged and what is its content?
4. Is the relevant act or decision apparently inconsistent with, or does it impose a limitation on, any of the rights protected under part 3 of the *HR Act*?
5. Is the limitation reasonable, insofar as it can be demonstrably justified in a free and democratic society having regard, inter alia, to the factors set out in section 28(2) of the *HR Act*? To put it another way, is the limitation proportionate?
6. Even if the limitation is proportionate, where the matter involves making a decision, did the decision-maker give proper consideration to the protected right?
7. Does the act or decision made under an Act or instrument give either no practical discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under section 30 of the *HR Act* consistently with the protected right?¹⁴¹

In applying this methodology, Refshauge J considered that the application concerned a decision of the Commission, rather than an act, and accepted that the Commission is a public authority.¹⁴² His Honour then considered the content of the rights in criminal proceedings in section 22. In the absence of reasoned argument by Mr Hakimi's solicitor, who 'referred to no authorities and cited no principles',¹⁴³ Refshauge J discerned a submission to the effect that legal assistance of choice is a minimum guarantee of a fair trial under section 22(2)(d) and that it is a further minimum guarantee that the State fund this legal assistance

¹⁴⁰ *HR Act* s 22.

¹⁴¹ *Hakimi* (2009) 3 ACTLR 127, 137.

¹⁴² *Ibid* 132, 137.

¹⁴³ *Ibid* 133.

if the defendant cannot afford it, and the interests of justice require it, under section 22(2)(f).¹⁴⁴ However, while he found such an argument superficially attractive, his Honour was persuaded by the weight of international jurisprudence on the content of the right to a fair trial, which suggested that the minimum guarantee does not extend to funding a lawyer of choice.¹⁴⁵ It was thus not necessary to consider whether the decision imposed a justifiable limitation on this right.

This decision provides a useful template for the consideration of applications under section 40C. However, it is notable that the methodology proposes a combined approach for actions and decisions (albeit with an extra consideration for decisions in step 6), whereas section 40B(1) sets out distinct and independent obligations in this regard:

- (1) It is unlawful for a public authority –
 - (a) to act in a way that is incompatible with a human right; or
 - (b) in making a decision, to fail to give proper consideration to a relevant human right.¹⁴⁶

The NHRCC recommended a similar dichotomous approach in any federal HRA.¹⁴⁷ It appears that section 40B(1)(a) imposes a substantive human rights compatibility obligation in terms of an act or omission by a public authority (which may be the outcome of a decision), while section 40B(1)(b) imposes a separate procedural obligation to give proper consideration to human rights in the decision-making process, where the failure to do so might be comparable to 'failing to take a relevant consideration into account in the exercise of a power' under section 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1989* (ACT) ('*ADJR Act*').¹⁴⁸ Further cases may refine this distinction and any differences in the scope of, and remedies available under section 40B(1)(b) and grounds of judicial review under the *ADJR Act*. The ACT Human Rights Commission's submission to the Five Year Review of the *HR Act* followed the recommendation in the NHRC Report that the *ADJR Act* be amended to explicitly include a note referring to the obligations of public authorities under section 40B(1)(b) of the *HR Act*.¹⁴⁹

The seven step methodology also tacitly assumes that it is permissible for public authorities to impose direct limitations on human rights, provided that these limitations can be demonstrably justified as proportionate.¹⁵⁰ While this is a pragmatic approach, it sits uncomfortably with the wording of section 28 of the

144 Ibid.

145 Ibid 142.

146 *HR Act* s 40B(1).

147 See National Human Rights Consultation Committee, above n 4, xxxviii (Recommendation 30).

148 See also *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24.

149 ACT Human Rights Commission, above n 112, 28.

150 Justice Refshauge adverted to, but was not required to decide this issue in *Hakimi* (2009) 3 ACTLR 127, 142. For interesting comments on this issue, see Jeremy Gans, 'Can Public Authorities Limit Rights?' on Jeremy Gans, *Charterblog: Analysis of Victoria's Charter of Human Rights* (25 May 2008) <<http://charterblog.wordpress.com/2008/05/25/can-public-authorities-limit-rights>>.

HR Act, which provides that limits may only be ‘set’ by Territory laws, rather than by official fiat.¹⁵¹ This could be resolved by the addition of a further step examining whether there is some basis or authorisation in a Territory law (which includes regulations and statutory instruments) for any limit imposed on human rights by a public authority. If no such authority can be found, then any limitation on human rights would be inconsistent with section 28 of the *HR Act*.

