ACT Government

ACT HUMAN RIGHTS COMMISSION
Australian Capital Territory

Mrs Janice Rafferty
Assistant Secretary
Standing Committee on Administration and Procedure
Legislative Assembly of the ACT

Via email

Dear Mrs Rafferty

Report on the Implementation on Latimer House Principles

Thank you for Dr Chris Bourke's letter of 23 April 2015, addressed to the Human Rights and Discrimination Commissioner, seeking comment on the *Report on the Implementation of the Latimer House Principles in the ACT*.

Confusion over roles

We note that the letter was addressed to only one of the Commissioners at the ACT Human Rights Commission. It is unclear if this relates to a misunderstanding about the structure of the Commission or an apparent assumption in the Report that the Human Right and Discrimination Commission is the only identified Public Office Holder in the context of the current inquiry.

For the information of the Standing Committee, we advise that the Commission is not headed by the Human Rights and Discrimination Commissioner. The Commission was established to operate under a collegiate model, and all Commissioners manage the Commission equally.

In this context, we found the discussions about the Commission on pages 20-22 somewhat confusing. The Report suggests that the Human Rights and Discrimination Commissioner remains the only identified Public Office Holder not to be appointed as an Officer of Parliament. While the Report discusses the situation of other Commissioners on page 22 in some detail, it does not clarify whether or not it considers the Human Rights and Discrimination Commissioner's role to be so different to the roles of the other Commissioners such that it should be considered separately in the context of discussions about the Latimer House Principles and Officer of the Parliament considerations. We recommend that the Committee seek clarification on this aspect from the reviewers, or provide an addendum to the Report which outlines the independent oversight nature of all Commissioners' roles at the Human Rights Commission. Our view is that all Commissioners undertake an independent and impartial role in overseeing designated actions of government agencies and the wider community.

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If the Report's description of the Commission was unintended, and it is the case that the Report should contemplate all three Commissioners as relevant Public Office Holders, then the gender representation of the heads of statutory authorities should correctly indicate that the Children and Young People Commissioner is male and that the Health Services Commissioner/Disability & Community Services Commissioner is female.

Status of the Commission as an independent oversight body

The current Report is closely aligned to the Committee's earlier consideration of offices that should be considered as Officers of Parliament. The Latimer House Principles are essentially about which bodies should be given the status of true independence from the government of the day and which should, therefore, be established as entities that are separate from the other arms of government.

The 2011 Hawke Review into the ACT Public Service recommended that all three Commissioners from the ACT Human Rights Commission should be considered in this context. In discussing the recommendations of the Hawke Review, the current Report is silent on whether further consideration should be given to designating the Commissioners at the Human Rights Commission as Officers of the Assembly. It notes that the Auditor General, the Electoral Commissioner and the Ombudsman have all been made Officers of the Assembly, but does not address the issue that the other arm of oversight within the ACT framework remains attached to a Directorate (about which it handles complaints, albeit that discrimination complaints can be made against any individual, ACT agency or other private or community body).

The Commission is not aware of the rationale for an apparent reluctance to provide it with the same status as other independent agencies that in Hawke's view should be at 'arms length' from the government of the day. In the Government response to the Standing Committee report *Inquiry into the feasibility of establishing the position of Officer of the Parliament*, it agreed with the recommendation that the Assembly should from time to time review whether additional Offices of the Parliament should be established.

In this context, we note that the current proposal in the *Discussion paper – design of an effective model for the protection of human rights* (for which submissions close on 12 June) would see the Commission's functions of undertaking independent and impartial oversight, merged with the functions of other agencies that provide direct services to the public. In our view, careful consideration needs to be given to how the future of independent oversight, and consistency with the Latimer House Principles and the Officer of the Parliament recommendations, would be impacted by the model proposed in the Discussion paper.

Human Rights Act

The discussion on page 6 about Declarations of Incompatibility under the ACT Human Rights Act 2004 is welcome. However, we note that there has only been one Declaration of Incompatibility made by the Supreme Court, and that this Declaration has not yet led to any amendment of the legislative provisions found by the Court to be incompatible with human rights.

The Human Rights and Discrimination Commissioner recently released the attached Report on the first 10 years of human rights protection. Look Who's Talking documents the positive culture that has developed in the legislative branch around rights.

Nonetheless, the Report also notes the lack of jurisprudence under the HR Act, which brings into question whether legislative amendments are necessary to ensure the Executive is fully accountable for human rights breaches.

Mr Burmester noted in his evidence to the Committee on 9 April that human rights data required by the Legislative Assembly may be 'buried' in the HRC. If Mr Burmester's suggestion relates to the level of compliance amongst Directorates with their human rights obligations, apart from thematic reviews, the Human Rights Commissioner has limited resources and jurisdiction to collect and report on such data. For example, the Commissioner has no jurisdiction to consider individual complaints of human rights breaches. Complainants must instead commence action in the relatively inaccessible and costly Supreme Court, and have no access to damages for a proven breach.

A preferable approach would be to ensure there are accessible ways for citizens to enforce their rights. For example, the addition of damages as a remedy or more accessible/cheaper dispute resolution, such as with discrimination complaints reviewable by ACAT, where better measures of accountability (such as numbers of successful complaints) could be analysed as Mr Burmester suggests.

The Human Rights Commissioner is currently surveying the legal profession about their views on improvements to the legislation with these issues in mind. In the meantime, relevant information held by the Commissioner is generally public released through thematic and Annual Reports.

Yours sincerely

Helen Watchirs OAM
Human Rights and
Discrimination Commissioner

Alasdair Roy
Children and Young People
Commissioner

Mary Durkin
Health Services
Commissioner
Disability and Community
Services Commissioner

29 May 2015

HUMAN RIGHTS &
DISCRIMINATION COMMISSIONER
ACT Human Rights Commission

Look who's talking

A SNAPSHOT OF TEN YEARS OF DIALOGUE UNDER THE HUMAN RIGHTS ACT 2004
BY THE ACT HUMAN RIGHTS AND DISCRIMINATION COMMISSIONER

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Look who's talking

A SNAPSHOT OF TEN YEARS OF DIALOGUE UNDER THE HUMAN RIGHTS ACT 2004

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Introduction

The ACT's pioneering *Human Rights Act 2004* is ten years old. As a non-entrenched law, based on a dialogue model of human rights protection, the HR Act is unique in that it has not remained a static document but has been incrementally improved over the years. The Act has been subject to three mandated reviews in the course of the last decade, the most recent of which was tabled in the ACT Legislative Assembly on 25 November 2014.

The first two reviews offered an opportunity to reflect on whether the HR Act had been living up to its overarching goal of 'bringing rights home' to Canberrans, and the chance to improve its provisions and related processes in light of identified shortcomings. Following the 12-month review, which was completed in 2006, the HR Act was amended to, among other things, introduce a duty on public authorities to comply with human rights, and an independent right of action in the Supreme Court for breaches of this duty.[1] The review on economic, social and cultural rights in 2010 resulted in the introduction of a right to education, the first express recognition of a socio-economic right in the HR Act, albeit in limited form.[2]

The Government's third and current Review Report, which is available on the website of the ACT Justice and Community Safety Directorate (JACSD), sets out its views in relation to various matters relating to the operation of the HR Act and whether it should be extended to include additional economic, social and cultural rights.[3] The Government has said that it proposes to extend public authority obligations to the right to education, and to progress express recognition of indigenous cultural rights. Both are welcome, but modest changes. Disappointingly, however, the Report, overall, recommends retaining the status quo, with little consideration or engagement with the evidence to date.

Coinciding with the 10-year milestone of the HR Act, the third and current review presents an important opportunity to begin a conversation about the roadmap for the next decade. The Government has said that it intends to undertake a more extensive process of public consultation on its proposals next year. As a first step towards contributing to that process, the Human Rights Commissioner has prepared this paper with the aim of identifying some of the strengths and weakness of the human rights dialogue to date, and the ways in which that dialogue may be deepened, strengthened and broadened over the next 10 years. The HR Act's credentials as ground-breaking legislation is beyond question, however, now is not the time to become complacent about its achievements.

