



REVIEW OF THE HUMAN RIGHTS ACT 2004

Submission to the Department of Justice and Community
Safety's Discussion Paper

May 2006



ABOUT ACTCOSS

ACTCOSS acknowledges Canberra has been built on the traditional lands of the Ngunnawal people. We pay our respects to their elders and recognise the displacement and disadvantage traditional owners have suffered since European settlement. ACTCOSS celebrates the Ngunnawal's living culture and valuable contribution to the ACT community.

The ACT Council of Social Service Inc. (ACTCOSS) is the peak representative body for not-for-profit community organisations, people living with disadvantage and low-income citizens of the Territory. ACTCOSS is a member of the nationwide COSS network, made up of each of the state and territory Councils and the national body, the Australian Council of Social Service (ACOSS).

ACTCOSS' objectives are representation of people living with disadvantage, the promotion of equitable social policy, and the development of a professional, cohesive and effective community sector.

The membership of the Council includes the majority of community based service providers in the social welfare area, a range of community associations and networks, self-help and consumer groups and interested individuals.

ACTCOSS receives funding from the Community Services Program (CSP) which is funded by the ACT Government.

ACTCOSS advises that this document may be publicly distributed, including by placing a copy on our website.

Contact Details

Phone: 02 6202-7200
Fax: 02 6247-7175
Mail: PO Box 195 Civic Square ACT 2608
E-mail: actcoss@actcoss.org.au
WWW: <http://www.actcoss.org.au>
Location: Jamieson House
43 Constitution Avenue
Reid ACT 2612

Director: Ara Cresswell
Policy Officer: Llewellyn Reynders

May 2006

© Copyright ACT Council of Social Service Incorporated

This publication is copyright, apart from use by those agencies for which it has been produced. Non-profit associations and groups have permission to reproduce parts of this publication as long as the original meaning is retained and proper credit is given to the ACT Council of Social Service Inc (ACTCOSS). All other individuals and Agencies seeking to reproduce material from this publication should obtain the permission of the Director of ACTCOSS.

CONTENTS

REVIEW OF THE HUMAN RIGHTS ACT 2004.....	1
Submission to the Department of Justice and Community Safety's Discussion Paper	1
MAY 2006.....	1
About ACTCOSS	2
Contact Details	2
Contents	3
Abbreviations	4
REFERENCES TO C&P RIGHTS REFER TO THE RIGHTS INCLUDED IN THE ICCPR.....	4
REFERENCES TO ESC RIGHTS REFER TO THE RIGHTS INCLUDED IN THE ICESCR.....	4
After the Dialogue	5
One Right – All Rights	7
All human rights should be recognised	7
ESC rights are not fulfilled in the ACT	7
All human rights have resource implications	8
ESC rights are justiciable	9
GENERAL COMMENT NO. 9, UN COMMITTEE ON SOCIAL, ECONOMIC AND CULTURAL RIGHTS, PARAGRAPH 10.....	9
Expanding the dialogue	10
Implementing ESC rights through the HRA	10
GENERAL COMMENT NO. 9, UN COMMITTEE ON SOCIAL, ECONOMIC AND CULTURAL RIGHTS, PARAGRAPH 2.....	11
Environmental rights	11
The right to an effective remedy	13
Including an effective remedy in the HRA	13
GENERAL COMMENT NO. 31, UN HUMAN RIGHTS COMMITTEE, PARAGRAPH 15.....	13

GENERAL COMMENT NO. 31, UN HUMAN RIGHTS COMMITTEE, PARAGRAPH 16.....	13
<u>A direct right of action</u>	<u>13</u>
TOWARDS AN ACT HUMAN RIGHTS ACT: THE REPORT OF THE BILL OF RIGHTS CONSULTATIVE COMMITTEE, SECTION 4.74, P.80.....	13
TWELVE MONTH REVIEW DISCUSSION PAPER – HUMAN RIGHTS ACT 2004, P.14.....	14
<u>Public authorities and the community sector</u>	<u>14</u>
CHARTER OF RIGHTS AND RESPONSIBILITIES BILL 2006 (VIC), SECTION 4.....	14
<u>Strengthening the HRA</u>	<u>16</u>
<u>Invalidation of subordinate laws</u>	<u>16</u>
<u>Expanding grounds for a Statement of Incompatibility</u>	<u>16</u>
<u>Beyond Legislation</u>	<u>17</u>
<u>A legalistic approach is insufficient</u>	<u>17</u>
<u>Raising awareness of human rights</u>	<u>18</u>
<u>Human rights in the community sector</u>	<u>18</u>
ADAPTED FROM HUMAN RIGHTS IN THE COMMUNITY SECTOR, SPEECH PRESENTED BY CHRISTINA RYAN TO THE HUMAN RIGHTS FORUM, 9 DECEMBER 2005.....	18
<u>Fulfilling human rights</u>	<u>19</u>