Justice Refshauge reiterated this seven step methodology in an interlocutory decision in *Eastman v Chief Executive Officer of the Department of Justice and Community Safety*,¹⁵² where a prisoner serving a life sentence sought an order requiring Corrective Services to provide him with full time employment within the prison as a tutor, relying on section 19(1) of the *HR Act* which provides: ‘Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person’.¹⁵³

His Honour found that there was an arguable case that section 19 requires that a prisoner be given the opportunity of useful work and a requirement for rehabilitative measures to be put in place, but declined to make an interim order in this case, due to the difficulties in framing and enforcing an order.¹⁵⁴ In the case of *Jackson v Chief Executive of the Department of Justice and Community Safety*,¹⁵⁵ no orders were made regarding delay in convening a parole hearing, as the hearing was then hastily convened. While instigating proceedings under section 40C may have been an effective means of prompting official action in this case, it does indicate one of the limitations in the *HR Act* remedy provision: that there may be no satisfactory remedy for a past breach of human rights, as an award of financial damages is specifically precluded.

E Compensation for Breach of Human Rights

One plausible explanation for the lack of cases under the *HR Act*, even with the new public authority provisions, is the express exclusion of monetary compensation as a remedy for a breach of human rights. Although in many cases non-monetary orders will provide a sufficient remedy for a breach of human rights by a public authority, as the UK courts have acknowledged,

there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called ‘the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied’.¹⁵⁶

The removal of monetary compensation as a remedy may deter genuine litigants who can incur significant costs (and a risk an adverse costs order if unsuccessful) in commencing Supreme Court proceedings, and removes an incentive for private law firms to take on human rights cases for impecunious

¹⁵¹ See generally Gans, above n 150.

¹⁵² (2010) 172 ACTR 32 (*‘Eastman’*).

¹⁵³ *HR Act* s 19(1).

¹⁵⁴ *Eastman* (2010) 172 ACTR 32, 51.

¹⁵⁵ [2009] ACTSC 102 (25 August 2009) [14].

¹⁵⁶ *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, 1057.

litigants on a pro bono or 'no win, no fee basis'. In providing training sessions to the ACT legal profession on the public authority obligations, the authors have observed that questions from private practitioners have tended to focus heavily on possibilities for pursuing damages under the *HR Act* and the difficulty for clients in conducting cases where damages are not available.

The NHRCC recommended that a federal HRA go further than the ACT *HR Act*, and follow the UK model in providing monetary compensation:

under any federal Human Rights Act an individual [should] be able to institute an independent cause of action against a federal public authority for breach of human rights and ... a court [should] be able to provide the usual suite of remedies – including damages, as is the case under the UK *Human Rights Act*.¹⁵⁷

Although the *HR Act* does not provide a general remedy of damages, some rights protected under the Act expressly include a right to compensation.¹⁵⁸ In *Morro v Australian Capital Territory*,¹⁵⁹ Gray J considered three concurrent cases for compensation for unlawful detention which relied on the *HR Act*. These cases were based on decisions of the ACT Sentence Administration Board to revoke the plaintiffs' periodic detention orders and commit them to full-time imprisonment. There was agreement that these decisions (which predated the commencement of the public authority obligations), involved errors and that the detention had consequently been unlawful.¹⁶⁰ A key issue in dispute was whether breach of the plaintiffs' right to liberty gave rise to an independent statutory right to compensation.

Section 18(7) of the *HR Act* provides that '[a]nyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention'.¹⁶¹ Justice Gray rejected the government's argument that the right in section 18(7) was declaratory only, and accepted the submission of the Human Rights Commissioner, who was given leave to intervene, that the *HR Act* conferred a substantive independent right to compensation.¹⁶² However, Gray J found that the right could be treated as a co-extensive remedy to that provided for unlawful imprisonment at common law,¹⁶³ and made compensation orders on this basis. Contrary to media reports which attributed the \$200 000 total compensation to the *HR Act*,¹⁶⁴ it does not appear that the *HR Act* had any clear impact on the quantum of damages awarded in this case, which were apparently assessed using common law principles. Nevertheless, the case establishes the principle of a stand-alone remedy under the *HR Act*, which could be invoked if the common law remedy were to be abrogated.

¹⁵⁷ National Human Rights Consultation Committee, above n 4, xxxviii (Recommendation 31).

