TWENTY YEARS OF HUMAN RIGHTS PROTECTION IN THE AUSTRALIAN CAPITAL TERRITORY: WHAT HAVE WE LEARNED?

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In 2004, the Australian Capital Territory ('ACT') became the first Australian jurisdiction to enact human rights legislation. Victoria and Queensland have followed since, and the Australian Human Rights Commission recently renewed the call for federal human rights protection. Legislative developments in one jurisdiction can lead to reforms in others. As such, there is much we can learn from the ACT's experience. This article investigates the impact and influence the Human Rights Act 2004 (ACT) has had in its first 20 years of operation based on interviews with lawyers and public servants who represent or work with human rights complainants or respondents. The findings suggest the legislation is having its greatest impact outside the courtroom by influencing decision-making processes within the executive and as a mechanism for resolving disputes early on. Barriers to access remain, notably a lack of awareness in the community and limited use of the legislation by the legal profession.

I INTRODUCTION

In 2004, the Australian Capital Territory ('ACT') became the first Australian jurisdiction to enact a Human Rights Act. This was a 'significant milestone', particularly given the number of failed attempts at introducing statutory human rights protections in this country at both the federal and state levels.[1] The main aim set for the *Human Rights Act 2004* (ACT) ('*ACT HRA*') was the 'development of a human rights-conscious culture' within the public sector and the broader community.[2]

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1 Helen Watchirs and Gabrielle McKinnon, 'Five Years' Experience of the *Human Rights Act 2004* (ACT): Insights for Human Rights Protection in Australia' (2010) 33(1) *University of New South Wales Law Journal* 136, 136. On that history, see Frank Brennan, *Legislating Liberty: A Bill of Rights for Australia?* (University of Queensland Press, 1998) ch 2; Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon, *Bills of Rights in Australia: History, Politics and Law* (University of New South Wales Press, 2009) ch 2.

2 ACT Bill of Rights Consultative Committee, *Towards an ACT Human Rights Act* (Report, May 2003) 2.

The *ACT HRA* came into force on 1 July 2004.[3] Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon write that it was the catalyst for public consultation in Victoria about human rights protection[4] which led, ultimately, to the passage of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Victorian Charter*'). More recently, Queensland became the third jurisdiction to introduce human rights legislation, with the passage of the *Human Rights Act 2019* (Qld).

The three Acts are similar in many ways. For example, they are all based on a 'dialogue model' of rights protection, and the substantive rights that they protect are mostly the same.[5] However, the *ACT HRA* is unique in several respects. For example, a person who claims that a public authority has breached their human rights has a specific cause of action and can lodge a claim with the ACT Supreme Court.[6] This is not so in Victoria and Queensland, where human rights claims cannot be the subject of legal proceedings on their own. Rather, they must be piggybacked onto another cause of action, such as a discrimination claim or an application for judicial review.[7] Although the three Acts protect rights derived from the *International Covenant on Civil and Political Rights* ('*ICCPR*'), the *ACT HRA* is distinct in its broader coverage of economic and social rights. The *ACT HRA* gives the Attorney-General a more expansive role in the scrutiny of legislation and, in an Australian first, the ACT has a Minister for Human Rights, indicating the value the ACT Government places on human rights protection.

There is much we can learn from the ACT now that it has two decades of experience in dealing with human rights. We have seen already that legislative developments in one jurisdiction can lead to reforms in others. For example, the ACT introduced its 'public authority provisions' in 2008 following Victoria's lead.[8] In 2009, the ACT amended its interpretive and limitation provisions to bring them into line with Victoria's.[9] Most recently, the ACT passed legislation to create a human rights complaints process similar to that which Queensland introduced in 2020.[10] Moreover, the operation of human rights legislation is relevant for jurisdictions without a Human Rights Act, particularly those that are considering introducing one.[11] The possibility of a federal Human Rights Act is a live issue

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3 For further details on the development and passage of the *Human Rights Act 2004* (ACT) ('*ACT HRA*'), as well as reflections on its first five years, see Byrnes, Charlesworth and McKinnon (n 1) ch 4.

4 Byrnes, Charlesworth and McKinnon (n 1) 107.

5 There are some notable exceptions: Queensland has a right to health services (*Human Rights Act 2019* (Qld) s 37 ('*Qld HRA*')) while the ACT and Victoria do not. The ACT (*ACT HRA* (n 3) s 27A) and Queensland (*Qld HRA* (n 5) s 36) have a right to education while Victoria does not.

6 *ACT HRA* (n 3) s 40C.

7 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39 ('*Victorian Charter*'); *Qld HRA* (n 5) s 59. This is also an option in the ACT: *ACT HRA* (n 3) s 40C(2)(b).

8 *Human Rights Amendment Act 2008* (ACT) s 7 ('*ACT HRA Amendment Act*'), inserting *ACT HRA* (n 3) pt 5A. See Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) 4.

9 *ACT HRA Amendment Act* (n 8). For a discussion, see Gabrielle McKinnon, 'Strengthening Human Rights: Amendments to the *Human Rights Act 2004* (ACT)' (2008) 19(3) *Public Law Review* 186, 186–91.

10 *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT) ('*HRCLA Act*').

11 There are active campaigns to introduce human rights Acts in several states: see, eg, 'A Human Rights Act for NSW', *Human Rights Act for New South Wales* (Web Page) <https://humanrightsfornsw.org/>;

again. In March 2023, the federal government launched the *Inquiry into Australia's Human Rights Framework* with a view to determining whether to enact a federal Human Rights Act.[12] The Australian Human Rights Commission has also renewed the call for federal human rights protection.[13] Presumably, the experiences of the states and territories with human rights Acts will prove informative throughout these processes.

Some scholars have observed that the effectiveness of the *ACT HRA* remains 'unmonitored and unaddressed'.[14] They claim that whilst some scholarship has focused on the application of the *ACT HRA* in the courts and the manner in which certain provisions have been interpreted, insufficient attempts have been made to measure the 'real-world' impacts or the extent to which human rights concepts have been 'internalised' by the community.[15] The relative absence of empirical research in the field of human rights has also been observed.[16]

With this in mind, we sought to investigate the impact and influence that the *ACT HRA* has had in its first 20 years of operation. We interviewed lawyers and public servants who represent or work with complainants or respondents in human rights matters in order to determine how human rights claims are being resolved, how the legislation is being used to protect and promote human rights, and whether there are any barriers to its effectiveness in resolving human rights complaints. Whilst several scholars have considered the role of courts in interpreting and applying the three Australian human rights Acts,[17] less focus has been directed at examining 'on-the-ground' applications of these Acts.[18] We were interested in learning more about

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'Rights Resource Network SA', *Rights Resource Network SA* (Web Page) <https://www.rightsnetworksa.com/>; Charter of Human Rights and Responsibilities Bill 2020 (SA); 'Support the Call for a WA Human Rights Act', *Western Australia for a Human Rights Act* (Web Page) <https://www.wa4hra.com.au>.

