



Free and Equal: An Australian Conversation
Australian Human Rights Commission

29/11/2019

Discussion Paper: A model for positive human rights reform in Australia

The ACT Human Rights Commission provides the following comments on the Discussion Paper on 'A model for positive human rights reform in Australia', as part of the Australian Human Rights Commission's (AHRC) Free and Equal national conversation.

Overall we support the paper's discussion of the benefits of comprehensive, legislated human rights protection in Australia. As the first jurisdiction to enact a Human Rights Act in 2004, the ACT is uniquely placed to assess the benefits of such legislation. The ACT Commission was also the first statutory agency charged with protecting, promoting and realising human rights. From our perspective, enactment of statutory human rights protections have brought about countless benefits for the ACT, particularly for vulnerable members of our community, including in the development and improvement to public policy and service delivery. The discussion paper highlights many case studies in the ACT and Victoria that illustrate this point, and we seek to elaborate on that material.

We agree that the options discussed in the paper are the most important that could be progressed to better protect human rights in Australia. Generally, the ACT Commission would be supportive of any change that results in a legislated set of common rights for all Australians. While the current Federal parliamentary scrutiny process is a welcome first step, we believe that a clearly documented set of rights offers several advantages.

The ACT Commission would also be supportive of a community information campaign focused on informing the Australian community of current Commonwealth obligations to comply with the existing human rights obligations in the AHRC Act and existing complaints mechanisms for alleged breaches of the conventions scheduled to the AHRC Act. The current perception and narrative that there is no Commonwealth human rights framework, because there is no bill of rights or clear enforcement mechanism, essentially deprives the community of the protections currently afforded by the existing legislative framework.

The ACT Experience

The ACT *Human Rights Act 2004* ('HR Act') has delivered clear benefits for all members of the ACT community. Grounded in a dialogue model of human rights protection, the enactment of the HR Act broke the political and cultural deadlock on bills of rights in Australia. It provided the impetus – and the model – for Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter'), with Queensland following in 2019 with the passage of the *Human Rights Act 2019* (Qld) ('Qld HRA').

While we are not opposed to an entrenched form of rights protection, the HR Act has benefitted from being a non-entrenched law, allowing incremental improvement over the years. The Act has been subject to regular mandated reviews, which have offered opportunities to reflect on whether it was living up to its goal of 'bringing rights home' to Canberrans. These reviews resulted in the HR Act being substantively amended on three separate occasions. The reviews led initially to the HR Act being amended to introduce a duty on public authorities to comply with human rights, and an independent right of action in the ACT Supreme Court for breaches of that duty.¹ Subsequently, a right to education was added, the first express recognition of a socio-economic right in the HR Act, albeit in limited form.² A third review resulted in amendments to extend public authority obligations to the right to education, and to provide express recognition of Aboriginal and Torres Strait Islander cultural rights.³

While the reviews identified various strengths and weakness of the human rights dialogue in the ACT, a common and consistent theme that has emerged is the HR Act's positive impact on the work of the legislature and the executive. It would seem that many of the typical shortcomings that have been identified in human rights scrutiny regimes elsewhere have not been reflected in the ACT's experience. For example, no bill in the ACT has been introduced with a statement of incompatibility. It is also not uncommon for bills to be amended in response to adverse comments by the ACT Legislative Assembly's Standing Committee on Justice and Community Safety (Legislative Scrutiny Role).

The HR Act protects a range of rights and freedoms that are primarily drawn from the *International Covenant on Civil and Political Rights 1966* (ICCPR).⁴ It also protects the right to education, which is drawn from the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),⁵ and the cultural rights of Aboriginal and Torres Strait Islander peoples, drawn from the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).⁶ The HR Act protects these rights by creating a 'dialogue' about human rights between the legislature, executive and judiciary, while preserving parliamentary supremacy over human rights matters. The HR Act utilises various mechanisms to facilitate this dialogue:

(i) Reasonable limits

The HR Act utilises a general limitation provision (s 28), which provides that the human rights protected in the Act may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. We suggest that the common proportionality test across all rights used in the ACT, Victorian and Queensland models aids

¹ ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004 Twelve-Month Review Report*' (2006). The relevant amendments were introduced by the *Human Rights Amendment Act 2008* (ACT).