ABBREVIATIONS

ACOSS	Australian Council of Social Service
ACT	Australian Capital Territory
ACTCOSS	ACT Council of Social Service
C&P	Civil and Political ¹
CESCR	Committee on Economic, Social and Cultural Rights (UN)
CSP	Community Services Program
ESC	Economic, Social and Cultural ²
HRA	Human Rights Act 2004
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UN	United Nations

¹ References to C&P rights refer to the rights included in the ICCPR

² References to ESC rights refer to the rights included in the ICESCR

AFTER THE DIALOGUE

In the ongoing debate about the *Human Rights Act 2004* (HRA) there has been much discussion of the “dialogue model”, whereby human rights are discussed between the three branches of government, apportioning a different role in the debate to each player but retaining the primacy of the Legislature in making the ultimate decision in whether human rights are to be respected. Yet the focus on the presence or absence of a dialogue can obscure more important issues at stake.

Firstly, and most importantly, does the dialogue work to protect human rights? From ACTCOSS’ perspective the areas with the most public discussion around human rights appear to be in the fields of mental health, corrections and the criminal law (particularly terrorism legislation) - a pattern which is also evident in international jurisdictions. Yet while these have received public attention, it is also apparent that the outcomes of the debate have been only fractionally different from what might have been expected had the HRA never been contemplated.

The ACT’s terrorism legislation is only marginally different to that of other jurisdictions and the use of non-voluntary electro-convulsive therapy has been re-affirmed. The construction of an ACT prison and new youth detention centre are likely to be a considerable improvement on the current options, but the human rights debate has had little to add about the causes of crime or the socio-economic disadvantage faced by those who come into contact with the criminal justice system.

While the more radical predictions about the effects of introducing the HRA have proved demonstrably false, there been no emphatic changes to attach to its presence. This seems to stem from two aspects of the chosen model – it is both minimalist and protracted. While this was in part intentional, it appears that both advocates and critics have been surprised by the relatively small effects of the HRA so far. Given its slight impacts, it is time to reconsider whether a stronger model for rights protection is required to give effect to what remains a very laudable goal.

There is a second point to consider in the dialogue model: who gets to participate in the dialogue? While institutional involvement in the protection of human rights is no doubt essential, the current model of dialogue remains one between the most privileged institutions of society, where the rest of the population remain mostly as observers. This is not to denigrate the steps that have been taken but to point out that, as yet, the impact of the HRA upon the lives of Canberrans is slight, and human rights remain a largely nebulous concept that lies beyond the realm of everyday life.

There is an underlying assumption that the “dialogue model” equates to a “human rights culture”. This may be, in part, a reflection of the legal theatre in which the HRA has played, where the focus has been upon the actors – and not the audience. Ultimately, a human rights culture involves both awareness and ownership of human rights by the people of Canberra, extending well beyond the democratic and legal institutions of the city. This process is only just beginning and will need a great deal of additional assistance for it to progress much further or faster.

In ACTCOSS’ view – articulated since its first submission to the Bill of Rights Consultative Committee some four years ago – the human rights debate has to reach beyond the confines of the legislative and legal systems. It is only through extensive education and engagement of the Canberra community that human rights will be translated into social norms and practices. The initial introduction of the HRA was a breakthrough for an Australian jurisdiction and this achievement should receive due recognition. But breakthrough or not, it remains only a first step and needs to be followed by many more to see an emergence of a human rights culture.