12 At time of writing, written submissions to the *Inquiry into Australia's Human Rights Framework* had closed and the Parliamentary Joint Committee on Human Rights had concluded its public hearings: see 'Inquiry into Australia's Human Rights Framework', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework>.

13 See, eg, 'A National Human Rights Act for Australia', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/human-rights-act-for-australia> ('A National Human Rights Act').

14 Simon Rice, '"Culture, What Culture?": Why We Don't Know if the ACT Human Rights Act Is Working' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 185, 205 <https://doi.org/10.5040/9781509919857.ch-010>. Similar claims have been made in Canada: see, eg, Harry Arthurs and Brent Arnold, 'Does the *Charter* Matter?' (2005) 11(1) *Review of Constitutional Studies* 37, 46.

15 See ACT Department of Justice and Community Safety, *Human Rights Act 2004: Twelve-Month Review* (Report, June 2006) 35.

16 Simon Rice, Denise Meyerson and Kate Ogg, '"Are We There Yet?": Measuring Human Rights Sensibilities' (2014) 20(1) *Australian Journal of Human Rights* 67 <https://doi.org/10.1080/1323-238X.2014.11882141>; Arthurs and Arnold (n 14).

17 See Tamara Walsh, 'Social Housing, Homelessness and Human Rights' (2022) 45(2) *University of New South Wales Law Journal* 688, 709–20 <https://doi.org/10.53637/KFED5275>; Julie Debeljak, 'The Rights of Prisoners under the *Victorian Charter*: A Critical Analysis of the Jurisprudence on the Treatment of Prisoners and Conditions of Detention' (2015) 38(4) *University of New South Wales Law Journal* 1332, 1333 ('Rights of Prisoners').

18 But see Tamara Walsh et al, 'Are Human Rights "Toothless" in Australian Child Protection Matters? Perspectives of Lawyers and Social Workers' (2022) 36(1) *International Journal of Law, Policy and the Family* 1 <https://doi.org/10.1093/lawfam/ebac028>.

how lawyers and public servants use the *ACT HRA* in their day-to-day work. In Part II of this article, we outline the operation of human rights Acts in Australia before identifying the distinguishing features of the *ACT HRA*. In Part III, we present our research methodology. In Part IV, we present the findings of our empirical research, which show that the *ACT HRA* is having its greatest impact outside the courtroom by influencing decision-making processes within the executive (including the scrutiny of Bills) and as a mechanism for resolving disputes early on. However, barriers are preventing greater use by the ACT community including lack of awareness and education, and limited use of the *ACT HRA* by the legal profession. In Part V, we discuss the implications of our findings both for the ACT and implementing human rights protections more generally.

II BACKGROUND TO THE *ACT HRA*

A Features of the Australian Human Rights Acts

The *ACT HRA*, like the Victorian and Queensland human rights Acts, protects around 20 human rights, derived from the rights contained in the *ICCPR*.[19] The protected rights have been expanded over time in the ACT. The right to education was added in 2012,[20] the right to work in 2020,[21] and the cultural rights provision was amended in 2016 to include specific rights for Aboriginal and Torres Strait Islander peoples.[22] There is currently a Bill before the ACT Parliament that, if passed, will introduce a right to a 'clean, healthy and sustainable environment'.[23] At present, the ACT is the only jurisdiction that has a right to work, and may soon become the only jurisdiction that has a right to a healthy environment. In this sense, it is leading the way in rights protection in Australia.

Under all of the Australian human rights Acts, rights can only be subject to 'reasonable limits set by laws that can be demonstrably justified in a free and democratic society'.[24] The factors that can be taken into account when assessing this under the *ACT HRA* include the nature of the right, the importance, nature and extent of the limitation, and the relationship between the limitation and its purpose.[25] Decision-makers are also directed to consider whether 'any less restrictive means' were 'reasonably available' to achieve the same purpose.[26] Both courts and scholars suggest that the differences between the proportionality tests

19 As to the differences between the rights protected in the ACT, Victoria and Queensland, see above n 5.
20 *ACT HRA* (n 3) s 27A, inserted by *Human Rights Amendment Act 2012* (ACT) s 6.
21 *Human Rights (Workers Rights) Amendment Act 2020* (ACT). It was decided not to introduce additional economic, social or cultural rights: ACT Government, *Economic, Social and Cultural Rights in the Human Rights Act 2004: Section 43 Review* (Report, November 2014).
22 *Human Rights Amendment Act 2016* (ACT).
23 Human Rights (Healthy Environment) Amendment Bill 2023 (ACT).
24 *ACT HRA* (n 3) s 28(1).
25 Ibid s 28(2).
26 Ibid s 28(2)(e).

across the three jurisdictions are legally insignificant.[27] However, Kent Blore has emphasised the differences between the ACT and Victorian provisions on the one hand, and the Queensland equivalent on the other.[28] He notes that the addition of 'the importance of preserving the human right' in Queensland as a factor for consideration is in 'closer alignment' with a structured proportionality approach and achieves a more 'explicit' and 'fair balance' between the importance of the limitation and the importance of protecting the right.[29]

The *ACT HRA* (like its Victorian and Queensland equivalents) embodies a 'dialogue model' of rights-based protection; that is, the legislation has been structured to promote a dialogue between the three arms of government – the legislature, the executive and the judiciary. The manner in which this occurs is, in most respects, common to all of the Australian human rights Acts. The expectation is that considering human rights will become a 'common or garden' activity for members of the executive.[30] The role of the executive in protecting human rights is critical since it is the arm of government which provides the services that impact upon vulnerable people, namely hospitals, schools, prisons and aged care facilities. The Acts assume that the executive will draft its policies with human rights in mind and will make administrative decisions in a way that is compatible with human rights.