² ANU, 'Report of the ACT Economic, Social and Cultural Rights Research Project', *Australian Research Council* (2010), and ACT Government response to the Report (2012). See also ANU Human Rights Research Project Report, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (2009) and related government response in 2012; available at: http://www.justice.act.gov.au/protection_of_rights/human_rights_act. The relevant amendments were introduced by the *Human Rights Amendment Act 2012* (ACT).

³ JACS, 'Economic, Social and Cultural Rights in the Human Rights Act 2004: section 43 review' (November 2014), available at: http://cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf. The relevant amendments were introduced by the *Human Rights Amendment Act 2016* (ACT).

⁴ The *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

⁵ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

⁶ Resolution adopted by the UN General Assembly, (2 October 2007), UN Doc A/RES/61/295.

courts, parliament and the executive to interpret and understand the application of rights, rather than seek to apply the various limitation clauses in each of the relevant international instruments.

The proportionality test as expressed in the ACT, Victorian, and Queensland models is consistent with formulations of permissible limitations in international human rights law. There is little difference between general and internal limits in practice. They both use proportionality as a key to unlocking whether a limitation on rights is permissible, or in other words 'reasonable'. For example, in General Comment No 22 on the right to religious freedom, the UN Human Rights Committee explained that 'necessary' limitations in the context of article 18(3) of the ICCPR meant that the limitation must be 'proportionate to the specific need upon which it is predicated'. The UN Human Rights Committee has similarly confirmed that proportionality is a cross-cutting test for assessing permissible limitations under the ICCPR:

... Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.⁷

(ii) Role of the Human Rights Commissioner

The office of the ACT Human Rights Commissioner, established by the HR Act, has various functions in relation to the HR Act. These include providing community education and information about human rights; reviewing the effect of ACT laws on human rights; and advising the Minister of Justice on the operation of the HR Act. One of the key features of the legislation from the inception has been the ability of the Human Rights Commissioner to seek leave to intervene in legal proceedings that raise human rights issues. The Commissioner has published guidelines about when she will seek to intervene. This function has been important to increase understanding of the operation of the legislation and draw upon comparative jurisdiction to assist ACT courts and the ACT Civil and Administrative Tribunal interpret rights. The Commissioner has generally intervened in proceedings that will develop jurisprudence most effectively for the community. The Commissioner has been granted leave in all proceedings in which she has sought to intervene.

For example, the ACT Human Rights Commissioner recently intervened in an ACT Court of Appeal matter concerning the scope of police powers to arrest without a warrant for breach of bail. The Commissioner submitted that, using the ordinary principles of construction, including the interpretive obligation in s 30 of the HR Act, the power to arrest without warrant in s 56A of the *Bail Act 1992* did not extend to a right for police to enter a person's home for the purpose of effecting the arrest. The Court of Appeal, however, dismissed the application of the HR Act because it considered that s 56A had a settled meaning. Based on its view of the purposes and legislative history of s 56A, the Court of Appeal concluded that s 56A carried with it a common law right for police to enter any place at any time to arrest someone who breached a bail condition. The matter was appealed to the High Court but was eventually settled. The government nevertheless moved to introduce legislative criteria to guide the use of the arrest power in s 56A, citing human rights reasons for introducing the amendments.

⁷ UN HRC, General Comment No 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at [6].

Under s41 of the Human Rights Act the Human Rights Commissioner also has the power to review the effect of Territory laws on human rights, which the Minister must table in the ACT Legislative Assembly. Four of these reviews of condition of detention have been conducted and termed 'Human Rights Audits' - two Adult Corrections Centres, the Belconnen Remand Centre in 2007 and the Alexander Maconochie Centre (only the women's area) in 2014, and two Youth Detention Centres, Quamby in 2005 and Bimberi in 2011. A Human Rights Audit is a dynamic monitoring of laws, policies, programs, practices, cultures and resources, which constructively reviews evidence bases. The methodology involves interviewing people and groups about relevant issues, including:

- current and former detainees;
- staff and management;
- NGOs and services providers; and statutory office holders eg Ombudsman and Official Visitors.