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[1] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) and '*Human Rights Act 2004* Twelve Month Review – Discussion Paper' (2006).

[2] ANU, 'ACT Economic, Social and Cultural Rights Research Project', *Australian Research Council* (2010), and Government response to the review (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

[3] ACT Directorate of Justice and Community Safety (JACS), 'Economic, Social and Cultural Rights in the Human Rights Act 2004 – s 43 Review', November 2014.

Courts and Tribunals

The *Human Rights Act 2004* invests a number of duties and functions on courts and tribunals:

- Under s 30 of the HR Act, courts and tribunals (and other decision-makers) must adopt, where possible, a human rights consistent interpretation of ACT laws.
- Under s 32 of the HR Act, the Supreme Court is empowered to issue a declaration of incompatibility, declaring a law incompatible where such an interpretation cannot be adopted.
- Under s 40C of the HR Act, a person who alleges that a public authority has breached a human right can apply to the Supreme Court for relief, and the Supreme Court may grant 'the relief it considers appropriate' except for damages. A person may also rely on the unlawfulness of the conduct of the public authority in other legal proceedings in ACT courts and tribunals.

Consistent with a dialogue-based model of rights protection, the courts are not the final arbiter of whether laws are consistent with human rights, but rather one participant in a discussion which also involves the executive and the legislature.

So how active a participant have the courts and tribunals been in the human rights dialogue to date?

First five years (2004-2009)

From July 2004 – June 2009, the HR Act was referred to in some 76 cases in the ACT Supreme Court (including in 10 instances in the ACT Court of Appeal – see chart below). It was also mentioned in approximately 10 cases in the former Administrative Appeals Tribunal and the Residential Tenancies Tribunal. There were no declarations of incompatibility issued by the ACT Supreme Court in the first five years of the HR Act's operation.

The one-year stage: The 12-month review of the HR Act noted that the Act had resulted in 'only a small impact in a handful of cases where parties have specifically argued human rights issues', and that it could not be said to have been a 'decisive factor' or to have been considered in 'any great depth' by the courts so far. At most, it had been used 'to lend support to a conclusion already reached by other reasoning'. The review concluded that 'the courts and tribunals have arguably been the least affected by the [HR Act]'. As a result of the 12-month review, a number of amendments were made to the HR Act which were aimed at improving its operation, including clarifying the interpretive provision in s 30; creating a duty on public authorities to comply with the rights under the Act; and creating a direct right of action to the Supreme Court for a breach of those rights, without entitlement to claim damages. The latter two amendments commenced on 1 January 2009.

The five-year stage: The 5-year review of the HR Act, which was concluded in June 2009, however, did not identify any significant improvement in the involvement of the courts and tribunals in the human rights dialogue:

> With some exceptions, the courts have, for the most part, remained a spectator to the HRA dialogue thus far. While ... there is some indication that its application in the Supreme Court is increasing, in most instances its use has been perfunctory and/or displays a lack of understanding by the legal profession of the provisions of the HRA, and their potential application.

The review concluded that '[un]til the courts fully grasp their part in the human rights conversation, there will remain some question as to the HR Act's ability to generate dialogue between the courts and legislature, and to provide accountability for the Government's implementation of human rights'.

Second five years (2009-2014)

In its second five years, from July 2009 to November 2014, the HR Act was referred to in some 110 cases in the ACT Supreme Court (including on 17 occasions in the ACT Court of Appeal) and in some 41 cases in the ACT Civil and Administrative Tribunal. The ACT Supreme Court issued one declaration of incompatibility (without any legislative response by the Government to date; see further below). The duty on public authorities, which came into effect on 1 January 2009, has been considered by the Supreme Court in approximately 14 cases, including on a handful of occasions, in the context of the new direct right of action.

Ten years in the courts and tribunals

Overall, in its first ten years of operation, the HR Act has been mentioned in approximately 50 cases in the ACT tribunals (6.6% of published decisions), 164 cases in the ACT Supreme Court (9.2% of 1846 published decisions) and in 29 cases in the ACT Court of Appeal (7.6% of 371 published decisions) – see chart below. As recently noted by Chief Justice Murrell,[4] after a peak in 2009 (which coincided with the HR Act being raised unsuccessfully in a number of bail applications), there has been a decline in the percentage of cases in which it has been raised in the Supreme Court. In her view:

> [T]he HRA has had little direct impact on the outcome of cases. The enactment of the HRA was a powerful symbolic statement, and it was predicted that the Supreme Court would play an important role in increasing human rights compliance in the ACT. But despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome.

Areas for improvement

Improving HRA accessibility

When the public authority obligations were introduced, the Attorney-General expressed the hope that the new right of action when it commenced in 2009 would stimulate renewed interest in the HR Act amongst the

[4] Chief Justice Helen Murrell, ACT Supreme Court , *'The judiciary and human rights'*, paper presented at Ten Years of the ACT Human Rights Act: Continuing the Dialogue Conference, ANU, 1 July 2014; available at: http://www.hrc.act.gov.au/content.php/content.view/id/385

legal profession and turn the trickle of human rights case law into a stream.[5] Compared to the Victorian Charter, the HR Act has been routinely raised in a higher percentage of cases in the ACT courts and tribunals (see chart below). However, the stream cannot be said to be very deep, and as noted by the Chief Justice, the HR Act has rarely made a difference to the outcome of cases. The direct right of action in the HR Act also remains under-utilised and it may be a remedy that is out of reach for the vast majority of people in the community.

(i) Clarification of section 40C - application of the HR Act in the lower courts and tribunals

A key factor that may be contributing to the limited success of the HR Act before the ACT courts and tribunals is the lack of clarity regarding the extent to which ACAT and lower courts may assess and remedy breaches of public authority obligations under the HR Act.

In *LM v Children's' Court* [2014] ACTSC 26, Master Mossop of the Supreme Court considered the ability of the Children's Court (and ACAT and courts other than the Supreme Court) to assess whether a public authority had breached its human rights obligations. The Master also considered the nature of any remedy such bodies could provide for a breach. This is a matter of concern because the Supreme Court's jurisdiction is an expensive and lengthy process for plaintiffs, who will often be vulnerable members of the community.

Master Mossop confirmed in *LM* that an express power to grant relief under the HR Act is given only to the Supreme Court via s 40C(4). However, his Honour also suggested that inferior courts and tribunals (and the Supreme Court) retain their inherent, statutory or common law jurisdictions to grant remedies otherwise available to them other than under the HR Act. Therefore a person may rely on their rights under the HR Act in lower courts and ACAT, but lower courts and ACAT cannot grant a remedy under the HR Act for that breach, unless it falls within the existing rules of that remedy. This creates a risk that HR Act arguments before a lower court or ACAT may be pointless, if any remedy for a breach is subject to the requirement of the non-HR Act matters before the court anyway. Master Mossop in *LM* did suggest that the consideration of a remedy by a lower court and ACAT for a HR Act breach may include factors beyond the traditional scope of that remedy, however this remains unclear.

In contrast to *LM*, a recent decision by the Victorian Supreme Court in *Goode v Common Equity Housing* [2014] VSC 585 (21 November 2014), confirmed that a lower court's or tribunal's jurisdiction to consider the question of lawfulness under the Charter was not lost when the original ground for making an application was not determined or rejected. Justice Bell considered that the tribunal in this case had erred because it had considered itself relieved of the responsibility to exercise the jurisdiction in section 39(1) of the Charter because it had rejected the non-Charter discrimination claim. The decision clarifies the previous Court of Appeal decision in *Sudi,* that the key issue is whether the Tribunal is already considering unlawfulness in the proceedings, in order to enliven the Charter consideration of the matter.

[5] Attorney-General Simon Corbell, ACT Legislative Assembly, *Parliamentary Debates* (6 December 2007) p 4031.