Each of the human rights Acts limit the role of the judiciary in determining human rights disputes. In the ACT, complainants only have a standalone cause of action for a breach of human rights in the Supreme Court – they cannot start proceedings in any other court or tribunal based on an allegation that their rights have been contravened by a public authority.[31] In Queensland and Victoria, there is no standalone cause of action for a breach of human rights at all – human rights arguments can only be piggybacked onto other legal proceedings.[32] Furthermore, courts cannot invalidate a law on human rights grounds. Whilst courts are expected to interpret laws consistently with human rights as far as possible,[33] the most courts can do in the event that they find that a law is incompatible with human rights is declare it to be so. Parliament remains sovereign in the sense that its laws remain valid regardless of the findings of any court on human rights grounds.[34] Indeed, according to George Williams, the Acts were constructed in a manner that emphasises 'the centrality of Parliament in the rights-protection process', and to

27 See, eg, *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [104] (Martin J); *Waratah Coal Pty Ltd v Youth Verdict Ltd [No 6]* [2022] QLC 21, [505] (Kingham P). Bruce Chen considers the Queensland section to be 'curious': Bruce Chen, 'The *Human Rights Act 2019* (Qld): Some Perspectives from Victoria' (2020) 45(1) *Alternative Law Journal* 4, 5 <https://doi.org/10.1177/1037969X19899661>.

28 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When Are the Factors in s 13(2) Necessary and Sufficient, and When Are They Not?' (2022) 45(2) *Melbourne University Law Review* 419.

29 Ibid 433–4.

30 *Castles v Secretary to the Department of Justice* [2010] VSC 310, [185] (Emerton J).

31 *ACT HRA* (n 3) s 40C.

32 *Qld HRA* (n 5) ss 59(1)–(2); *Victorian Charter* (n 7) s 39(1).

33 *ACT HRA* (n 3) s 30; *Victorian Charter* (n 7) s 32; *Qld HRA* (n 5) s 48.

34 *ACT HRA* (n 3) s 32(3); *Victorian Charter* (n 7) s 32(3); *Qld HRA* (n 5) s 48(4).

ensure that Parliament has the final say.[35] The expectation, however, is that human rights considerations influence the development of laws in the drafting phases. This is achieved through various mechanisms providing for the scrutiny of legislation, including the preparation of statements of compatibility for Bills and regulations[36] and the oversight by parliamentary committees of the legislative drafting process.[37]

B Unique Features of the *ACT HRA*

There are some aspects of the ACT human rights framework that are unique, and these features of the *ACT HRA* have important implications for how the dialogue model applies in practice.

Unlike Victoria and Queensland, there is no 'override power' in the *ACT HRA*.[38] That is, the ACT Legislative Assembly does not have the power to declare that a law has effect despite being incompatible with human rights. Given the extensive use that the Queensland Parliament has recently made of its override power to insulate its punitive youth justice laws from human rights scrutiny,[39] the absence of an equivalent power in the ACT is notable.[40]

The *ACT HRA* provides additional powers to the Attorney-General relating to the scrutiny of legislation. For example, if a court issues a declaration of incompatibility, it is the Attorney-General that is required to prepare a written response for the parliament in the ACT, not the responsible Minister as is the case in Queensland and Victoria.[41] Furthermore, the Attorney-General is required to prepare statements of compatibility for every Bill presented to the Legislative Assembly by a Minister.[42] A statement of compatibility is a written statement that indicates whether the Bill is consistent with human rights, and if it is not consistent, in what ways.[43] In Victoria and Queensland, it is the responsibility of the Member of Parliament who proposes to introduce the Bill to prepare the statement of compatibility, and a statement of compatibility must be prepared for all Bills.[44] In the ACT, it is the Attorney-General who must prepare statements of compatibility, but only for all *government* Bills. The ACT Attorney-General

35 George Williams, 'The Distinctive Features of Australia's Human Rights Charters' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade on* (Federation Press, 2017) 22, 29. See also Rice (n 14) 187; ACT Bill of Rights Consultative Committee (n 2) 61.

36 *ACT HRA* (n 3) s 37; *Victorian Charter* (n 7) s 28; *Qld HRA* (n 5) s 38.

37 *ACT HRA* (n 3) s 38; *Victorian Charter* (n 7) s 30; *Qld HRA* (n 5) s 39.

38 Cf *Victorian Charter* (n 7) s 31; *Qld HRA* (n 5) s 43.

39 *Strengthening Community Safety Act 2023* (Qld); *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (Qld). In Victoria, the override power has only been used three times since the Charter's introduction in 2006: *Corrections Amendment (Parole) Act 2014* (Vic); *Corrections Amendment (Parole) Act 2018* (Vic); *Legal Profession Uniform Law Application Act 2014* (Vic). As to the override power more broadly, see Julie Debeljak, 'Of Parole and Public Emergencies: Why the *Victorian Charter* Override Provision Should Be Repealed' (2022) 45(2) *University of New South Wales Law Journal* 570 <https://doi.org/10.53637/TMSV9345>.

40 Note, however, it is possible to introduce (and pass) a Bill that does not have a statement of compatibility: *ACT HRA* (n 3) s 39.

41 Ibid s 33; *Victorian Charter* (n 7) s 37; *Qld HRA* (n 5) s 56.

42 *ACT HRA* (n 3) s 37(2).

43 Ibid s 37(3).

44 *Victorian Charter* (n 7) s 28; *Qld HRA* (n 5) s 38(1).

must also take carriage of the administrative tasks associated with declarations of incompatibility. This requires the Attorney-General's Department (the ACT Justice and Community Safety Directorate) to liaise extensively with other government departments on human rights issues, presenting both a workload burden but also an opportunity for the development of expertise within the Directorate.

While not part of the dialogue per se, the role of the ACT Human Rights Commission ('ACT HRC') in protecting human rights is also worthy of note. The ACT HRC is a statutory agency, funded by government but intended to operate independently. Its enabling legislation, the *Human Rights Commission Act 2005* (ACT) ('*HRC Act*'), states that the main object of the Commission is 'to promote the human rights and welfare of people living in the ACT'.[45] The Act further states that the Commission will educate the community on human rights, make recommendations to government and non-government agencies on laws and policies affecting vulnerable groups, and promote compliance with the *ACT HRA*.[46] Like other human rights commissioners, the ACT Human Rights Commissioner has standing to intervene in proceedings involving the *ACT HRA* with the leave of the court,[47] and the Supreme Court must provide notice to the Commission if a question arises in proceedings concerning the application of the *ACT HRA* or if it is considering making a declaration of incompatibility.[48]