These Audits have highlighted the need for continuous improvement in the key areas of to ensure humane treatment of detainees:

- use of force and restraints;
- strip and other searching;
- lockdowns and time out of cells;
- family and other visits and communication;
- security, discipline, segregation and behaviour management;
- complaint handling, data management and decision-making;
- staffing resources and staff training eg de-escalation;
- transitional release; non-discrimination and special needs of minorities including women, Aboriginal and Torres Strait Islanders, culturally and linguistically diverse populations, people with disability, religious and LGBTIQ groups; and
- work, education and health (including mental health) programs.

Human rights compliance by detention facilities are not solely fixed by new buildings, although they are critical to avoid issues like overcrowding and inappropriate mixing of detainees. Detention facilities are only a part of the criminal justices system, and systemic reform is important through prevention and diversion, such as throughcare, as well as strong impact from Justice Reinvestment (JR) programs. Focusing on rehabilitation is extremely important immediately, but it and JR programs may take some time to impact on recidivism rates, and break inter-generational cycles. These Audits have driven legislative, systemic policy and infrastructure change, with impact being strongest at the time of the Audit being conducted and finalised due to increased oversight and media coverage and parliamentary debate.

(iii) Parliamentary scrutiny of human rights

Statements of compatibility

The HR Act (s 37) requires the Attorney-General to prepare a written statement about each government bill presented in the ACT Legislative Assembly indicating whether in his or her opinion the bill is consistent with human rights. If a bill is inconsistent with human rights, the Attorney-General's statement must explain how it is inconsistent.

Scrutiny reports

The HR Act (s 38) requires that a standing committee of the Assembly must report to the Assembly on human rights matters raised by any bill (both government and private members bills) introduced into the Assembly. The Assembly's Legislative Scrutiny Committee has carried out this role since the HR Act's commencement in 2004.

Failure to comply with the requirements in ss 37 or 38 of the HR Act does not affect the validity, operation or enforcement of an Act that is passed (s 39). The HR Act therefore preserves parliamentary sovereignty and the Assembly retains the discretion to pass laws that are not compatible with the HR Act.

Similar to other traditional scrutiny committees in Australia, the Scrutiny Committee eschews commenting on the policy aspects of legislation but instead undertakes non-partisan, technical scrutiny of primary legislation.

There are instances in which the Opposition and Crossbench parties have successfully moved amendments based on Scrutiny Committee comments, sometimes winning over the support of the government to do so. For example, in the case of the Health Legislation Amendment Bill 2006 (No 2), the government had initially rejected the human rights concerns raised by the Scrutiny Committee regarding a potentially coercive warrant and detention power given to the Health Professions Tribunal. However, the Scrutiny Committee's comments gave the Shadow Attorney-General (and chair of the Scrutiny Committee) Bill Stefaniak powerful ammunition with which to criticise the government during debate, and the amendments were eventually agreed to by the government. In describing the role of the Scrutiny Committee's comments in her decision-making, Minister Katy Gallagher MLA 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.'⁸

As the Discussion Paper notes, the Commonwealth Parliamentary Joint Committee on Human Rights (PJCHR) is similarly empowered to examine Bills and legislative instruments for compatibility with human rights. Based on the ACT experience, we encourage further support for the PJCHR's work given the significant role its reports can play in improving human rights compatibility of law.

(iv) Interpretation of laws

The HR Act (s 30) requires all ACT statutes and statutory instruments to be interpreted in a way that is compatible with human rights protected in the Act, so far as it is possible to do so consistently with their purpose. International law and relevant judgments of domestic, foreign and international courts and tribunals may be considered in interpreting human rights (s 31).

⁸ ACT Legislative Assembly, *Parliamentary Debates*, 14 November 2006, 3423 (Katy Gallagher MLA).