ONE RIGHT – ALL RIGHTS

All human rights should be recognised

Of all the departures from the Bill of Rights Consultative Committee's recommendations – and there were many – the refusal to include Economic, Social and Cultural (ESC) rights stands out most starkly. The inclusion of ESC rights was ACTCOSS' first priority in its original submission to the process, and their omission remains our greatest concern with the HRA. There have been a number of theoretical justifications for the decision to exclude ESC rights from the HRA, which will be questioned and responded to elsewhere in this submission.

Human rights are not hierarchical and should not be expressed as optional extras to some set of 'core' rights. The philosophical foundation for human rights is that there are certain fundamental rights we all possess through our common humanity. To infringe one right is to infringe all of them. The United Nations (UN) Vienna Declaration and Programme of Action states that: "All human rights are universal, indivisible and interdependent and interrelated."

The omission of ESC rights in the HRA is its most fundamental weakness, as from the outset the Legislature has introduced a schism in its recognition of human rights. While the first priority of the Assembly should be to include in legislation the full complement of rights under ICCPR and ICESCR, the symbolism of including all the rights from the outset and articulation of the deep connections between them has been lost, perhaps permanently. It remains incumbent on our legislators to redress this error in the current legislation.

ESC rights are not fulfilled in the ACT

A second fundamental argument for the inclusion of ESC rights is that these rights are not being fulfilled in our community. Despite being very simple and universally regarded as basic human needs, ESC rights are not available to every Canberran. Canberra is not so privileged that there are no children who go hungry, that no people sleep on the streets, that there is no-one who is illiterate or innumerate, and that nobody is denied access to primary health care. Recognition that people have a right to access the basic social services is a prerequisite for the construction of a civilised society, which aims to support all individuals to reach their full potential.

As with all human rights, ESC rights are particularly relevant when attempting to protect and assist to people who live with disadvantage. Access to ESC rights is far less a problem for the privileged and the wealthy, who do not face the same barriers of discrimination or lack of resources.

It is also essential to recognise that every human right is an aspiration, regardless of the relatively meaningless division between Civil and Political (C&P) and ESC rights. Recognising the right to life does not banish death, freedom from torture does not create a world without pain, and freedom of expression does not mean we live in a world without repression. Yet these rights have been included in the HRA. Similarly, there are those who would suggest that the right to housing means that the State must provide housing for all, the right to health means that no-one can get sick, and the right to education means we must all have multiple degrees. This is absurd as all human rights are subject to reasonable limitations, but oblige the Government and the community to actively work towards them as goals.

All human rights have resource implications

One of the most common objections to the inclusion of ESC rights is the assertion that the Judiciary may make decisions that affect the budgetary decisions of Governments.

The most obvious response is that judicial decisions frequently have resource implications for Governments - whether they are about human rights or otherwise. For instance, if a Court sentences someone to imprisonment, they immediately impose a financial burden on government. A single prison sentence may cost many hundreds of thousands of dollars, yet we rarely hear the objection that a prison sentence is an inappropriate judicial decision because of its cost imposition. Indeed, the opposite is frequently the case, with a subset of commentators declaring that prison sentences are too short, regardless of their budgetary implications. It is contradictory to ignore the financial burden when the judiciary restricts people's rights and freedoms, but then to state that courts should not require Government spending to enhance human rights.

Similarly, to suggest a disjunction between C&P and ESC rights based on their costs is equally incongruous. The right to vote is not costless to Government, nor is the right to a fair trial. It is hard to see that security of person could be achieved without some form of public expenditure. On close inspection, it is hard to see that any human right can be achieved without some commitment of resources from the Government.

Ultimately, the core of the argument is not that some rights have financial costs and others do not, it is more a question of degree. Perhaps the reluctance to recognise ESC rights is a tacit admission that much larger sums might need to be spent if these rights were to be given any meaningful protection. That being said, it is also unlikely that the Courts would make findings that would be too far out of step with Executive practice given that human rights will always exist within a normative framework. Options for addressing these over-cautious fears are reviewed elsewhere in this submission.

ESC rights are justiciable

A second line of argument against the inclusion of ESC rights is that they are not justiciable; that is, they cannot be competently examined and enforced by the Courts. This is contradicted by those jurisdictions that have included ESC rights as part of their human rights protections, and have successfully integrated them into the operation of their Courts.