The Commissioner considers legislative reform is needed to clarify these questions, particularly in light of the recent Victorian decision on the operation of s 39(1) of the Victorian Charter, which is similar but not identical to s 40C(4) of the HR Act. If s 40C(4) precludes inferior courts and tribunals from issuing a direct remedy (as the Master of the Supreme Court found in *LM*), then applicants are likely to be disadvantaged. Inferior courts and tribunals offer applicants a more cost-effective path to remedying wrongs. Tribunals and lower courts offer significant benefits with specific jurisdictional expertise, such as tenancy matters in ACAT, and the Children's Court. They are familiar with the subject matter and particular legal framework, thus able to weigh up the impact of a public authority's breach of the individual's rights in light of all relevant factors in the proceeding. They are well-placed to issue an effective remedy under the HR Act. It has been noted in various forums, including most recently at the HR Act's ten-year anniversary seminar that such a reform would encourage the use of human rights arguments in 'far more cost-effective and accessible jurisdictions, in a much broader range of cases, argued by a larger number of advocates'.

The 2014 ACT Government Review Report takes the view that any amendments to these provisions are unnecessary because the courts have already clarified their operation. However, there is still considerable uncertainty about the operation of these provisions and the Commissioner has previously written to the Attorney General about these concerns, which in her view, were not resolved completely by the Supreme Court's decision in *LM.* Part of the confusion is how Government agencies are seeking to respond to human rights pleadings in the Magistrates Court, Children's Court and ACT Civil and Administrative Tribunal.

It would be helpful for the Government's position on these matters to be clearly articulated during the forthcoming consultation process. It would also be beneficial for the Government to undertake to monitor the application and use of these provisions in practice and to take the step of instructing all relevant agencies as to its position. Absent legislative amendment, this should include amending Government policy so that agencies agree that they consent to courts and tribunals, other than the Supreme Court, considering if they have complied with obligations under the HR Act.

(ii) Damages

The Commissioner remains of the view that the availability of damages under the HR Act would assist genuine claimants who may otherwise be deterred by the cost and time involved in pursuing test case litigation. Excluding the possibility of damages being awarded may deter would-be claimants, including those with meritorious claims, from bringing them to court because of the cost and stress associated with litigation. The ACT remains one of the few human rights jurisdictions in the world to not offer damages to victims of human rights breaches.

Declaration of incompatibility

The Government has yet to legislatively respond to the first declaration of incompatibility issued by the Supreme Court *In the Matter of an Application for Bail by Isa Islam* [2010] ACTSC 147. The Commissioner believes further reform to bail laws are needed as a result of the decision.

Table 1: HRA cases/mentions per calendar year

YEAR	ACT Court of Appeal	Total ACTCA	% ACTCA cases	ACT Supreme Court	Total ACTSC	% ACTSC cases	ACAT (AAT/RTT prior 2009)	Total tribunals	% tribunal cases
2004 (Jul-Dec)	0	15	0	5	79	6	1	26	4
2005	1	49	2	11	138	8	0	54	0
2006	2	28	7	11	90	12	4	57	7
2007	4	25	16	12	99	12	2	44	4
2008	1	21	5	13	143	9	2	54	4
2009	3	23	13	26	161	16	4	53	7
2010	2	28	7	17	162	10	8	86	9
2011	2	27	7	19	199	9	6	80	7
2012	8	57	14	16	204	8	8	75	11
2013	2	52	4	17	284	6	7	83	8
2014 (Jan-Nov)	4	46	9	17	287	6	8	69	12
TOTAL	29	371	7.636364	164	1846	9.272727	50	681	6.636364

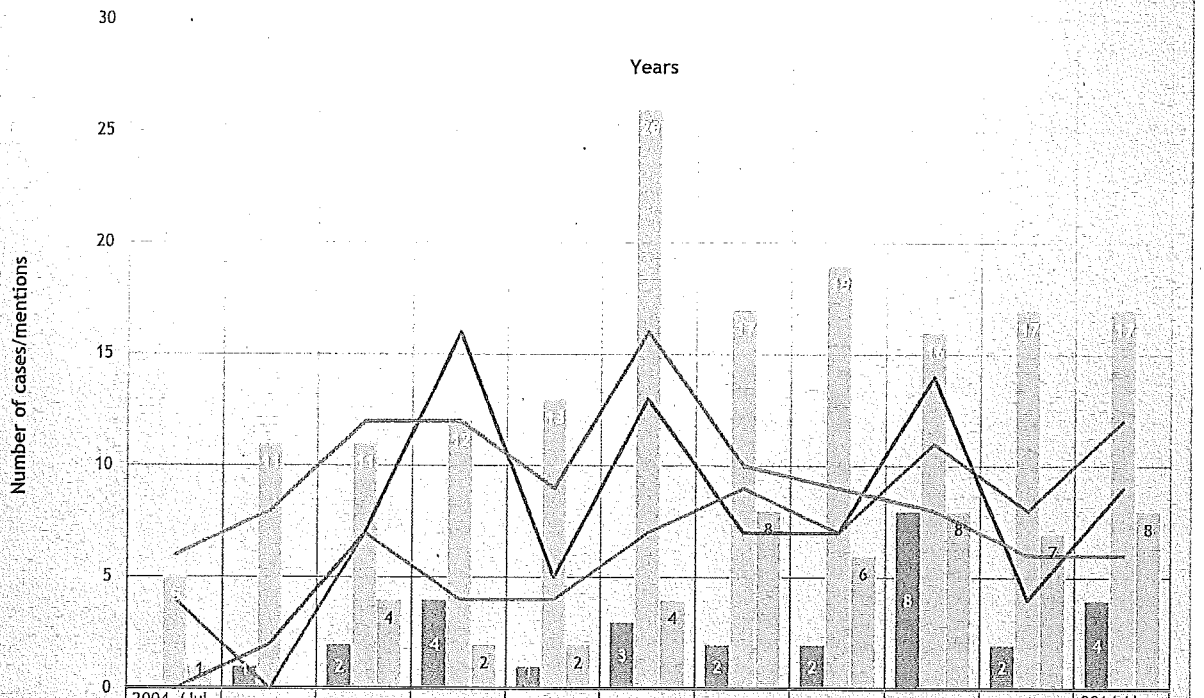
Table 2: ACT Supreme Court - HRA cases/mentions by year of operation

Year			ACT Court of Appeal	ACT Supreme Court	Total
1st year	Jul '04 -	Jun '05	1	10	11
2nd year	Jul '05 -	Jun '06	2	12	14
3rd year	Jul '06 -	Jun '07	2	8	10
4th year	Jul '07 -	Jun '08	3	13	16
5th year	Jul '08 -	Jun '09	2	23	25
6th year	Jul '09 -	Jun '10	3	21	24
7th year	Jul '10 -	Jun '11	0	20	20
8th year	Jul '11 -	Jun '12	4	18	22
9th year	Jul '12 -	Jun '13	6	14	20
10th year	Jul '13 -	Jun '14	4	20	24
TOTAL			27	159	186