¹⁵⁸ See, eg, *HR Act* s 18(7), which provides for compensation for unlawful detention; *HR Act* s 23(2), which provides for compensation for wrongful conviction.

¹⁵⁹ (2009) 168 ACTR 1 ('*Morro*').

¹⁶⁰ *Ibid* 3.

¹⁶¹ *HR Act* s 18(7).

¹⁶² *Morro* (2009) 168 ACTR 1, 11.

¹⁶³ *Ibid*.

¹⁶⁴ See, eg, Noel Towell, 'Prisoners get \$200,000 over Rights Breach', *The Canberra Times* (Canberra) 11 September 2009.

F Declaration of Incompatibility

The ACT Supreme Court has not yet exercised its power under section 32 of the *HR Act* to grant a declaration of incompatibility where a Territory law cannot be interpreted consistently with human rights. A declaration was sought in the case of *SI bhmf CC v KS bhmf IS*.¹⁶⁵ This case concerned a provision of the *Domestic Violence and Protection Orders Act 2001* (ACT) under which final protection orders could come into force automatically if a respondent failed to comply with procedural obligations.¹⁶⁶ Chief Justice Higgins found that such a scheme would breach the right to a fair hearing, but thought it could be possible to resolve the issue through an inventive use of the interpretation power and the *Magna Carta*, though this would only reach the same outcome as what could be reached through *HR Act* section 21.¹⁶⁷ He did not refer to detailed submissions made by the Attorney-General or the Human Rights Commissioner, or consider whether to grant a declaration of incompatibility. A declaration of incompatibility has also been sought (in the alternative, if a human rights-consistent interpretation is not possible) in the case of *Blundell v Sentence Administration Board*.¹⁶⁸

The lack of use of the declaration provision is not wholly surprising as a declaration of incompatibility does not invalidate the impugned law, and does not provide a remedy in an individual case. It has thus been described as a ‘booby prize’ for litigants.¹⁶⁹ Instead, a declaration offers the possibility of change in the longer term, by drawing attention to legislation that is inconsistent with human rights and requiring a formal government response. It may thus have more value as a tool for systemic test case litigation, although this potential has not yet been realised in the ACT. The first declaration was issued under the equivalent provisions of the *Victorian Charter* by the Court of Appeal in *Momcilovic* in respect of amendments to the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), which reversed the onus of proof, by placing the legal rather than evidential burden on the defendant in regard to deemed possession and trafficking of drugs, and thus violated the right to the presumption of innocence.¹⁷⁰

In addition, the *Victorian Charter* allows Parliament to expressly declare for five years (with the ability to be reinstated) that legislative provisions are incompatible with human rights in exceptional circumstances, and during this

165 (2005) 195 FLR 151 (*‘SI v KS’*).

166 Ibid 154.

167 Ibid 164. For detailed comment on this case, see Gabrielle McKinnon, ‘An Opportunity Missed? Comment on *SI bhmf CC v KS bhmf IS* [2005] ACTSC 125’ (2006) 9 *Canberra Law Review* 21.

168 [2010] ACTSC 10 (9 February 2010). This case currently before the ACT Supreme Court, and concerns s 150 of the *Crimes (Sentence Administration) Act 2005* (ACT) which requires parole to be revoked where a parolee is subsequently convicted of an offence punishable by imprisonment, even if the offence was committed before parole was granted.

169 Lady Justice Arden, ‘The Interpretation of UK Domestic Legislation in the Light of *European Convention on Human Rights* Jurisprudence’ (2004) 25 *Statute Law Review* 165, 167.

170 *Momcilovic* [2010] VSCA 50 (17 March 2010) [152]–[154].

time, the Supreme Court cannot make a declaration of incompatibility.¹⁷¹ No such declaration has been made yet, but recent amendments introduced by the Police Minister in respect of summary offences and search powers appear to be incompatible, especially in regard to children.¹⁷² The ACT *HR Act* does not have an express override provision, and the NHRCC takes a similar approach in its recommendations.