The UN Committee on Economic, Social and Cultural Rights made the comment that:

“While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions ...The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”³

Naturally, making rights justiciable does not immediately mean that the Court can or will ensure that every right is fulfilled. As with C&P rights, under any form of Bill of Rights the judiciary has limited capacity to force Governments to fulfil rights, for instance HRA section 11: “protection of children and the family”, has not been immediately fulfilled simply because it has been included in the HRA. It does, however, allow the Court to examine whether the right has been infringed or inadequately protected by Territory law, and in this instance the clause has been utilised by the Supreme Court in making judgements involving the HRA. ACTCOSS desires to see a similar utilisation of ESC rights – as standard against which to test legislation where applicable.

Inclusion of ESC rights in the HRA would also allow the Court to draw the connections between these rights and those contained in the current Act. In many ways ESC rights extend and provide an additional interpretative framework for C&P rights, as was identified by the integrated drafting in the Consultative Committee’s Bill, and has been indirectly inferred in other jurisdictions, such as Canada.

³ General Comment No. 9, UN Committee on Social, Economic and Cultural Rights, paragraph 10.

Expanding the dialogue

ACTCOSS believes that including ESC rights in the HRA would encourage greater dialogue about how to respect, protect and fulfil ESC rights. ACTCOSS would submit that there is limited scope in the current dialogue model about how these rights should be upheld. The inclusion of ESC rights in the HRA would expand the dialogue on these rights to the Courts and the Legislature. In addition, many pieces of legislation contain overarching principles that recognise the pursuit of social, economic and cultural goals as part of the objectives of various Acts. The inclusion of ESC rights would strengthen these interpretive provisions that already form part of ACT law.

Further, including ESC rights in the HRA would mean that the Legislature and the Executive would be encouraged to identify the elements of the rights that they saw as being respected or protected when it was introducing and reviewing legislation. This aspect of the dialogue would both provide guidance to the judiciary by providing information about how ESC rights are legislated, as well as engaging the Legislative and Executive branches of Government on their duties to realise ESC rights and whether legislation derogates those rights. It would also encourage explicit legislative provision where rights are to be restricted.

Implementing ESC rights through the HRA

The HRA Review Discussion Paper points to a number of means by which ESC rights might be implemented, including qualified inclusion in the HRA or by implementation through some other means, such as directive principles for public policy.

In the first instance, ACTCOSS would question whether the explicit qualification of ESC rights, such as through minimum standards or reasonableness review, is really necessary as we share the view of the Bill of Rights Consultative Committee that the problems with implementing ESC rights are overstated. Ideally, the extent to which ESC rights are justiciable and their impact on public policy would be defined through the dialogue model itself. ACTCOSS would submit that the judiciary is highly unlikely to utilise ESC rights in areas beyond their competence. Of course, ESC rights are also subject to the reasonable limits clause, and this includes the limitations imposed by the finite resource of government revenue.

Two concepts intrinsic to discussion of ESC rights are the principles of progressive realisation and non-retrogression. These are included in the ICESCR in recognition that it is not possible for many ESC rights to be fulfilled immediately, and thus they are required to be implemented progressively as development proceeds and community resources grow. The companion of this concept is the principle of non-retrogression: that realisation of human rights should not go backwards and governments have a responsibility to ensure that the past fulfilment of ESC rights is maintained. The concept of progressive realisation is explicit in the Covenant, although the UN Committee on Social, Economic and Cultural Rights (CESCR) points out that the flexibility given by the Covenant should not be used as an excuse to neglect the implementation of rights, noting that “this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind.”⁴

Similarly, the concept of “reasonableness review”, as used in the South African context, gives another example of how the expression of ESC rights has been utilised by the Courts to give guidance to their justiciability. It is simply an extension of the implicit recognition by the ICESCR that there is no ‘best’ method to enhance ESC rights, and there is more than a single approach to their implementation.