Table 3: Victorian Supreme Court and VCAT: Charter Cases/Mentions per year

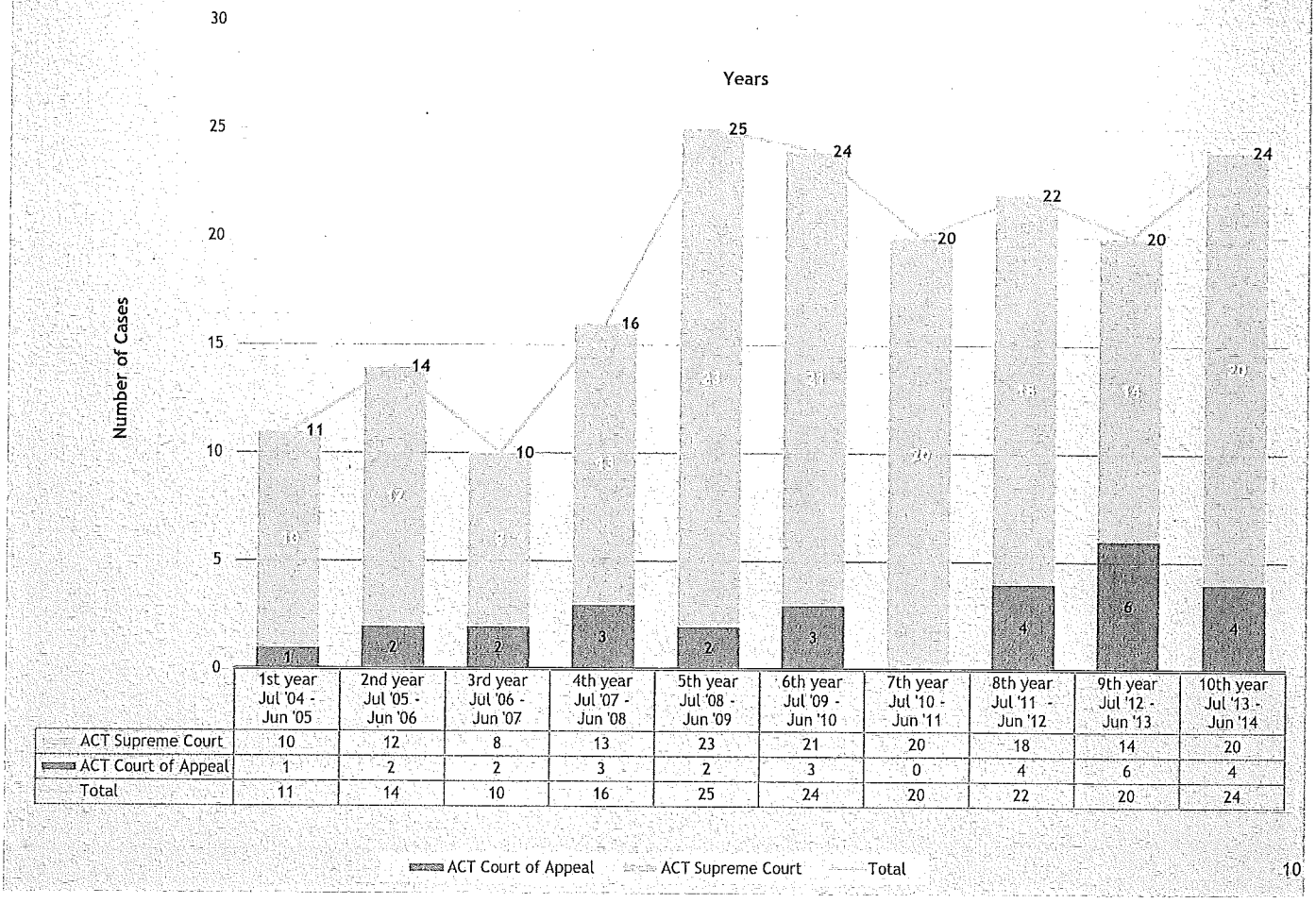
	Vic Court of Appeal	Total VCA cases	% VCA cases	Vic Supreme Court	Total VSC cases	% VSC cases	VCAT	Total VCAT cases	% VCAT cases
2007	0	319	0	8	564	1	6	2367	0.2
2008	8	284	3	16	607	3	15	2553	0.6
2009	3	322	9	20	650	3	27	2656	1
2010	10	360	3	21	650	3	39	2077	2
2011	10	447	2	14	660	2	24	2376	1
2012	5	328	1	18	626	3	20	1982	1
2013	8	376	2	18	677	3	43	2190	2
2014 (Jan-Nov)	8	284	3	16	517	3	18	1395	1
TOTAL	52	2720	2.875	131	4951	2.625	192	17596	1.18

Courts and tribunals:
HRA cases/mentions per calender year

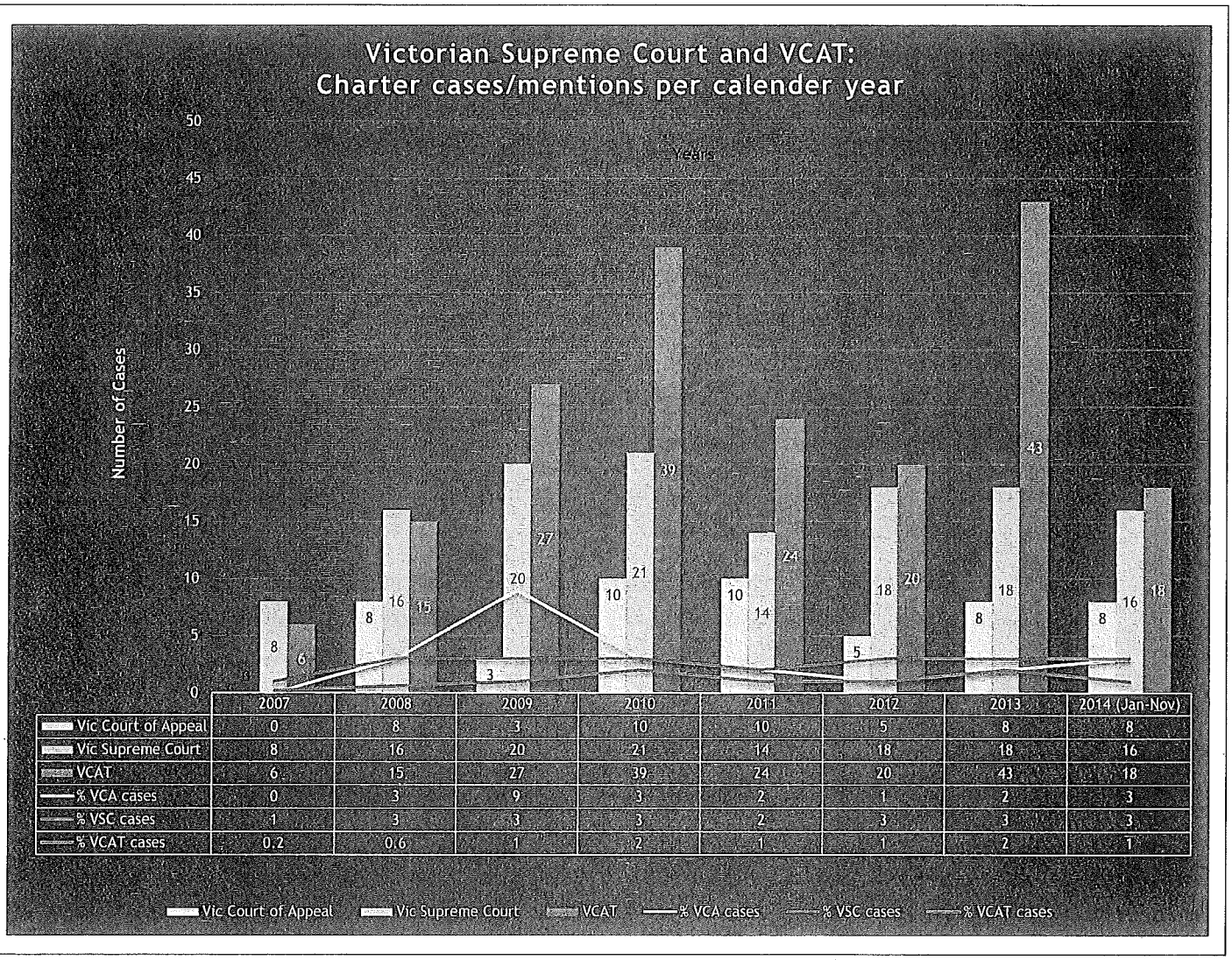


	2004 (Jul-Dec)	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014 (Jan-Nov)
ACT Court of Appeal	0	1	2	4	1	3	2	2	8	2	4
ACT Supreme Court	5	11	11	12	13	26	17	19	16	17	17
ACAT (AAT/RTT prior 2009)	1	0	4	2	2	4	8	6	8	7	8
% ACTCA cases	0	2	7	16	5	13	7	7	14	4	9
% ACTSC cases	6	8	12	12	9	16	10	9	8	6	6
% tribunal cases	4	0	7	4	4	7	9	7	11	8	12