The ACT HRC has specific functions under the *ACT HRA* that differ from those granted to other human rights commissions. In particular, the ACT Human Rights Commissioner has an 'own-motion audit power'[49] – that is, they can review the effect of any ACT law (including the common law) on human rights and prepare a report for the Attorney-General, which must then be presented to the Legislative Assembly within six sitting days of receipt.[50] A similar power exists in Victoria and Queensland, however the Victorian and Queensland Human Rights Commissioners can only undertake a review of laws when requested to by the Attorney-General.[51]

At the time our interviews were conducted, the ACT HRC did not have the power to receive human rights complaints and conciliate them.[52] In November 2023, the ACT Legislative Assembly passed the *Human Rights (Complaints) Legislation Amendment Act 2023* (ACT) ('*HRCLA Act*'), which enables the ACT

45 *Human Rights Commission Act 2005* (ACT) s 6(1) ('*HRC Act*').
46 Ibid ss 6(2)(a), (c)–(d).
47 *ACT HRA* (n 3) s 36.
48 Ibid ss 34(1)–(2).
49 Penelope Mathew, 'Taking Stock of the Audit Power' in Matthew Groves and Colin Campbell (eds) *Australian Charters of Rights a Decade on* (Federation Press, 2017) 53, 56. Watchirs and McKinnon (n 1) also reflect on the positive outcomes of the audits that were conducted during the mid- to late-2000s: at 164–5. See also Rice (n 14) 197–8.
50 *ACT HRA* (n 3) s 41.
51 *Victorian Charter* (n 7) s 41(b); *Qld HRA* (n 5) s 61(b). Note the Queensland Human Rights Commission can review public entities' policies, programs, procedures, practices and services of its own motion: *Qld HRA* (n 5) s 61(c). The Victorian Equal Opportunity and Human Rights Commission can only conduct such a review at the request of the public authority: *Victorian Charter* (n 7) s 41(c).
52 It is responsible for receiving complaints under the *Discrimination Act 1991* (ACT) and in relation to health, disability and community services: *HRC Act* (n 45) pt 4.

HRC to receive complaints that a public authority has contravened the *ACT HRA* provided the person has already made a complaint to the relevant public authority.[53] The ACT HRC can conciliate the complaint and, if conciliation is unlikely to succeed, the ACT HRC can prepare a report including recommendations as to actions the respondent should take to ensure their acts or decisions are compatible with human rights.[54]

III RESEARCH METHOD

Despite its 20-year history, few studies have been undertaken in the ACT to determine how effective the *ACT HRA* has been in ensuring human rights compliance. There is much to learn from the experiences of the ACT, and this research is timely given the Australian Human Rights Commission's push for federal human rights protection and the federal government's inquiry into the country's human rights framework.[55]

A Approach

The aim of this study was to investigate the impact and influence that the *ACT HRA* has had in its first 20 years of operation. We wanted to learn more about how human rights claims are being resolved, how the legislation is being used to protect and promote human rights, and whether there are any barriers to its effectiveness in resolving human rights complaints. Of course, when assessing effectiveness, it is important to consider stated legislative goals. According to the Preamble, the purposes of the *ACT HRA* are to:

- ensure that 'individuals know what their rights are';
- ensure that human rights are 'taken into consideration in the development and interpretation of legislation';
- 'encourage individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others'; and
- protect the rights of Aboriginal and Torres Strait Islander peoples, for whom human rights have 'special significance'.

Several other goals of the *ACT HRA* were laid out by the ACT Bill of Rights Consultative Committee ('Consultative Committee'), which was established in 2002 to determine whether the ACT should enact human rights legislation. The Consultative Committee's findings emphasised the importance of 'cultural change' within the bureaucracy. Its hope was that the *ACT HRA* would build 'a public sector where a "rights-respecting culture" would imbue decision-making at every level'.[56] Chief Minister Jon Stanhope said that the *ACT HRA* would mean that 'as

53 *HRCLA Act* (n 10) s 13, inserting *HRC Act* (n 45) s 41D. Section 41D mirrors *Qld HRA* (n 5) ss 64–5.
54 *HRCLA Act* (n 10) s 17, inserting *HRC Act* (n 45) s 82D.
55 'A National Human Rights Act' (n 13).
56 ACT Bill of Rights Consultative Committee (n 2) 37.

part of the duty to act lawfully an administrative decision maker will have to take account of human rights'.[57]

We sought to ascertain the views of lawyers and public servants who work with complainants and respondents in human rights matters on the extent to which these stated goals have been met by the *ACT HRA*.

B Participants

We interviewed barristers and solicitors who typically represent complainants, respondents or both in human rights matters. We also interviewed members of the ACT public service who work in human rights-related roles either in policy areas and complaint management, or at the ACT HRC. Some participants were private practitioners, whilst others worked for government or non-government organisations.[58]

A combination of purposive and snowball sampling methods was used. We contacted several local practitioners and agencies, and they referred us to other potential participants. Over a period of several months, we used purposeful recruitment to ensure that a broad range of practitioners were included representing complainant, respondent and intermediate perspectives.[59] We note the limitations of speaking only to legal professionals and public servants. We intend to include the perspectives of complainants and respondents in future research so that a more holistic account can be constructed.

There was a total of 29 participants. We conducted four group interviews (n=25), and four individual interviews. A condition of ethical approval was participant anonymity. Since the ACT is a small jurisdiction, individual participants are potentially identifiable. Therefore, we have not reported on any demographic information we collected about the participants, nor have we linked individuals' comments with their role or employer. Our observations suggest that individuals in the sample differed widely in age and years of experience, and a range of genders was represented. Several participants had worked in a variety of roles – in private practice, government and non-government agencies – and were therefore able to compare and contrast the different perspectives of complainants and respondents.

We did not ask participants to indicate whether or not they identified as Aboriginal and/or Torres Strait Islander, but we do consider that Aboriginal and/or Torres Strait Islander perspectives were not sufficiently represented amongst our sample, and this is a limitation of our research. This study was undertaken around the time of the 2023 Referendum on an Aboriginal and Torres Strait Islander Voice, and as a result, our efforts to purposefully recruit Aboriginal and/or Torres Strait Islander organisations and individuals to the study were unsuccessful. Obtaining the perspectives of Aboriginal and/or Torres Strait Islander peoples on

57 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2003, 4029.

58 The project received ethical clearance from the University of Queensland Human Research Ethics Committee (Project ID: 2023/HE000340).