In contrast, the UK Joint Committee on Human Rights noted that between the UK *Human Rights Act* coming into force on 2 October 2000 and 23 May 2007, a total of 24 declarations of incompatibility were made. Of the 17 which were not overturned on appeal or awaiting appeal, 12 had been addressed by the government through legislation or remedial order, and five were awaiting action.¹⁷³ These figures suggest a relatively high strike rate for achieving systemic reform through courts issuing a declaration of incompatibility. The Committee noted, however, that further steps were required to ensure prompt government action in response to declarations if they were to be considered an 'effective remedy' for the purposes of the European Court of Human Rights.¹⁷⁴

In the federal context, the concept of a declaration of incompatibility has been clouded by concerns that it would be inconsistent with the exercise of federal jurisdiction under Chapter III of the *Constitution*, although the advice of the Commonwealth Solicitor-General to the NHRCC does not support this view.¹⁷⁵ The NHRCC recommends that such a power be given to the High Court, but if this should prove impractical, that the power be omitted altogether.¹⁷⁶ The UK experience indicates that a declaration of incompatibility can be a powerful tool for achieving systemic law reform, even if responses are not always swift. The differing context of the UK *Human Rights Act*, where the government may be called to account before European Court of Human Rights, may, nevertheless, provide a greater incentive to respond positively to such declarations. The ACT experience suggests that the omission of a declaration power would not necessarily be fatal to a federal HRA, as the *HR Act* has prompted a range of changes and improvements in legal policy without a single declaration. However, it is likely that the ability of the Supreme Court to issue a declaration of incompatibility operates as a cautionary factor in legislative development, and enhances the quality of the compatibility assessments given by the Attorney-General. The absence of such a mechanism may thus change the balance between the arms of government by weakening the potential voice of the courts in the human rights dialogue, which has only recently been used in Victoria.

171 *Victorian Charter* s 31.

172 See Summary Offences and Control of Weapons Acts Amendment Bill 2009 (Vic).

173 Joint Committee on Human Rights, *Monitoring the Government's Response to Court Judgments Finding Breaches of Human Rights*, House of Lords Paper 128, House of Commons Paper 728, Session 2006–07 (2007) 40.

174 *Ibid* 40–3, citing *Burden v UK* (2008) 47 EHRR 38.

175 Stephen Gageler and Henry Burmester, *In the Matter of Constitutional Issues Concerning a Charter of Rights: Supplementary Opinion*, Solicitor-General Opinion Nos 40, 68 (2009).

176 National Human Rights Consultation Committee, above n 4, xxxvii (Recommendation 29).

V ROLE OF THE HUMAN RIGHTS COMMISSIONER

The ACT HRC was established by the *Human Rights Commission Act 2005* (ACT) (*'HRC Act'*) in November 2006, amalgamating the former Human Rights Office and Community and Health Services Complaints Commission, as well as incorporating substantive new functions relating to children and young people.¹⁷⁷ The ACT HRC 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. In contrast to the Australian Human Rights Commission, there is no President. While the *HR Act* informs the work of all of the Commissioners, the Human Rights and Discrimination Commissioner has a number of specific functions relating to human rights, derived from the *HR Act* and the *HRC Act*. These are to:

- provide education about human rights and the *HR Act*;¹⁷⁸
- advise the Attorney-General on anything relevant to the operation of the *HR Act*;¹⁷⁹
- collect information about the operation of the *HR Act* and publish the information;¹⁸⁰
- review the effect of Territory laws (including the common law) on human rights and report to Attorney-General;¹⁸¹ and
- intervene (with leave) in the court proceedings that involve the application of the *HR Act*.¹⁸²

Each of these functions is valuable, and with a very small team of staff, the Commissioner is required to prioritise resources strategically. The ability to intervene in human rights litigation with the leave of the court, for example, is critical but time consuming. To this end, the Commissioner has developed guidelines for intervention which prioritise cases where: the human rights issues are significant; 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 the proceedings may have significant implications for the ongoing interpretation or operation of the statutory provision being interpreted in light of the *HR Act*, or the *HR Act* itself.¹⁸³

177 Although the *HRC Act* 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.

178 *HRC Act* ss 27(2), 14(1)(d).

179 *HRC Act* s 27(2).

180 *HRC Act* s 14(1)(h).

181 *HR Act* s 41(1).

182 *HR Act* s 36.

183 See Human Rights Commission, *The Intervention Power under the Human Rights Act: When Will the ACT Human Rights Commissioner Intervene?* (17 February 2010) ACT Human Rights Commission <<http://www.hrc.act.gov.au/content.php/category.view/id/108>>.