In ACTCOSS’s view, the concepts of progressive realisation, non-retrogression and reasonableness review are derived from the ICESCR and need not be explicitly legislated in the HRA in order for them to operate. It is also useful to question whether they are concepts that only operate in the context of ESC rights. Many of them also have implications for C&P rights, particularly those that are similarly open ended in terms of the resources needed to fulfil them, such as protection of the children and the family, the right to a fair trial, or the right to take part in public life. If there is to be additional qualification of rights (other than HRA section 28) in adopting ESC rights into the HRA, then it should be carefully considered whether it would be more appropriate to apply these to all of the rights, rather than maintaining a dual system of rights recognition.

On the question of the development of directive principles or any other forms of recognition of ESC rights, such as those articulated in the Canberra Social Plan, these are welcome as an *additional* response to including them in the HRA. It is important that both the Government and the Legislature promote human rights in exercising their responsibilities, and that the issue is not left to the HRA alone. However, directive or other policy principles are not a substitute for recognising ESC rights in the HRA and should not be presented as such.

Environmental rights

⁴ General Comment No. 9, UN Committee on Social, Economic and Cultural Rights, paragraph 2.

ACTCOSS supports legislative recognition of environmental rights in principle, although we will leave more detailed discussion of this issue to those with greater expertise in this area. ACTCOSS acknowledges more generally, however, that the infringement of environmental rights is most often borne by those suffering the greatest disadvantage. This is particularly where people experiencing disadvantage have least resources to relocate away from areas with a degraded environment or purchase health care or other means of offsetting the negative consequences of an unclean environment. We note that inclusion of economic, social and cultural rights will give greater opportunity to recognise environmental rights indirectly, particularly through the right to health and the right to an adequate standard of living, but acknowledge that environment-specific legislation may be required to ensure these rights are protected more completely.

THE RIGHT TO AN EFFECTIVE REMEDY

Including an effective remedy in the HRA

While the HRA sought to incorporate the principles of the ICCPR into local ACT law, it continues to leave out some of the rights protected by the Covenant. Chief among them is the right to an effective remedy granted by Article 2 (3) of the ICCPR. Exclusion of the right to an effective remedy in the HRA stands in contrast to the recommendations of the Consultative Committee, which suggested that a remedy for infringements of the HRA by public authorities should be included.

The UN Human Rights Committee has made repeated comments about the importance of the right to an effective remedy in the protection of human rights and to fulfil obligations under the Covenant, including that “Article 2 (3), requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights”⁵, and it “requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2 (3), is not discharged.”⁶

A direct right of action

Specifically, the Consultative Committee recommended that a person who believed their human rights had been infringed by the conduct of a public authority should be able to undertake proceedings in the Supreme Court and that the Court be enabled to grant any remedy open to it that seemed just and equitable in the circumstances. It is important to note that a remedy need not be financial, but could include “a declaration, injunction, writs of mandamus and habeas corpus in addition to specific remedies provided by the HRA, such as a public apology.”⁷ The Committee further limited remedies by stating that they were only available when the infringement was not authorised by law, thus preserving Legislative superiority in determining whether human rights will be protected.

⁵ General Comment No. 31, UN Human Rights Committee, paragraph 15.

⁶ General Comment No. 31, UN Human Rights Committee, paragraph 16.

⁷ Towards an ACT Human Rights Act: The Report of the Bill of Rights Consultative Committee, section 4.74, p.80

It is disappointing that even this relatively unobtrusive right to a remedy was not implemented with the introduction of the HRA. The HRA Review Discussion Paper reports that the major reason given by the ACT Government for not supporting this suggestion was “that other jurisdictions that have introduced human rights legislation have required time to adapt policies and practise”, and removing any right of action was “protecting the Territory from the risk of substantial claims”.⁸ However, these circumstances have now receded, with Government agencies being given some time to adjust to the implications of the HRA. It is unclear from what source the government expected ‘substantial claims’ to emanate, but it is hoped that these sources of litigation would have been soon remedied.

Public authorities and the community sector

The HRA does not explicitly bind the conduct of public authorities in its present form, although there is legal argument that this is a reasonable interpretation of its effect. Given the current ambiguity about the issue, it would be useful to clarify the issue by the explicit inclusion of this provision in the HRA. ACTCOSS notes that this is the option taken by the Victorian legislation currently proposed.⁹

ACTCOSS is aware that the definitions of ‘government authority’ have been presented as including non-government agencies exercising public functions on behalf of the government and note that this would extend explicit coverage to many community organisations, although the provisions in the Victorian proposal still leave some ambiguity about the exact extent of coverage.