ACT Supreme Court:
HRA cases/mentions by year of operation



	1st year Jul '04 - Jun '05	2nd year Jul '05 - Jun '06	3rd year Jul '06 - Jun '07	4th year Jul '07 - Jun '08	5th year Jul '08 - Jun '09	6th year Jul '09 - Jun '10	7th year Jul '10 - Jun '11	8th year Jul '11 - Jun '12	9th year Jul '12 - Jun '13	10th year Jul '13 - Jun '14
ACT Supreme Court	10	12	8	13	23	21	20	18	14	20
ACT Court of Appeal	1	2	2	3	2	3	0	4	6	4
Total	11	14	10	16	25	24	20	22	20	24



	2007	2008	2009	2010	2011	2012	2013	2014 (Jan-Nov)
Vic Court of Appeal	0	8	3	10	10	5	8	8
Vic Supreme Court	8	16	20	21	14	18	18	16
VCAT	6	15	27	39	24	20	43	18
% VCA cases	0	3	9	3	2	1	2	3
% VSC cases	1	3	3	3	2	3	3	3
% VCAT cases	0.2	0.6	1	2	1	1	2	1

The Legislature

The ACT Legislative Assembly is at the centre of the HR Act dialogue model, which is designed to preserve parliamentary supremacy over human rights matters. The Act invests a number of duties and functions on the Assembly, and utilises various mechanisms to facilitate dialogue on human rights both within and with the Legislative Assembly:

- the *compatibility statement* by the Attorney-General, which informs the Legislative Assembly that Government bills have been assessed for HR Act consistency before being introduced (s 37);
- the *pre-enactment scrutiny role* of the Scrutiny of Bills Committee which reports to the Legislative Assembly on human rights issues raised by Government and private member's bills (s 38);
- the express invitation to benchmark the interpretation of rights, including any limits on rights placed by the Legislative Assembly, against *international human rights standards* (s 31);
- the obligation to present a *declaration of incompatibility* of the Supreme Court in the Legislative Assembly (via the Attorney-General) for consideration if any remedial action is necessary (s32(4) and s33);
- the requirement for the Attorney-General to table human rights audit reports by the *Human Rights Commissioner* in the Legislative Assembly (s 41);
- the requirement for the Attorney-General to conduct mandatory reviews of the HR Act and report to the Legislative Assembly (s 44); and
- the *annual reports obligation*, where Government departments and public authorities are accountable to the Legislative Assembly by reporting on the steps taken to implement the HR Act.[6]

First five years (2004-2009)

The one-year stage: The 12-month review noted that it was 'clear' that the HR Act was achieving results within the Legislature, and that 'the Assembly had been engaged in an intense 'pre-enactment dialogue' prior to the passing of a Bill.' It also noted that the Act had brought a 'new focus and workload' for the Scrutiny of Bills Committee:

> Section 38 [of the HR Act] has brought about a significant change in the task of the Committee. It must now assess clauses in bills from a rights perspective on a much broader basis than is the case under its terms of reference as provided for in a resolution of the Assembly. ... A report on a human rights issue is not confined to making a comment that some clause is, or even may be, in conflict with some rights standard. The Committee might report that a bill enhances rights protections. [It] is aware that its reports may be

[6] Consequential amendments to the *Annual Reports (Government Agencies) Act 2004*, s 5 and s 9(3).

> consulted by members of the Assembly for the purposes of debate on a bill. A report may thus provide explanation, and outline different points of view, in a way that will facilitate a debate about rights.

Five-year stage: The five-year review was similarly positive about the impact of the HR Act within the Legislature:

> 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.

The report noted that there were signs that the Scrutiny of Bills Committee's work was being taken seriously, citing examples of Government amendments to legislative proposals in light of the committee's criticisms. The committee's concerns with regard to strict liability offences provisions also resulted in the issue being referred for inquiry by the ACT Standing Committee on Legal Affairs, and the recommendation that ACT laws be audited to determine the prevalence of such offences and their appropriateness in each case. That in turn resulted in the Government developing comprehensive guidelines for framing offences, which were published in 2010.

Second five years (2009-2014)

By all accounts, the HR Act's main influence remains clearest within the Legislature, where there are signs that it has made a genuine cultural difference to the way the Assembly goes about its work. The Act and the standards that it upholds are frequently invoked in parliamentary debates by members across the political divide.

Significantly, and in contrast to comparable human rights scrutiny committees in Victoria and the Commonwealth, the Scrutiny of Bills Committee's reports are routinely referred to in second reading debates of bills. The committee's concerns are also often cited as the basis for Government amendments to bills. In 2014 alone, close to 100 Government amendments in relation to 7 bills were moved, ostensibly in response to comments made by the committee. In contrast, Victoria's Scrutiny of Acts and Regulations Committee has identified only 8 instances over a period of eight years, where its Charter reports had resulted in a house amendment to a bill. While there are positive signs that the Commonwealth's Parliamentary Joint Committee on Human Rights's work is being taken into account in the development of legislation, its reports have not to date resulted in any amendments to bills in the course of their passage through the Parliament.

Areas for improvement

The five-year review made various recommendations which concerned strengthening the statement of compatibility requirement in the HR Act. None of these recommendations were accepted by the Government for reasons that ranged from considering a particular change to be unnecessary, to

concerns that they would involve the need for additional resources. The Government has repeated those concerns in the current Review Report.

The Commissioner, however, considers that the current review provides an opportune time to revisit some of these issues.

(i) Compatibility statements for secondary legislation

Explanatory statements for regulations and other secondary legislation, which the HR Act does not subject to the statement of compatibility requirement, have nevertheless occasionally included human rights analysis. This *ad hoc* process, while welcome, could be greatly improved if the HR Act were amended to require statements of compatibility for legislative instruments as well as bills.

The present system which exempts secondary legislation from any systematic human rights scrutiny and review reduces the thoroughness of the ACT's pre-legislative human rights scrutiny regime. As the Commonwealth model has demonstrated, such a model is feasible and also necessary, given the range of amendments which have an impact on human rights that can be promulgated through secondary legislation.

The Government's 2014 Review Report states that a requirement for statements for secondary legislation would involve a significant increase in resources even if the responsibility was devolved to the agency developing the legislative proposal. But it does not explain why or how this would be the case. If human rights factors were properly taken into account throughout the legislative development process, then the requirement for a statement at the end of that process should not present any undue burden. Alternatively, consideration could be given to including appropriate human rights analysis in the explanatory statements for secondary legislation, similar to that which is required for bills.

(ii) Compatibility statements for private members bills

The continued exemption of private member's bills from the statement of compatibility requirement is undesirable as it creates a two tier system for the human rights scrutiny of proposed legislation. In principle, there is no reason why private member's bills should be subjected to lower or different standards of scrutiny. Both Victoria and the Commonwealth have extended the requirement for statements of compatibility to all bills, regardless of whether the proponent is the Government or a private member.

The Government's 2014 Review Report rejects the proposal on the basis that it is inappropriate for Government to make determinations based on the policy behind private members bills. It does not, however, explain why it would not be feasible for private members to prepare their own statements, similar to the Victorian and Commonwealth models, and/or include appropriate human rights analysis in the accompanying explanatory materials.

The Executive Government

The *Human Rights Act 2004* invests the executive Government with several duties and functions, including:

- the requirement for the Attorney-General to present a written statement on the human-rights compatibility of each Government bill presented to the Legislative Assembly (s 37);
- the requirement for the Attorney-General to report the Government's response to any declaration of incompatibility issued by the Supreme Court to the Assembly within six months (s 33);
- the requirement for the Attorney-General to review and report to the Legislative Assembly on the operation of the HR Act (s 43);
- the positive obligation on public authorities to comply with human rights in decision-making (Part 5A).
- the obligation for Government Directorates and other public authorities to report on their implementation of the HR Act in their annual reports (*Annual Reports (Government Agencies) Act 2004*, ss 5, 9(3)).