59 Lawrence A Palinkas et al, 'Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research' (2015) 42(5) *Administration and Policy in Mental Health and Mental Health Services Research* 533 <https://doi.org/10.1007/s10488-013-0528-y>.

the effectiveness of rights-based protections is an avenue for future research which we are committed to pursuing.[60]

C Data Collection and Analysis

All interviews were facilitated by the authors via video conferencing. The interviews were semi-structured in nature, and a series of prompt questions was developed, which addressed topics including:

- whether, and how, the *ACT HRA* is used by complainants to assert their rights, or make rights-based arguments;
- how public authority respondents react and respond to human rights complaints;
- whether the *ACT HRA* is taken into account in the development of laws and policies;
- whether the *ACT HRA* has resulted in changes within the culture of the public service;
- the role of the ACT HRC in human rights dispute resolution; and
- the effectiveness of current processes in resolving disputes.

The interviews were audio-recorded and transcribed verbatim. We employed thematic data analysis to code and sort data into identifiable themes.[61] Initial codes represented both predefined areas of study and areas that were inductively identified from the interview transcripts. Both authors undertook manual coding separately first. The codes were reviewed and finalised collaboratively, and further refined during the writing process.

IV FINDINGS

Participants identified several ways in which the *ACT HRA* had been effective in protecting and promoting human rights. However, they also noted that some barriers to effective rights protection remain in the ACT.

A Ways in Which the *ACT HRA* Has Been Effective in Protecting Human Rights

We generated several themes from participants' comments on the effectiveness of the *ACT HRA*. Some of those themes relate to the positive influence that the *ACT HRA* has had on the development of laws and policies; others relate to administrative decision-making; and others relate to the use of the *ACT HRA* in legal advocacy before courts and tribunals.

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60 This study is part of a broader investigation funded by an Australian Research Council Linkage Grant.

61 Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE Publications, 2021) 35–6.

1 Law-Making: The Influence of the ACT HRA on the Development of Legislation and Policies

Several participants said that because of the *ACT HRA*, human rights were now being considered when laws and policies were developed and drafted. Participants who worked in the public service confirmed that human rights were routinely considered during the legislative drafting process. In fact, one participant said that, in their experience, 'no Minister' was prepared to go to Cabinet with a Bill that was not human rights compatible and argue in favour of it. The process of drafting statements of compatibility was said to be 'really influential' in ensuring that draft legislation was rights compliant by the time it reached Cabinet. One participant observed that the ACT Justice and Community Safety Directorate plays an important role in 'educating public servants' and liaising and negotiating with Ministers and departments to ensure that Bills were amended to make them 'human rights compliant'. They observed that this made sense because, 'that's the portfolio where all the really strong institutional knowledge is around the application of human rights law, so it's probably the most robust agency to deal with that'.

Other participants discussed the role that the ACT HRC plays in the development of laws and policies. They noted that the ACT HRC has access to cabinet submissions and is given an opportunity to comment on them. As a result, they are able to 'work directly with the policy officer' to resolve rights-based concerns related to draft legislation and policies. Several participants said that the ARC HRC was 'trusted' and 'very well respected' by government, and indeed was 'a lot closer to government than other commissions'.

Participants who worked in non-government agencies had also 'seen the benefit' of developing 'really positive working relationships' with government. Some described situations where their advocacy activities had led to policy changes that had positive outcomes for vulnerable clients. One participant raised the new Housing Assistance Program as an example, saying it 'incorporates the language of human rights', including an 'explicit protection of cultural and kinship rights' as a direct result of community-based advocacy efforts. Other participants described how their advocacy had resulted in the establishment of a consultation panel to guide the process of relocating public housing tenants subsequent to the acquisition and sale of their properties.

Overall, participants considered the ACT Government to be quite receptive to rights-based arguments when developing laws and policies. One said:

> ACT agencies are pretty responsive in that space, at least in trying to understand the practical implications of what do human rights look like on the ground in our hospital wards, or in a secure mental health facility, or even on our public transport system?

Participants who worked in the public service confirmed that 'we do see the language of human rights being used in terms of government decisions' however 'it depends on the policy that we are working with – if [the policy has] a human rights focus … we would respond in a similar way'. One participant observed: 'I think the main impact of the Act has been in the development of laws and policies, and I think where we're weak is in the implementation.'

2 Using the ACT HRA to Influence Administrative Decision-Making

Participants who worked in non-government agencies said the most common use they make of the *ACT HRA* in their work is in their negotiations with government departments on behalf of individual clients. There was general agreement amongst lawyers that '[t]he Supreme Court is not where the bulk of that human rights interface happens. It happens much more in our day-to-day work'.

The lawyers we interviewed said that much of their human rights work with clients involved seeking 'early resolution' of potential human rights disputes. They said they sought to intervene on behalf of clients 'before it gets out of hand', 'to try to prevent things escalating further'. The lawyers found that administrative decision-makers could often be persuaded to reconsider decisions on human rights grounds simply by being 'reminded' of their obligations under the *ACT HRA*. They said that by 'dealing directly with the public authority' they can often 'change the action before it's finalised'. This was done by either making a phone call or writing a letter to the public authority to say, 'it looks like you're not necessarily being human rights compliant'. One participant explained: '[We] specifically wrote to the [public authority] and said, "You are breaching the Human Rights Act in these whole bunch of ways – back off and leave our client alone". And so far, that seems to have worked.'

Several participants shared examples of successful outcomes through these 'early resolution' techniques. Many said they had used the Act 'to actually prevent homelessness' by raising human rights arguments, particularly the right to privacy, family and the home, cultural rights, and the right to protection of the family unit. One lawyer described using the cultural rights provision to advocate for a social housing property with an extra bedroom to support the client's 'kinship responsibilities'. Another participant said they had used cultural rights arguments to ensure prisoners could access art supplies to practise their culture in prison.

Participants said that by using the *ACT HRA* in this 'direct way', they were able to avoid more formal complaints processes and 'achieve practical outcomes' for clients in a timely fashion. One of the lawyers summarised the views of many in saying: 'It's a very good tool, I've discovered, in trying to work with government … It's being able to say, "well, this doesn't look like it's human rights compliant". So it's, perhaps even a level down from a complaint, actually a very practical tool on occasion.'