While ACTCOSS agrees that it is appropriate for organisations exercising public functions to be bound by the HRA, we are also cognisant that many organisations do not currently have either the awareness or the resources to implement the requisite staff training and possible changes to internal procedures to ensure that human rights are respected. A statutory requirement that community organisations respect and protect human rights is desirable, but requires a parallel increase in resources to ensure that the sector is capable of meeting those increased expectations. ACTCOSS has attempted to raise awareness through its regular series of seminars and by convening a community human rights network within its existing resources, but additional resources would be required to ensure that the community sector was sufficiently prepared.

⁸ Twelve Month Review Discussion Paper – Human Rights Act 2004, p.14

⁹ Charter of Rights and Responsibilities Bill 2006 (Vic), section 4

ACTCOSS would point out that unlike the public sector, the community sector has been largely excluded from the advice and education services provided by the Human Rights Unit of the Department of Justice and Community Safety. The contrast with the education services extended to the judiciary and legal profession is stark, particularly when, under some interpretations, many community organisations are already bound by the operation of the HRA.

Finally, it is pertinent to note that for most community organisations, the rights contained in the ICESCR are far more central to their operation than those in the ICCPR.

STRENGTHENING THE HRA

This submission has already outlined two important changes that ACTCOSS supports to strengthen the HRA: the inclusion of ESC rights and the explicit incorporation of the right to an effective remedy. This section contemplates another two suggestions that would ensure a more extensive role for the HRA in protecting human rights.

Invalidation of subordinate laws

The Consultative Committee recommended that the HRA include more stringent oversight by the judiciary than is currently legislated, by providing that subordinate legislation and statutory instruments must comply with the HRA unless otherwise allowed by their authorising parent Act. If the Supreme Court found an inconsistency, the legislation could be invalidated to the extent of the inconsistency. This review should consider re-instating this provision, as subordinate legislation and statutory instruments are not subject to the same level of pre-enactment scrutiny as Acts of Parliament, and also, in many cases, exclude the Legislature from the 'dialogue'. If a statutory instrument is found to infringe the HRA, then this provides a prompt for the Legislature to consider whether it needs to be explicitly sanctioned in the authorising Act. This addition would extend the dialogue without derogating from the primacy of the Legislature.

Expanding grounds for a Statement of Incompatibility

Currently the ACT Supreme Court is empowered to make a Statement of Incompatibility only where it finds a Territory law that is incompatible with the human rights in section 3 of the HRA. A Territory law is defined as an Act or statutory instrument in the dictionary of the HRA. However, the Bill does not contemplate that human rights may fail to be protected by the absence of a Territory law, only by the presence of a law that actively contravenes them. Thus, the HRA only enables a dialogue about whether the Territory respects human rights in its existing laws: it does not allow a dialogue over whether the absence of a Territory law means that human rights fail to be protected, particularly where the Territory could restrain contraventions by private individuals or corporations. There is scope to expand the availability of a Statement of Incompatibility where the Territory is empowered to make a law protecting human rights but it has failed so far to do so. This would extend the current dialogue, and point to areas of 'missing' law that would assist in the protection of human rights.

BEYOND LEGISLATION

A legalistic approach is insufficient

ACTCOSS expresses its concern that the ACT Government's approach to building a human rights culture remains a legalistic one, but to build a cultural understanding and commitment to human rights requires popular understanding, adoption and utilisation before any such culture can be fairly considered to be achieved. This is not to suggest that the entire population must have detailed knowledge of the intricacies of human rights law. Yet an everyday understanding that people have fundamental rights in a liberal democratic society based on inherent human dignity is a basic premise of a human rights culture. ACTCOSS raises the concern that, while the HRA is a welcome and requisite step towards building a human rights culture, its impact 'at the coalface' in assisting marginalised and disadvantaged people in the ACT has been difficult to identify to date. ACTCOSS calls upon the ACT Government to bridge the gap between rhetoric and reality and provide greater assistance in ensuring that the human rights principles articulated in the HRA (and elsewhere) are translated into organisational and individual practice, be it in the public, private, not-for-profit or domestic spheres. This requires investment in education, promotion and regulatory understanding of human rights principles.