In June 2009, the Commissioner provided submissions on human rights interpretive obligations of the new ACT Civil and Administrative Tribunal and the application of right to a fair trial and right to privacy in relation to development applications in *Thomson*.¹⁸⁴ The Commissioner also intervened in the cases discussed above of *Morro* and *SI v KS*.¹⁸⁵

While not strictly a use of the intervention power, the Discrimination Commissioner's decision to refuse a race discrimination exemption sought by defence company Raytheon Australia was overturned by the Administrative Appeals Tribunal under section 109 of the *Discrimination Act 1991* (ACT).¹⁸⁶ The Commissioner sought leave to appeal from the decision focusing on the application of the interaction of the new interpretive provision of the *HR Act* to the exemption provision in the Discrimination Act. Unfortunately, the application for leave to appeal was refused by the Master of the Supreme Court with costs of \$18 000 (that is the respondent's legal costs).¹⁸⁷

A Human Rights Audits

One of the most important functions of the Human Rights and Discrimination Commissioner ('Commissioner'), in terms of achieving systemic improvements in human rights protection, is the general review power in section 41 of the *HR Act*. The Commissioner has conducted two major human rights audits under this power. The first audit involved the former ACT youth detention centre, Quamby, in 2005, and the second audit related to adult 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 section 48 of the *Human Rights Commission Act 2005* (ACT), which was informed by the *HR Act* and drew upon international human rights standards for mental health facilities.

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 the government has total responsibility. It is in these closed environments that people can be at their most vulnerable to human rights abuses and violations. The review function has been powerful in achieving systemic change at legislative as well as practical levels. The Chief Minister commented on the impact of the Human Rights Commissioner's audit of Quamby Juvenile Detention Centre:

184 See above Part III(A)

185 See above Part III(E)–(F).

186 See *Raytheon* [2008] ACTAAT 19 (24 July 2008).

187 *ACT Human Rights Commission v Raytheon Australia Pty Ltd* [2009] ACTSC 55 (15 May 2009).

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.¹⁸⁸

The Commissioner's audit of adult detention facilities was more extensive and also resulted in significant reform. This audit 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 and the Symonston Temporary Remand Centre, 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 who 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.

Some urgent concerns identified in the corrections audit included excessive lockdowns, lack of organised activities, and overcrowding at the Periodic Detention Centre which impacted primarily on women, who were bussed to and from the Remand Centre on weekends, resulting in less humane conditions of detention, including additional strip searches and fewer privileges.¹⁸⁹ The discriminatory treatment of women was included in the federal government's 2008 Report to the United Nations on the Implementation of the *Convention on the Elimination of all Forms of Discrimination against Women*.¹⁹⁰

The audit recommended detailed general improvements in many areas including:

- equivalence of detainee health care to health care in the community, including the 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;

188 Jon Stanhope, 'ACT Human Rights Community Forum' (Speech delivered at the Human Rights Community Forum, Canberra, 1 May 2006).

189 ACT Human Rights Commission, *Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (2007) 27–38.

190 Department of Families, Housing, Community Services and Indigenous Affairs, *Report to the United Nations on the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women* (2008).

- 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 (for example, videos and digital footage of incidents subject to investigations, such as use of force).¹⁹¹

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 4, and 'noted' a further 10. It did not agree with specific recommendations regarding ceasing the chaining of seriously ill prisoners to hospital furniture; ensuring that women prisoners are only guarded by women at night; enabling remand prisoners to wear their own clothing; and providing more verbal information on rights to detainees at induction.¹⁹²

Overall, however, the ACT HRC was encouraged by the response to the corrections 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 offered detainees meaningful activities, which assisted them to cope better with custody. The Commissioner continues to take an active monitoring and oversight role over the AMC, including an independent inspection role under section 56 of the *Corrections Management Act 2007* (ACT). When there was a delay in the opening of the AMC from late 2008 to early 2009 remand facilities became overcrowded and substandard in summer, particularly since NSW refused to take ACT prisoners (as had previously been the practice) due to its own overcrowding, as well as the unexpected delay in the repatriation of ACT sentenced prisoners to the AMC. In these exceptional circumstances, of the 112 ACT detainees, 25 were sentenced and should not have been mixed with remandees. In February 2009 the ACT government eventually implemented the Commissioner's recommendation to use all available facilities, including reopening the former Quamby youth detention facility when young people were relocated to the new youth detention facility Bimberi in December 2008, so that low security adult detainees could be accommodated there.