First five years (2004-2009)

The one-year stage: The 12-month review considered that the HR Act was having its most significant impact at the level of policy formation in the executive (along with the legislature). But the review found that the Act had not equally penetrated all levels of the bureaucracy, and that further support and training was required to clarify its implementation to public servants. The review also recognised that there was still much work to be done to develop a culture of human rights in the ACT community.

Five-year stage: Many of the issues identified in the 12-month review were still present at the five-year stage. The five-year review noted that the compatibility statement requirement had played an important role in fostering awareness of human rights, and that overall the Act was having a beneficial impact on Government culture in some areas. However, its effect was neither consistent, nor widespread across Government, and there was still inconsistent engagement with the Act at a practical level.

The five-year review assessed the impact of the HR Act on the work practices, attitudes and culture of the ACT Government through a series of interviews with a range of ACT public servants from different departments and agencies between April 2006 and October 2008. It found that:

> [S]everal participants from different departments and agencies demonstrated a very high level of engagement with the HRA and the scrutiny process, and had a sophisticated understanding of the Act and the human rights issues raised by the policies and legislation they were responsible for developing. However, others who were also involved in the preparation of legislation, and thus subject to the compatibility statement and cabinet submission requirements, had less engagement with the Act, considering that detailed human rights scrutiny and analysis remained the responsibility of the HRU. These

officers generally relied on either the Office of Parliamentary Counsel or the HRU to pick up human rights breaches.

There is also some complacency about existing legislation and practices, and an assumption that these already meet human rights standards, along with the tendency to equate human rights with ordinary morality or common sense. There is limited awareness of the HRA amongst frontline decision-makers and some officers who administer legislation have not appeared to appreciate the requirements of the s 30 obligation to interpret legislation consistently with human rights. In part, this is because of a lack of training, information and accessible resources for public servants.

Second five years (2009-2014)

A noticeable improvement over the last five years has been the consolidation of practices around the statement of compatibility requirement. The statement itself has remained simply a one-line confirmation of the Attorney-General's opinion that a bill is compatible with human rights (there has yet been no statement of incompatibility issued by the AG). However, the Government has followed through on its commitment to ensure that appropriate analysis of human rights issues continues to be included in the explanatory statements to bills.[7] In 2012, JACS published a factsheet to provide guidance on how to address human rights issues in explanatory statements.[8] For every Government bill, the responsible agency must address the issue of compatibility with the HR Act in the explanatory statement to the bill, including:

- identification of any rights protected under the HR Act engaged by the bill;
- the specific clauses of the bill that engage such rights;
- whether the bill limits those rights; and
- an analysis of whether any limits are reasonable in accordance with the factors set out in section 28 of the HR Act.

This approach appears to have largely satisfied the expectations of the Scrutiny of Bills Committee, which had initially been critical of the absence of detailed reasons in the statement of compatibility itself. While the committee still usefully draws attention to analysis that falls short of its expectations, the overall quality of the human rights analysis included in explanatory memoranda has undoubtedly improved.

The Act's impact on departmental practices and culture, however, is more difficult to assess, due in part to the absence of any ongoing or systematic initiative by the Government to measure the HR Act's influence in this area. Directorates have also for most part continued to provide only perfunctory accounts of their efforts to implement the HR Act in their respective annual reports, despite the promulgation of directions requiring

[7] In accordance the ALP/Greens Agreement for the 7th Assembly.

[8] JACS, 'Addressing human rights in explanatory statements of bills: Fact Sheet'; available at: http://www.[illegible]

more detailed information.[9] As a result, there a few public examples to draw on, as to whether the HR Act is genuinely a starting point for Government agencies when developing policies, programmes and procedures that do not require a legislative expression. The Government's 2014 Review Report is a missed opportunity in this regard, as it did not canvass the question of whether there had been improvements (or otherwise) in the last five years in terms of how the Act is perceived and used within Government.

Areas for improvement

Drawing on the some of the markers used by the five-year review, however, some observations may be made. The five-year review emphasised the requirement of sustained and strategic leadership and commitment, particularly by JACS as the lead agency for the implementation of the HR Act, in order to ensure the Act's successful uptake within Government. Among other things, the five-year review recommended that:

- The role of the Human Rights Unit within the Justice and Community Safety Directorate should be enhanced, with more staff and resources to provide a centralised focus of expertise on human rights which can be drawn upon by other agencies. The HRU should be primarily responsible for arranging training for other agencies and for providing and maintaining human rights resources. The different roles and responsibilities of the HRU and the Human Rights Commissioner should be made clear to all agencies.
- Intensive and ongoing training on the HR Act should be implemented across all levels of Government. To be most effective, this training should be tailored to specific agencies and roles and should provide detailed and practical examples of the application of the HR Act to the particular work of those agencies and officers. This training should cover the new public authority obligations and also support the guidelines for departments' annual reports, so that there are more sophisticated HR Act reports.
    - The Commissioner notes that it was initially intended that the ACT Government would provide such training, in later years, however, the Commission has offered this training (for a fee), but this has been taken up in piecemeal fashion. The Commission has developed generic e-learning to address this lack of engagement, but tailored training, whether provided by the Government or the Commission is still needed.
- An accessible and up to date resource should be created to assist public servants to understand human rights principles and developments. This resource could complement formal training sessions. This could build upon existing materials available on the JACS website, and should be intelligible to those without formal legal training. This resource could also provide a guide to research and links to other sources of more detailed information and human rights cases from Australia and overseas.
    - The Commissioner notes that it would not be appropriate for the Commissioner, as an independent office holder who at times scrutinises the Government's human rights compliance, to develop this material. Further, the Human Rights Unit is uniquely placed to develop this

[9] See Chief Minister's Annual Report Directions since 2007.

material, given its understanding of the cabinet and legislative processes as part of the Legislation Branch of the Justice Directorate.

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

The Government's response to the five-year review, which was tabled in the Legislative Assembly in March 2012, supported these recommendations either in full or in-principle. Specifically, the Government said that:[10]

> The HRU is currently developing a web-based plain-English Human Rights Toolkit to assist ACT public authorities to comply with their obligations under the HRA, incorporate human rights into public policy at an earlier stage and reduce the risks associated with non-compliance such as legal action and reputational damage. The Toolkit will include information about each right protected under the HRA, the scope of protected rights and good practice approaches to assist agencies to develop human rights compatible legislation and policies. It will also address the obligations of public authorities under the HRA.
>
> The Toolkit will enhance the range of available human rights information maintained by HRU, serving as a first point of reference for policy and decision-makers in ACT public authorities to assist them to recognise when a policy or decision may engage a protected right. The HRU will promote awareness of this new resource across the ACT Government.
>
> Once the Human Rights Toolkit is completed, JACS will explore opportunities for publicising the Toolkit, including incorporating information into induction and staff development programs.
>
> The Toolkit will complement formal training sessions already conducted by the HRC and existing human rights materials on the HRA, such as the information sheet addressing the statutory obligations of public authorities available on the HRC"s website.
>
> In addition to guidance materials on the HRA, the JACS website also contains links to the case law of comparative jurisdictions, Government resources published by jurisdictions that have human rights acts, charters or bills of rights as well as links to the external websites of institutions specialising in international human rights law.

The Government's response also said that:[11]

> There are a number of educational initiatives currently being pursued by the HRU in furtherance of the objective of ensuring community organisations are provided with support and resources to enable them to

[10] See Government Response to the ANU Human Rights Research Project Report, The Human Rights Act 2004 (ACT): The First Five Years of Operation (2009), March 2012, pp 28-31; available at: http://www.justice.act.gov.au/protection_of_rights/human_rights_act

[11] Ibid, p 20.

comply with their statutory obligations under the HRA. For example, as part of the Toolkit a fact sheet is being developed which addresses the obligations of public authorities under Part 5A of the HRA and measures that public authorities can take to comply with these obligations. Any increase in support for community organisations provided will be subject to resourcing considerations.