There was general agreement amongst participants that early resolution of potential complaints was of benefit to both complainants and respondents. In particular, lawyers noted that being able to resolve a complaint without having to access a formal complaints process ensured that relationships were maintained between complainants and respondents. They explained that often complainants and respondents would need to continue to work together after the complaint was resolved, so maintaining relationships was a priority. This was particularly the case in child protection matters and education settings. One of the lawyers said: '[Where] people have got a 10- to 12-year relationship they have to sort out, it's very much about, how do we set that up for the future?' Participants who worked for the public service agreed; one said:

> We try to take action straight away … to see if there's any action we can take … to stop it escalating to become a complaint. And we have great success with that … We've found … that being proactive when that phone call starts, and try[ing] to mitigate any action, has helped reduce the number of complaints.

Furthermore, being able to negotiate an outcome without the involvement of an external decision-maker meant that there was greater 'breadth of options and outcomes that people can get through these more informal processes'. Participants agreed that 'flexibility sets us up for success' and allows for a 'quick turn-around'. One lawyer said it becomes more difficult to achieve agreement between the parties the longer a matter goes on because 'people's positions become more entrenched', so 'a quick apology that's genuine and meaningful … prevents litigation a hell of a lot of time'. For the public service participants, communication was considered to be very important: '[I]t's definitely about allowing people to be heard … to actually maintain communication, provide updates – just basic communication I think goes a really long way'.

In short, participants agreed that it was at the early stages of a dispute that the *ACT HRA* was most effective. One of the lawyers said: 'I think [the time] these Acts have the most ability to change outcomes for people on the ground is in that early intervention space … Whereas, if you have to put in a formal submission to the department … it just doesn't happen'.

3 Making Rights-Based Arguments in Courts and Tribunals

Many lawyers we interviewed said they regularly raised human rights arguments in their submissions before courts and tribunals but mostly to strengthen existing arguments, rather than as a direct cause of action before the Supreme Court.

Participants said that lawyers had developed the practice of piggybacking human rights arguments onto other claims before the ACT Civil and Administrative Tribunal ('ACAT').[62] They emphasised that, in ACAT, 'we're not litigating based on the human rights' – rather, human rights arguments are raised to 'bolster' or 'beef up' other arguments.

Participants observed that ACAT members had become more receptive to human rights arguments over time and are 'now referring to [the *ACT HRA*] as one of the rungs upon which it bases its exercise of discretion'. A lawyer said that by 'incorporating human rights submissions within our advocacy with the tribunal … we've been able to convert those aspirational protections into something that's actually used daily in our legal practice'. Several lawyers said they believed human rights arguments could have the effect of tipping the balance in situations where a decision-maker 'wanted to go there anyway – there's this human rights problem as well, which reinforces that I should do this'.

Participants acknowledged the direct cause of action to the Supreme Court that exists under section 40C(2)(a). However, most said this mechanism was only ever used as a last resort, where 'we've, sort of, exhausted all reasonable means' to

62 In *LM v Childrens Court of the Australian Capital Territory* [2014] ACTSC 26, the ACT Supreme Court concluded that this was permissible: at [29] (Master Mossop), quoting *Russel v Pangallo* [2012] ACTMC 4, [21]–[22] (Magistrate Mossop).

achieve an outcome some other way. This included matters that 'don't come within any of the attributes for discrimination' and matters that concerned specific rights that are not protected under other Acts, such as 'specific protections for people who are in detention'. Supreme Court litigation was not undertaken lightly. Lawyers were more inclined to litigate if 'there's a number of vulnerable people who are impacted' or 'a number of people who have a similar complaint', particularly where the issue arises from a policy or practice that is generally applied.

Having said this, there was a sense from participants that litigation, or at least the threat of it, could 'force' change when all other options had failed. One participant said that, upon the threat of litigation, 'you suddenly see them jump up and down and they go and brief their barristers … we get offered compensation and matters settle'. Another observed: '[T]he government will settle before it embarrasses itself'. It was also suggested that the threat of litigation can act as 'an incentive for people to actively participate' in early resolution or conciliation processes. Furthermore, successful litigation 'makes the legal profession listen. And the judges.' Litigation also has an impact on decision-makers who think, 'I could be in trouble. I better start thinking about this human rights thing.'

B Barriers to Effective Protection of Rights in the ACT

1 Lack of Awareness about the ACT HRA

Participants felt that the main barrier to the effectiveness of the *ACT HRA* was the general lack of awareness about it. They said that even 20 years later, community members, public authorities and lawyers lacked knowledge of the Act's existence and its potential to bring about positive outcomes for individuals.

Participants said that the ACT community was under informed about the *ACT HRA*. They said the community 'doesn't know that they can raise their human rights when dealing with those [government] agencies' and that only those who have 'connected with a lawyer in some way' are aware of their rights. Participants across the board agreed that 'more can be done to educate the public about human rights'. One participant concluded that '[t]here needs to be a lot more engagement with the community sector, with agencies, with non-profit organisations, to explain what the Human Rights Act is, to explain how it can help individuals in particular circumstances'.

Participants also suggested that members of the public service were not sufficiently informed about their human rights obligations. One public servant observed that, whilst most of their colleagues were aware of their obligations under the Act, they are 'so busy making day-to-day decisions' that they do not always remember to apply it. Furthermore, participants said that knowledge of human rights was 'non-existent' amongst 'those who are contracted private entities carrying out government roles' such as community housing providers and care and protection providers, even though 'they still have those human rights obligations'. One participant said:

> If you've got frontline teachers and medical professionals and care and protection workers and corrections officers and housing officers who don't know that the

> Human Rights Act exists and don't know what it means for their role, then I think there's a problem.

Participants who worked in the public service referred to a new 'e-learn' training module, 'Introduction to Human Rights' for all employees. This was considered to be a 'very important' 'beginning', but it was also suggested that human rights training should 'form part of the orientation of new staff' and that currently there 'just wasn't enough of it'.

More surprising was the reported lack of knowledge of human rights amongst lawyers and judicial officers. Participants said there was only a small number of law firms that regularly raise the *ACT HRA* or bring human rights cases before the Supreme Court, 'but not the big ones – the big ones are conflicted because they act for the public authorities'. The perception was that whilst community legal centre lawyers often raised human rights arguments, most other lawyers did not, and several participants said they were 'surprised how little this stuff is being argued when it seems obvious that it should be'. For example, child protection proceedings were considered 'ripe – that area really should be looking to the Human Rights Act a lot more than it is'. Others saw potential for human rights advocacy in corrections matters, particularly parole applications:

> I think that's a really, really important area where human rights should be regularly raised because often people are denied parole because they don't have housing or they don't have access to mental health treatment or they don't have access to other things that are within the government's control, not within their own control.