The Attorney-General has initially stated that he would welcome a further audit by the ACT HRC once the AMC has been in operation for 12 months,¹⁹³ but the ACT HRC has not been given further resources to undertake this work. A review by an independent consultancy has now been commissioned.¹⁹⁴ The scale of the exercise will double, given that there are about 200 detainees, compared to over 100 at the old remand centres. In the meantime the ACT HRC attends

191 ACT Human Rights Commission, above n 189, 6–14.

192 ACT Government, *Government Response to the Recommendations of the Report of the Human Rights Audit on the Operation of ACT Correctional Facilities under Corrections Legislation* (2007).

193 ACT, *Parliamentary Debates*, Legislative Assembly, 21 August 2007, 1742 (Simon Corbell).

194 David Stockman, 'Qld Consultant Appointed to Head Prison Review', *The Canberra Times* (Canberra), 17 April 2010, 2.

regular meetings of oversight agencies at the AMC, such as the Official Visitor and the ACT Ombudsman (who receives about 100 complaints from detainees per annum).

The *HR Act* has been a vital catalyst for the 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. At a national level, an audit function will also be important under a federal HRA, and the Australian Human Rights Commission is well placed to conduct large scale reviews of closed facilities such as immigration detention centres. Reviews of places of detention will also take on new significance when Australia ratifies the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*¹⁹⁵ in 2010, as foreshadowed,¹⁹⁶ which will require the federal government to put in place a National Preventative Mechanism to conduct or oversee regular and systematic reviews of all places where people are involuntarily detained, including psychiatric, disability, aged care and immigration detention facilities.

B Community Engagement and Complaint Handling

Another essential role of the Commissioner is to provide human rights education and to engage with the community on human rights. Although legislation is necessary, alone it cannot achieve compliance with human rights, as social and cultural change is necessary at community as well as government levels. The ACT HRC regularly conducts free training for community organisations, as well as responding to enquiries for information about human rights issues. The ACT HRC (and its predecessor the Human Rights Office) hosts regular public human rights forums on International Human Rights Day (10 December) as well as special interest seminars on topics such as mental health, anti-terrorism laws, corrections, victims' rights and economic, social and cultural rights (such as health and housing). Local media interest in human rights issues is significant, and the ANU website has tracked media commentary over the last five years.¹⁹⁷ A key performance measure that the ACT HRC is required to report on annually is the number of individuals attending community engagement events – the figure required is 4000 people per annum, and in Annual Reports this figure has been exceeded.¹⁹⁸ This is a substantial coverage for a population of over 350 000 people.¹⁹⁹

The ACT HRC also seeks to monitor public awareness of and support for the *HR Act*. In 2009 the ACT HRC conducted snapshot community and government service on-line surveys on attitudes to human rights and the *HR Act*. There were

195 Opened for signature 18 December 2002, 42 ILM 26, (entered into force 22 June 2006) ('OPCAT').

196 See, eg, Robert McClelland and Stephen Smith, 'Australia Takes Action against Torture' (Joint Media Release, 22 May 2009).

197 See Australian National University, above n 62.

198 In the 2008–09 Annual Report it was 4222 and in 2007–08 the figure was 5367.

199 Natasha Rudra, 'Canberra Cracks the 350 000 Mark' *The Canberra Times* (Canberra) 18 December 2009.

249 respondents from the ACT public service who responded to whole-of-government email notices advertising the survey. There were 100 respondents from the community who responded to advertisements in a variety of forums, including the Community Noticeboard in the local newspaper, the *Canberra Times*. The survey reported that 84 per cent of community respondents and 81 per cent of public servants felt 'positive' about ACT having the *HR Act*.²⁰⁰ One respondent to the Community Survey commented: '[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'.²⁰¹ Although some bias is inherent in a self-selecting survey relying on people to voice their opinion, the results were interesting. Another respondent to the Government Survey stated: 'A work in progress. In some instances it hasn't changed the culture but it is shifting in the right direction'. Only 27.8 per cent of respondents to the Government Survey had attended human rights training or seminars, which highlights the need for more resources for systemic human rights work. One respondent stated: '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* [ie 1 January 2009]'.²⁰²