The HRU will explore opportunities to publicise the Toolkit to community sector groups to enable them to more effectively implement HRA obligations in organisational policy, practice and service delivery.

Similarly, in response to the five-year review Report's recommendation that the opt-in provision be promoted more widely, the Government said that:[12]

> [JACS] will prepare a web-based information sheet, to form part of the human rights related resources maintained by the HRU. The information sheet would set out how the opt-in scheme works, clarify the procedure required to be followed if an entity is seeking to opt-in and explain the benefits of opting in. This information sheet will be able to be circulated to community sector organisations which have capacity to distribute it more broadly to other interest groups and organisations. It could also be circulated to private industry through, for example, the ACT Business Council.

Almost three years later, these materials have not yet been made available, and regrettably, the current Review Report provides no update on these matters. It is also unfortunate that JAC's online presence is represented in the main by HR Act publications that were developed some ten years ago, and which are no longer current. Similarly, the links to comparative case law and resources have not been updated to include later developments such as the introduction of the Victorian Charter or the Commonwealth *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Commissioner considers that it remains important for the Government, and JACS in particular, to address the continued lack of systematic education inside the bureaucracy and to play a role in disseminating knowledge about the operation of the HR Act more broadly where appropriate. In this regard, the Commissioner considers that the ACT Government Solicitor can also be an important resource. As stated in successive Annual Reports, the ACTGS 'is at the forefront of a growing jurisprudence in relation to human rights in Australia and maintains a strong engagement with practitioners and academics in this developing area.' It would therefore be ideally placed to share its expertise more broadly, for example, via an online presence, similar to its Victorian counterpart, by providing short updates on legal developments that may affect agencies' program or policy planning.

[12] Ibid, pp 9-10.

Human Rights Commissioner

The ACT Human Rights Commission (the Commission) is an independent statutory agency established by the Human Rights Commission Act 2005 (the HRC Act). The HRC Act establishes five members of the Commission:

- The Children & Young People Commissioner
- The Disability & Community Services Commissioner
- The Discrimination Commissioner
- The Health Services Commissioner
- The Human Rights Commissioner

Three people are currently appointed to cover the work of the five positions:

- Mary Durkin: Disability & Community Services Commissioner, and Health Services Commissioner
- Alasdair Roy: Children & Young People Commissioner
- Helen Watchirs: Discrimination Commissioner, and Human Rights Commissioner

The Commission operates from a model of collegiality, and does not have an administrative head. All three Commissioners have equal seniority and decision making authority within the Commission.

The Human Rights Commissioner has various functions in relation to the *Human Rights Act 2004*, including:

- Providing community education and information about human rights;
- Reviewing the effect of ACT laws on human rights; and
- Advising the Attorney-General on the operation of the HR Act.

The Human Rights Commissioner may also intervene, with the leave of the court, in any legal proceedings which relates to the application of the HR Act. The Commissioner, however, does not have any jurisdiction to handle individual cases of human rights breaches. The issue of conferring a complaints handling function on either the Commission or the ACT Ombudsman was canvassed in the five-year review of the HRA. The five-year report noted that such a function would complement the direct right of action to the Supreme Court under s 40C of the HRA. The Commissioner continues to support in-principle the allocation of a complaints handling role to the Commission, particularly in light of the under-utilisation of the direct right of action in the HR Act (see discussion above).

The table below provides some brief highlights of the Commissioner's work over the last decade. Please note that it is not an exhaustive list. Some of this work was undertaken jointly between the Human Rights Commissioner and other Commissioners at the HRC.

Work of the Office of the Commissioner for Human Rights - Highlights

2004	**Advice on Commonwealth Anti-Terrorism Proposals** • Utilised by the ACT Government in discussions with the Commonwealth about the breadth of the proposed limits on rights.
2005	**Human Rights Audit of the Quamby Youth Detention Centre** • Changes to management policies and practices at the Centre. • Informed new Children and Young People Act. • Influenced design of new, more Human Rights compliant Bimberi Youth Detention Centre. **Submissions made on Electroconvulsive Therapy (ECT)** • Ensured that the threshold for emergency ECT is 'immediate necessity' where the person's life is at serious risk'. • ECT not to be used on children aged under 16 yrs.
2006	**Advice on Terrorism (Extraordinary Temporary Powers) Act 2006** • Judicial overview and review of detention • No torture evidence. • Higher threshold for making Preventative Detention Orders (PDO), a power for police to detain terror suspects where such detention is to prevent threat of imminent attack or protect vital evidence. Other changes included a shorter duration of interim PDOs, No rolling PDOs. • Increased provision of information to accused. • Presumed confidential communication between accused and legal representative. • A human rights training requirement for Australian Federal Police Officers. **Submission to the 12-month review of the Human Rights Act 2004 including on the question of possible direct application of the HR Act to public authorities.**
2007	**Human Rights Audit into Adult Correctional Centres** • changes also to the treatment of women detainees, and in particular, a significant reduction in routine strip searching. • informed design of new, more Human Rights based detention centre (and prison), Alexander Maconochie Centre. **Advice the Chief Minister on discrimination & human rights implications of Commonwealth emergency measures in NT Indigenous communities.**
2008	**Submission on mandatory roadside Drug testing.** **Submission on the Sexual and Violent Offences Legislation Amendment Bill 2008.**

2009	World AIDS Day community survey on discrimination. National push to impose serious limitations on civil liberties to curb Outlaw Motorcycle Gangs. • Released views that the proposals went too far, and didn't achieve their aim. Developed new education package and materials to explain new obligations on Public Authorities, including forum with senior executives. Submission to the Commonwealth Government's national human rights consultation. Advice to the Attorney-General on the Motor Vehicle Insurance Act.
2010	Intervention in court proceedings • Compensation paid for wrongful detention and legislation improved. Advice on Gender Identity • Recommendations on changes to ACT law, particularly to Births, Deaths and Marriages Act to ensure that people can have the gender of their choice (including non-binary genders) properly recorded. Ultimately supported in change to legislation. Submission to Joint ANU-ACT Government ARC Linkage Grant project Review of ACT Human Rights Act • Contributed to ACT Government's decision to add Right to Education to ACT Human Rights Act (added in 2013). Advice to Attorney-General on Gender Diversity and the *Births, Deaths and Marriages Registration Act 1997*.
2011	Human Rights Audit of the Bimberi Youth Justice Centre as part of corresponding Review of the Youth Justice System by Children and Young People Commissioner • found improved practice as a result of recommendations implemented from Quamby Audit. • ACT Government ultimately adopted recommendations, resulting in decrease in numbers of young people in custody, and better treatment of those who are. Submission to the ACT Government Consultation on economic, social and cultural rights. Submission to the ACT Government's consultation on the ANU's Five-Year Review Report.
2012	Series of advices to Government about inadequacy of ACT anti-vilification law. Submission to the Commonwealth Attorney-General's Office consultation on the consolidation of Commonwealth Anti-Discrimination Laws.
2013	Submission on Review of Discrimination Act by Law Reform Advisory Committee. Submission to the 2013 Draft Model of Care for the new ACT Secure Mental Health Unit.

	Submission to Shane Rattenbury MLA regarding criminal law amendments in relation to drug offences.
2014	Human Rights Audit of the Womens Area of the Alexander Maconochie Centre • Found cultural change compared to old BRC, and women treated humanely. • Recommended better rehabilitation, employment and education options for women. • Recommended a transitional release facility for women preparing to leave AMC. • Government response supported all but seven of the recommendations. Intervention in court proceedings • Argued that all courts and tribunals should consider if ACT Government directorates have acted and made decisions consistent with human rights. Submissions to Review of Mental Health Treatment and Care Act 1994 • Assisted in the development of a new Mental Health Act, leading to more human rights compliant mental health treatment, in a range of areas, particularly in relation to involuntary mental health treatment. The new Act includes a strong emphasis on a person's capacity to consent to treatment, with a presumption that everyone has such capacity.