Participants raised several possible reasons for the lack of human rights awareness within the legal profession. They observed that the ACT does not have a 'Human Rights Law Centre equivalent'. They observed that in some matters, particularly child protection and parole hearings, individuals often self-represent and these individuals are not aware of their rights, so human rights arguments are not raised in proceedings.

Other participants suggested that the ACT legal profession, particularly the private bar, 'is not as educated in human rights as it could be'. They observed that 'there's no human rights education role' within the ACT HRC, so there is no one to create legal education resources or 'put out materials' for practitioners. Some participants suggested that the ACT HRC should be 'better resourced' to enable it to undertake community education functions, and to allow it to intervene in more cases. Several others identified the need for ongoing training, particularly for public authorities, and proposed that the ACT HRC be responsible for this.

2 Lack of Human Rights Jurisprudence

Lawyers noted the lack of jurisprudence on human rights in the ACT. Even after 20 years, participants said there is still 'not very much case law – we're having to work it out'. Participants said that some key issues – including whether certain government contracted private entities were 'public authorities' under the *ACT HRA* – remained unresolved. Cases are being brought in the tribunals to 'test' and 'tease out' these issues, participants said, however these cases are not always published so 'the precedent value isn't there'. There was agreement amongst

participants that 'we are still in the really, really early stages of this jurisdiction and the jurisprudence around it' and that courts are still trying to work out, 'well, how does this actually work in practice?' Several participants said that the *ACT HRA* was still 'something novel' for judicial officers, and that lawyers often needed to 'get the magistrate and judge up to speed and explain the newer arena and the rules that apply'. In one focus group, lawyers observed the difficulties in relying on international authorities in the absence of a body of Australian case law, saying 'you can't just pick up a European authority or Canadian authority or New Zealand authority and drop them into Australia'.

There was, however, a general sense of optimism for the future, provided lawyers continued to raise human rights arguments in their advocacy: '[O]ver time, it does have an impact, but it does depend very much on people using it in order to make that, to bring that to life'. Corrections provided an important example of an area in which a 'good body of case law' has developed in recent years (concerning conditions of confinement), however, participants agreed that there is 'still work to be done' to ensure judicial officers consider human rights in all relevant cases. Participants acknowledged that compared to the Victorian and Queensland tribunals, references to the *ACT HRA* in ACAT were 'way behind'.

3 Practical and Procedural Barriers in Human Rights Cases

Some participants said that the *ACT HRA* itself was not 'user-friendly' and this discouraged people from bringing human rights complaints. They said: '[I]t's anything but easy to front up, commence a human rights action under this [Act] and know what remedy you're going to seek and what remedy you actually can get'. Without a lawyer, making a human rights argument before a court or tribunal was considered to be extremely difficult.

Furthermore, participants noted the myriad procedural barriers both clients and lawyers face. They said that bringing a cause of action before the Supreme Court 'is no small feat'. Court rules were observed to be complex and inflexible, effectively making it impossible for self-represented litigants to manage their own case, in addition to the 'structural impediments in court processes that don't support people with disability, for example, to access and participate in proceedings as effectively'.

Litigation is also expensive. As one participant said: '[C]ourt is not just generally not accessible, or a really scary place. It involves a lot of costs. It means that we're often relying on pro bono support to run those sorts of matters.' Participants said that most human rights litigation is either 'speculative or pro bono', placing heavy reliance on community legal centres to run human rights cases. Yet, the same barriers were faced by community legal centres: participants noted that they have 'really limited resources' and therefore 'need to be really mindful of prospects of success' before bringing a case. One of the lawyers said that people are forced to rely on the community legal sector for advice about human rights because 'the private sector doesn't have a great deal of interest until it can make money out of it'.

Participants suggested that conciliation processes are much more 'cost-effective', as well as providing people with 'the opportunity to be heard'. Participants were supportive of the ACT Government's plans to introduce conciliation for

human rights matters.[63] Participants in all interviews reflected on the conciliation process run by the ACT HRC in discrimination matters and generally agreed that it provided 'an opportunity to have a really frank, safe discussion with the Human Rights Commission there, helping to facilitate and come to a resolution'. Most participants felt that conciliation in human rights matters would allow lawyers to achieve 'both a really tangible individual outcome for the complainant as well as being in a position to use that to advocate for non-monetary or broader systemic change'. Having said that, some participants observed that conciliation processes 'take a long, long time' so conciliation should only 'be considered as one possible option, on a case-by-case basis'.

4 Lack of Transparency and Independence of the ACT HRC and Government Processes

A small number of participants questioned the transparency and independence of the ACT HRC and suggested that this might present a barrier to success for the new human rights conciliation process. Some participants wondered whether parties 'might be more willing to engage with a process which is externally facilitated', such as by ACAT. These participants observed that 'the Commission is not seen as being independent'. Some said the Commission was viewed as 'very pro-complainant', whilst others said the Commission was too much 'in the tent' with government. By contrast, others said the Commission's closeness with government could be beneficial because government agencies could have 'confidence in the process' and may be willing to 'engage early' and 'take advice' from it on the best pathway forward. Others suggested that a clearer line would need to be drawn between the Commission's conciliation and client support functions if conciliation for human rights claims was introduced.

Several participants raised the 'opaque' nature of government processes as an ongoing barrier to rights-compliant policies and practices. In particular, participants observed: '[T]here's protected instruments and policies that operate within government that we're not privy to and we can't get access to'. This was viewed as counter-productive because 'if [the government] are obliged to take into account human rights considerations at every level', it is important that they 'make those processes transparent [so] we can look at whether or not they have complied when they've made a decision'.

V DISCUSSION

When he tabled the government's response to the Consultative Committee's report into whether or not the ACT should introduce a Human Rights Act, Chief Minister Jon Stanhope described the proposed law as 'an exciting step'[64] but also

63 At the time of the interviews, this change was anticipated. The Human Rights (Complaints) Legislation Amendment Bill 2023 (ACT) was introduced in the Legislative Assembly after the interviews were conducted.

64 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2003, 4031.

as 'a measured step'.[65] He said the *ACT HRA* was not intended to result in a torrent of litigation; indeed the hope was that the impact of the *ACT HRA* on the courts would be gradual.[66] The goal of the *ACT HRA* was to demonstrate the ACT's 'commitment as a community to the fundamental values that are part of our culture and our democratic system of government'.[67]

In this study, we investigated how lawyers and public servants use the *ACT HRA* in their daily work, and whether the Act has been effective in protecting human rights and resolving human rights complaints. Our findings suggest that the Act is predominantly used when government is developing legislation and in the early stages of a dispute, and that over the last two decades, the culture of the public service has increasingly been influenced by human rights considerations.