(v) Declarations of incompatibility

The ACT Supreme Court may issue a declaration of incompatibility if a Territory law cannot be interpreted consistently with human rights (s 32). The declaration does not invalidate the law, or prevent its continued operation or enforcement. Instead it is a formal way of expressing the Supreme Court's finding on the question of human rights compatibility. The Attorney-General is required to table the declaration in the Assembly within 6 sitting days of receiving it and table a written response no later than 6 months after that (s 33). There has only been one declaration of incompatibility to date: *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147, which is discussed below.

(vi) Obligations of public authorities

The HR Act imposes a direct duty on public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights in their decision-making (s 40B). Unlike the Victorian and Queensland legislation, the public authority duty under the HR Act is enforceable through a direct right of action in the ACT Supreme Court, which may grant any remedy other than damages (s 40C).

A recent example of this obligation working in practice involved an Aboriginal woman who lived in a one bedroom public housing property. She provided respite care for her grandchildren and niece, and as an elder, gave her family significant cultural and other support. Housing ACT initially refused her application for a larger home as there were no formal arrangements for the care of her grandchildren and niece. She contacted the Dhurrawang Aboriginal Human Rights Program at Canberra Community Law, who helped her to put her case to Housing ACT, arguing her cultural and family rights were denied by the refusal. Housing ACT remade their decision taking into such rights and approved her for a larger home.

While it continues to be refined and improved, we suggest that the ACT model has demonstrated the benefits of a comprehensive, legislated suite of human rights protection.

Alternative options

While we support a form of legislated rights, we accept that incremental change may be necessary prior to Australia adopting such protection. We agree that changes such as a requirement for public servants to act and make decisions consistently with human rights, including through changes to *Public Service Act 1999* (Cth), are worth considering. The discussion paper suggests that measures could be taken to foster a human rights culture within the federal public service. In our experience, this can be a particularly significant change in the way the service operates, but is only possible with well-resourced training materials and regular face to face education.

One significant difference in the ACT human rights scheme has been for the ACT Commission to see and comment on draft Cabinet Submissions. In our experience, this level of access has increased the dialogue with the public service and enhanced the understanding of human rights compatibility, particularly when coupled with requirements in the ACT Cabinet Handbook that submissions explicitly consider human rights and the availability of less restrictive options. In our experience, such early awareness has regularly informed further scrutiny of prospective limitations or drafting of prospective bills before presentation.

Reforming tort law to expand existing torts to cover international human rights law is also worth exploring, and could improve upon the ACT direct action model if plaintiffs were able to claim damages for breaches as well as other remedies. We also agree that some relatively minor amendments to the *Australian Human Rights Commission Act 1986* (Cth) would provide a more comprehensive complaints framework for human rights breaches, including recourse to court should conciliation by the AHRC prove unsuccessful.

We further support constitutional change to recognise Indigenous Australians, remove racially discriminatory provisions and include constitutional protections of equal treatment and non-discrimination. The ACT Human Rights Act includes explicit protection for Aboriginal and Torres Strait Islander peoples' cultural rights, tailored through consultation with the ACT Aboriginal and Torres Strait Islander Elected Body. As highlighted in the housing case cited above, our experience is the inclusion of cultural rights has led to many benefits including raising awareness for the broader community, grounding conversations about reform and cultural safety, and increasing recognising the cultural heritage significance of Aboriginal sites such as scarred trees.

Overall, based on our experience in the ACT, we maintain that human rights in Australia cannot be properly respected, protected and fulfilled without a national human rights act.

In our view, one proposal in the discussion paper may merit slight caution. The discussion paper suggests 'sentencing courts, as well as prison and parole authorities, could be required to have regard to Australia's human rights obligations when making sentencing and custodial decisions. This is a matter that could be incorporated into Part IB of the *Crimes Act 1914* (Cth)'. We are less supportive of this proposal, as the bulk of prison administration and criminal law enforcement occurs at the state and territory level. Changes such as these at the Commonwealth level may create confusion and complexity, particularly in those jurisdictions who already have clear legislated human rights protection.

Should you wish to discuss this matter further, the contact in my office is Renuka Thilagaratnam, who may be reached on 6205 2222.

Yours sincerely



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President and Human
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Karen Toohey

Discrimination, Health
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