Economic, Social and Cultural Rights

Right to education

The *Human Rights Act 2004* was amended in 2012 to include a partial right to education in new s 27A, which commenced operation on 1 January 2013. The right included was essentially a right to non-discrimination with regard to access to primary, secondary, and further education, which, for all relevant purposes, was already covered by the equality rights in s 8 of the HR Act, along with the right of parents to choose schooling to ensure the religious and moral education of their child, which is right that is recognised under the International Covenant on Civil and Political Rights in accordance with the right to religious freedom (guaranteed in s 14 of the HR Act). The Attorney-General noted that:

> Whilst some may characterise it as modest, what we are doing tonight is a significant reform in the Australian human rights landscape. We will become the first jurisdiction to formally provide for the protection and recognition under law of a right to education in a human rights piece of legislation. It is a significant step, an important step in advancing potentially a range of other economic, cultural and social rights in time into a statutory form.[13]

The Attorney-General also noted that the limited amendment was consistent with the incremental approach towards greater rights protection that had been taken in the ACT, and that the issue would be revisited in two years.

The Commissioner therefore welcomes the proposal in the Review Report to extend the public authority obligations in Part 5 of the HR Act to the right to education. The Report, however does not propose to amend s 27A to better reflect the content of our obligations under international law, without any substantive consideration of the issues. No explanation is provided for this decision, but the Report mentions that the *Education Act 2004* already provides for free education (with certain exceptions). It is not clear whether this means that it is therefore unnecessary to revise the content of s 27A of the HR Act, or if there are separate concerns about expressly recognising the full right in the HR Act. The reasons for dismissing this proposal should be fully canvassed as part of the forthcoming consultation process.

The Review Report refers to the practice of the Education and Training Directorate charging International Students to attend public schools. The Commissioner has, since 2009, reported to ETD its concerns with these policies. The Commissioner is currently completing an own-motion Review on this subject, and has already provided a draft final copy to Government. That Report will elaborate on the Commissioner's concerns. However, at this point, it appears that references in the Report to the cost of waivers to Government are unhelpful, as they do not take into the true cost/benefit analysis of public education. In particular, such figures do not take account the negative impact on the community of students not enrolling in school because of these policies. These figures are also somewhat arbitrary, as the Government spends hundreds of millions of

[13] Attorney-General Simon Corbell, ACT Legislative Assembly, *Parliamentary Debates*, 22 August 2012, 3313.

dollars a year on public education, yet this investment is apparently not perceived as 'lost revenue' because of the benefits free education brings to the community. This creates the perception that certain international students should not also be provided with the opportunity to reach their potential and contribute meaningfully to their new home because of their visa status, including asylum seekers who have fled persecution (and are not exempted from fees until they are granted a refugee visa). It is also imperative that the community understands that this policy does not require fees from comparatively wealthy international students, such as diplomats' children, which raises clear issues of equity.

Examining such issues through a human rights lens often also reveals the economic benefit education and other economic, social and cultural rights bring to a society. The economic benefits of all human rights law are discussed further below.

Right to housing

The Review Report does not support extending the HR Act to include the right to housing, which would appear to be contrary the Government's election commitments to legislate in this regard.

The Review Report argues against including the right to housing on the basis that the right is already provided in ACT legislation and because of the possible implications on resourcing and the operation of housing strategies and policies. The decision to exclude the right to housing appears to be largely based on a series of assertions which are not supported by reference to any relevant evidence. These arguments also appear contradictory, as it is not clear why legislating a right already protected through existing legislation would lead to a significant new resource cost.

Given that consideration of the right to housing forms a key part of the Review's terms of reference, the Commissioner recommends that the Government should provide a more detailed explanation of the basis of the position taken in the Report, including the relevant evidence that was taken into account, as part of its broader consultations.

It would also be helpful to explain why there is no consideration, for example, of introducing a right to housing that is limited to the Government's immediate obligations in the first instance, particularly if it is considered that these obligations are already being met through existing legislation. As previous Reviews of the HR Act have shown, providing for the express recognition of rights is beneficial for a number of reasons, not least for its ability to improve legislative, policy and decision-making processes.

Other ESC rights

The Review Report's treatment of whether the HR Act should include other ESC rights falls short of satisfying the terms of reference of the Review, which requires consideration of whether 'other economic, social and cultural rights should be included in [the HR] Act.' Instead, the Report essentially reiterates the Government

position which was set out in the response to the ANU report two years ago, and does not include any consideration of more recent evidence.

In the last two years, there have been notable developments at the Commonwealth level with regard to these issues, and the Commissioner had recommended that these matters be considered in light of those experiences. However, the Report does not mention or seek to draw any lessons from the Commonwealth scrutiny model, which requires statements of compatibility and systematic scrutiny by Parliament with regard to the full suite of ESC rights.

In the Commissioner's view, it will be important for the consultation process to include consideration of the viability of introducing a staged process for the recognition of additional ESC rights, which, for example, focused initially on pre-legislative scrutiny requirements, without imposing any related obligations on public authorities or creating any new role for the courts, as occurred in relation to the new right to education.

Economic Outcomes

A theme throughout the Review Report is the economic cost of change. However, no discussion is included on the economic costs of not acting, or the economic benefits of human rights law. Academic studies have shown that:

> ... many countries that demonstrate a higher respect for human rights experience higher economic growth.[14]

The Herbertson report cites research which found that the World Bank Group's investments in countries with the strongest civil liberties, such as freedom of speech and association, have an economic rate of return 8 to 22% points higher than in countries with the weakest civil liberties.[15] As Seymour and Pincus have also noted:

> But the theoretical proposition that slavery, arbitrary arrest, restrictions on mobility, starvation and illiteracy do not undermine the social, political and legal bases of the market economy departs from a particularly blinkered understanding of the development of capitalism.[16]

Many of the other arguments put forward on 'economic grounds' are unsubstantiated. The suggestion that there will be 'uncertainty for investors' from the introduction of the right to housing is not immediately clear to us. Obligations for a right to housing will only be on public authorities (eg not private investors) and it highly unlikely that any interpretation of existing law through the lens of the right to housing would alter the current

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[14] Kirk Herbertson, Kim Thompson and Robert Goodland, 'A Roadmap for Integrating Human Rights into the World Bank Group', World Resources Institute Report, 2010.

[15] Isham, Kaufmann, and Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects," World Bank Economic Review (Oxford: Oxford University Press, 1997), vol. 11, no. 2, p. 234.

[16] Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity', *Developmental Policy Review*, 2008, 26(4) 387-405, 400.

rules of evictions to any significant extent. It is incorrect to claim that the right to housing would lead to more discrimination claims to the Commission. The addition of the right to education has not lead to such an increase, and, in recent years, the numbers of discrimination complaints made to the Commission has decreased. As Seymour and Pincus have noted:

> Welfare economists are attracted to user fees because people tend to overconsume freely provided goods and services, resulting in scarcity, queues and misallocation. But human rights protagonists argue that some kinds of services, like health and education, are qualitatively different from others. Electricity and water are not the same as primary education. The point is not that a human rights framework provides an incontestable answer to the problem of achieving equity and efficiency in the provision of basic services, but that the combined application of positive economics and a normative human rights framework is superior to either approach taken in isolation. Economics helps us to understand some of the behavioural consequences of policy choices. Human rights provide the best available framework against which to judge those choices. Neither on its own is adequate for decision-making.[17]

[17] Dan Seymour and Jonathan Pincus, 'Human Rights and Economics: The Conceptual Basis for their Complementarity', *Developmental Policy Review,* 2008, 26(4) 387-405, 403.