Indeed, there would be few who would argue that court action and legal argument are the optimal way of ensuring rights are respected in the first instance. While they provide an essential recourse for failures in rights protection, they should be properly regarded as the end of the rights protection process, not the beginning. It is also relevant to point out that even where there are existing legal rights of action to remedy an infringement of a right (whether under the HRA or elsewhere), people who are disadvantaged are often the last to utilise such formal avenues of complaint or redress. Legal and complaints processes are often complicated, and require access to legal advice or other assistance in order to work effectively. The justiciability of human rights is an indispensable element of human rights protection, but it is a long, slow and inaccessible means of achieving the goal of rights protection in isolation.

Raising awareness of human rights

Rather than waiting for human rights principle to 'trickle down' through legislative and judicial oversight, more effective and immediate methods of building a human rights culture are those that seek to develop a direct understanding with stakeholders and the general community, not just holding an internal dialogue within agencies. The Human Rights Office, and a number of community organisations, including ACTCOSS, have sought to promote community awareness and discussion of human rights as best they can, but with few resources these agencies have had a limited ability to penetrate the public consciousness.

Education and awareness campaigns work best when they can be tied directly to a person's individual experience and ordinary life, rather than more ethereal conceptual and legalistic interpretations. The lack of a provision for an effective remedy, or any other direct effect of the HRA makes it harder to gain and sustain interest in human rights because it is more difficult to attach the rights to a person's individual circumstances. At the moment, there is a limited ability to find a tangible way that an individual might 'use' their human rights.

ACTCOSS would point out that the Government's obligations under the Covenant extend well beyond the adoption of legislation, and finding the appropriate resources to ensure that the community understands their rights is an essential first step.

Human rights in the community sector¹⁰

To be able to engage and build a human rights framework staff and committee members of community organisations need to have a basic understanding of what human rights are and how rights fit into the broader scheme of things. It is important that workers who support people living with disadvantage are able to identify the rights that are being upheld or are being breached for the consumers they work with.

There is also a growing awareness amongst human rights practitioners that to work within a human rights framework individuals must practice human rights. It can't simply be left to the organisation to develop a human rights structure; workers must also support that structure as individuals. Developing individual human rights practice within an organisation provides a more sustainable framework that is open to continuous improvement and self monitoring.

¹⁰ Adapted from Human Rights in the Community Sector, Speech presented by Christina Ryan to the Human Rights Forum, 9 December 2005

Through the seminars and the consultancy work that ACTCOSS does there is an ability to start incorporating human rights into the practices of organisations. This extends to governance through a human rights filter, and ensuring that core documents like the organisation's strategic plan, policy and procedures and risk management framework take account of the organisation's human rights principles. ACTCOSS has established the Community Sector Human Rights Network so that sector workers, volunteers, and consumers are able to discuss organisational and individual practice on an ongoing basis.

ACTCOSS continues to be restricted in our work by the limitations of our resources. While we have begun to assist some organisations to put human rights theory into practice, this remains limited. Particularly in the event that a right of action becomes available against community organisations, additional resources will be required so that ACTCOSS and others will be able to assist organisations to ensure that human rights are respected, protected, promoted and fulfilled at the frontline of service delivery.

Fulfilling human rights

The ICCPR states that governments "must adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant" [Article 2 (2)]. Similarly, governments are obliged by the ICESCR "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means" [Article 2 (1)].

Both Covenants foresee an active commitment to fulfilling human rights, well beyond the articulation of those rights in law. The fulfilment of human rights is the ultimate goal of both Covenants, by which legislation is only one means that is ineffective in isolation. More broadly, the ACT Government should review its actions against the Covenants, as well as reminding the Commonwealth of their obligations. The HRA is only one step in a long term process of fulfilling human rights. This review provides an important opportunity to provide a platform to progress the respect, protection, promotion and fulfilment of human rights in the ACT.