The community itself has embraced human rights in everyday work, with some service agencies clearly recognising the difference between a human rights and a 'charity' approach, as well as developing special projects such as Shelter and ACT Council of Social Service's 2006 postcard campaign, 'Housing is a Human Right'.²⁰³ In one example, the Disability Discrimination Legal Service ('DDLS') at the Welfare Rights and Legal Centre resolved a public tenancy issue through human rights advocacy without having to resort to litigation. In this case, a client was residing in public housing property she shared with her children, but which was technically held in her mother's name. After the client's mother passed away, there was a risk that she would lose the property, but DDLS successfully argued that her family should be allowed to stay in the premises because of the *HR Act*'s protection of the family and children.²⁰⁴

Under the section 30 interpretative provision, the Human Rights and Discrimination Commissioner has been able to take a stronger approach to handling complaints under the *Discrimination Act 1991* (ACT) ('*Discrimination Act*'), for example, in the interpretation and application of provisions relating to unlawful discrimination the grounds of disability in the provision of government services such as public housing. In these cases the Commissioner has relied on the right to equality under section 8 of the *HR Act*, as well as the obligations

200 This finding accords with the results of the more detailed survey conducted by Ipsos MORI Social Research Institute for the UK Equality and Human Rights Commission: Kully Kaur-Ballagan et al, *Public Perceptions of Human Rights* (Equality and Human Rights Commission, 2009).

201 ACT Human Rights Commission, above n 112, 21.

202 Ibid 8.

203 See ACT Shelter, *Housing is a Human Right Project* (2005) <<http://www.actshelter.net.au/1.html>>.

204 See Helen Watchirs, 'Human Rights Concerns That Come to Our Attention and How We Deal with Them' (Speech delivered at the National Human Rights Consultation Public Hearing, Parliament House, Canberra, 1 July 2009).

under the United Nations *Convention on the Rights of Persons with Disabilities*²⁰⁵ and the positive duty to accommodate their needs. However, a broader approach to interpretation of the *Discrimination Act* was not supported by the former Administrative Appeals Tribunal in *Raytheon*, discussed above.

While the provision of community education and information on human rights is of great importance, information alone is often insufficient to resolve human rights concerns raised by individuals. The Human Rights and Discrimination Commissioner has limited ability to provide further assistance to people who contact the ACT HRC to complain of a breach of human rights by a public authority, unless the complaint falls within another ground of complaint considered by the ACT HRC, such as unlawful discrimination (or health, disability or children's services complaints). The ACT HRC supports the recommendation of the ANU *HR Act* Project's Five Year Review Report that the Commissioner 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.²⁰⁶ This function would provide a more accessible forum for redress for victims of unlawful acts by public authorities, than the existing right of action in the ACT Supreme Court.²⁰⁷ It could operate in a way similar to current discrimination complaint handling, using consideration/investigation and conciliation processes. Conciliated agreements could similarly be enforced by being registered with the ACT Civil and Administrative Tribunal ('ACAT'), as well as a right of review by ACAT. Of course, there should be no restriction on a complainant taking civil proceedings in the Supreme Court instead of using this informal process with the ACT HRC and ACAT. Criminal cases should be excluded from such a complaint scheme due to issues being sub judice.

The NHRCC similarly recommended that the functions of the Australian Human Rights Commission be enhanced to allow it 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.²⁰⁸

VI CONCLUSION

Overall, 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, and suggests that a national HRA following a similar model, as recommended by the NHRCC, would make a genuine difference to the protection of human rights across Australia. While the national Human Rights Framework does not go this far, the establishment of a Parliamentary Joint Committee on Human Rights and a legislative requirement for compatibility statements will go some way to improving

205 Opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).

206 National Human Rights Consultation Committee, above n 4, xxxiv (Recommendation 18).

207 ACT Human Rights Commission, above n 112.

208 National Human Rights Consultation Committee, above n 4, xxxii–xxxiii (Recommendation 13).

human rights protection at federal level. The *HR Act* has had a positive impact 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. This substantive impact on the ACT government was evident after the first year of the *HR Act*'s operation, albeit on a much smaller scale than now.²⁰⁹

Although the *HR Act* has had a slower impact in the courts, after five years, a more sophisticated jurisprudence is now developing, in part prompted by amendments to the *HR Act* aimed to clarify the interpretive obligation and to impose direct obligations on public authorities. The introduction of an independent right of action to the courts is a welcome development (and an improvement on the Victorian model), but yet to be fully embraced by the local legal profession, with financial compensation only being an available remedy in the case of unlawful detention likely to continue to be a dampening effect on its uptake by potential litigants. The NHRCC has recommended that a national HRA similarly include a freestanding right of action, plus a range of remedies (with financial compensation in exceptional cases, as in the *UK Human Rights Act*) be available in the courts. In our view this proposal would not lead to a flood of litigation lacking in merit at the national or ACT levels, based on the UK experience of the courts taking a cautious approach to the award of damages.

The ACT Supreme Court has now adopted a systematic approach to the application of the interpretive power and its interaction with permissible limitations on human rights taking the *Hansen* approach. However, there are questions to be resolved around the scope of this power, particularly given that the Victorian Court of Appeal has taken the *Moonen* approach in the recent case of *Momcilovic*.²¹⁰ In that case, the Victorian Supreme Court issued its first Declaration of Inconsistent Interpretation, which is a central feature of the dialogue model which gives Parliament the final say in whether legislation is human rights compatible. The authors do not favour the more radical *Ghaidan* approach taken in the UK, where the *HR Act* also has a differently worded interpretative provision to the ACT and Victoria. To do so would further inflame the hysteria generated by conservative commentators in Australia, and fuelled by the media about human rights legislation being undemocratic, because it allegedly transfers power from the legislature to the judiciary.

The audit power given to the ACT HRC (and formerly the Human Rights Commissioner) has been an important tool that has been used to achieve systemic reform for some of the most vulnerable people in the Territory, children, young people and adults held in detention. Following the 2005 and 2007 audits, new correctional facilities have been built that incorporate human rights standards and design, although implementation of a human rights culture is a long term process of continuous improvement. The inspection precedents set by the audits could be important on a national scale given the federal government's intention to ratify

209 Helen Watchirs, 'Protecting Rights in the ACT – The ACT *Human Rights Act*' *New Matilda* 25 January 2006 <<http://newmatilda.com/2006/01/25/protecting-rights-act-act-human-rights-act>>.

210 *Momcilovic* [2010] VSCA 50 (17 March 2010).

the *OPCAT* in 2010, although this could occur irrespective of whether Australia ultimately adopts a national HRA.

Nevertheless, there is room for improvement in the *HR Act*, and lessons to be learned in considering a future HRA at national level. A simple example is the need for the *HR Act* to make non-derogable human rights, such as torture, exempt from the limitation provision in section 28, which the ACT Human Rights Commission/er advocated in both the Twelve Month and Five Year Reviews of the *HR Act* – the NHRCC also supports this need for clarification. A straightforward example where the ACT *HR Act* does not need improvement (and the NHRCC takes a similar approach) is the absence of an override provision – the *Victorian Charter* allows Parliament to expressly declare for five years (with the ability to be reinstated) that legislative provisions are incompatible with human rights. On the other hand, the *Victorian Charter* provision that what should be adopted in the *HR Act* is the power of the independent Human Rights Commission to report annually on agency compliance, rather than the existing Annual Report requirement for agencies to self-report, where substantive implementation has been patchy. The NHRCC also picks up this best practice model.

Despite the amendment of the *HR Act* to include explicit duties on public authorities and a right of action, the Supreme Court remains an inaccessible avenue for many ordinary people aggrieved by a breach of their human rights. Funding for community legal centres and advocacy organisations would assist potential litigants to assert their rights and would allow important human rights test cases to be brought under the *HR Act*.²¹¹ Giving a complaints handling role in respect of human rights breaches to the Human Rights and Discrimination Commissioner would also provide a more easily reached first step in resolving rights breaches by public authorities. Using the discrimination complaints conciliation model, enforcement of civil cases could also be achieved through the new ACT ACAT, which is cheaper and more accessible than the Supreme Court.

While a genuine human rights dialogue has been generated across ACT government agencies, and between the executive and the legislature, much of its beneficial impact remains hidden from the general community. There is evidence that this discussion has reached the parts of the community actively engaged in human rights issues, as shown by media coverage and parliamentary debates collected by the invaluable ACT HRA Research Project based at the ANU.²¹² Mechanisms which promote transparency, such as detailed reasons for compatibility statements, and increased use of public exposure drafts of Bills would encourage civil society to contribute to debates on policy issues, which in turn would foster a broader and systemic culture of human rights.

211 The ACT Greens have proposed an Action Plan to increase community legal centre funding: Shane Rattenbury, *Closing the Gap on Unmet Legal Need, The ACT Greens' 5 Point Action Plan* (April 2010) The Greens Australian Capital Territory <<http://act.greens.org.au>>.

212 See Australian National University, above n 62.