In this section, we discuss three key conclusions arising from our research findings which are relevant beyond the ACT's border. They are applicable when thinking about the overall design and implementation of a human rights framework, which is currently taking place at the federal level, and relevant to improving existing human rights protections in Victoria and Queensland.

A 'Behind the Scenes' Advocacy and Dispute Resolution

Our participants emphasised that the *ACT HRA* has had the most significant impacts 'behind the scenes', particularly in the initial stages of a complaint when an administrative decision-maker is asked (informally) to reconsider a decision.

Writing at the end of her term as the ACT's inaugural Human Rights Commissioner, Dr Helen Watchirs observed that when the *ACT HRA* was first in place 'there was considerable resistance by the ACT public service that was risk averse to human rights' but over time, it has played 'a significant role in shaping policy and legislation'.[68] The participants in our study seemed to agree that the *ACT HRA* has resulted in some changes to the culture of the public service. While at first its impact was only at the most senior levels, participants said that over time, the importance of human rights considerations has permeated down, somewhat, to the mid and junior levels of the bureaucracy. They did, however, note that some implementation gaps remain, especially at the level of 'day-to-day' decision-making.

Certainly, courts have not been the forum in which human rights have had most influence. Watchirs and Gabrielle McKinnon write that there was a 'cautious flow' of litigation during the first few years of the *ACT HRA*'s operation, that did not 'appreciably' add to the courts' workload.[69] This conservative use of the *ACT HRA* justified greater boldness some years later, when the public authority provisions

65 Ibid 4032.

66 The Act did not go so far as the Consultative Committee recommended: see generally ACT Bill of Rights Consultative Committee (n 2); Watchirs and McKinnon (n 1) 139; McKinnon (n 9) 186.

67 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2003, 4031 (Jon Stanhope, Chief Minister).

68 Helen Watchirs, 'Reflections on the ACT's Human Rights Bill 20 Years On: Lessons for the National Inquiry' (2023) 268 (Winter) *Ethos* 26, 31.

69 Watchirs and McKinnon (n 1) 145.

and the cause of action to the Supreme Court were introduced. Indeed, the then Attorney-General, Simon Corbell, said the ACT Government 'looks forward' to 'growth in the number of cases' and 'depth of argument' – he hoped that the 'trickle' of cases would turn into a 'stream'.[70] Watchirs and McKinnon suggested that by 2010, no such flow existed,[71] although in 2015, Simon Costello and Renuka Thilagarantnam painted a more complex picture.[72] They reported that the *ACT HRA* was mentioned in around 6.6% of ACT published decisions in its first 10 years of operation, which compared favourably with the *Victorian Charter*, which was only raised in 1.1% of Victorian published decisions.[73] Our participants were of the view that, even now, use of the *ACT HRA* has not reached stream level. They said that litigation is still undertaken reluctantly and only when it is considered necessary to achieve change.

Watchirs and McKinnon blame the legal profession for the 'slow start' in human rights advocacy in ACT courtrooms, saying lawyers are not raising human rights arguments as often as they should.[74] They give members of the judiciary more credit, observing that 'it is often judges who identify human rights issues for the parties'.[75] Our participants blamed both, and scholars have noted that the two are intertwined – a negative experience with a judge or tribunal member can deter lawyers from attempting to raise human rights arguments in future cases.[76] Watchirs and McKinnon further observe, as did our participants, that the absence of compensation as a remedy may deter potential litigants, coupled with the risk of an adverse costs order.[77]

Regardless, case law provides some examples of situations where the threat of litigation seems to have brought about a rights compliant outcome.[78] In the case of *Jackson v Chief Executive, Department of Justice and Community Safety*, a human rights application based on undue delay seems to have resulted in an expedited parole hearing.[79] And whilst the outcome in *Andrews v Thomson*[80] was not favourable to the complainant, the *Bail Act 1992* (ACT) was subsequently amended to provide legislative guidance to police effectuating an arrest at a person's home.[81]

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70 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 6 December 2007, 4031 (Simon Corbell, Attorney-General).

71 Watchirs and McKinnon (n 1) 155.

72 Sean Costello and Renuka Thilagaratnam, 'Reinvigorating the Human Rights Dialogue' (2015) 128 *Precedent* 16, 17–20.

73 Ibid 17.

74 Watchirs and McKinnon (n 1) 147.

75 Ibid.

76 Walsh et al (n 18) 13; Debeljak, 'Rights of Prisoners' (n 17) 1379.

77 Watchirs and McKinnon (n 1) 158–9. On the issue of damages in human rights matters, see Ciara Murphy, 'Damages in the Australian Human Rights Context' (2021) 27(2) *Australian Journal of Human Rights* 311 <https://doi.org/10.1080/1323238X.2021.1997093>.

78 See Helen Watchirs and Karen Toohey, Submission No 152 to Australian Human Rights Commission, *Free and Equal: An Australian Conversation on Human Rights* (29 November 2019).

79 [2009] ACTSC 102, [13]–[14] (Higgins CJ). See also Watchirs and McKinnon (n 1) 158.

80 (2018) 340 FLR 439.

81 See *Bail Act 1992* (ACT) ss 56AA–56AB, as inserted by *Crimes Legislation Amendment Act 2019* (ACT) s 6.

It seems that having a range of dispute resolution options available is important to ensure the successful resolution of human rights complaints. Our participants emphasised that there is no 'one size fits all approach'. In 2024, the ACT HRC will assume responsibility for human rights complaints handling, and new options for resolution will be available including conciliation (as is currently the case in Queensland). The benefits of informal dispute resolution processes include accessibility, timeliness, informality, cost-effectiveness and confidentiality.[82] These advantages undoubtedly apply to human rights claims where it can be critical to have the matter resolved as quickly and cost-effectively as possible, while also maintaining relationships. Complainants are most often seeking to change a decision or, at the very least, to understand the reasons for a decision, and litigation may not be the best avenue for these kinds of disputes. Conciliation potentially allows for both the resolution of individual complaints and broader changes to policies and decision-making processes.

B Human Rights Awareness and 'Culture'

Another important finding of this research is the importance of human rights training and education in embedding a 'human rights culture'. We agree with McKinnon's conception of human rights culture as a 'pattern of assumptions, shared and taught, that human rights must be considered and respected'.[83] Our participants emphasised that if human rights is to be routinely taken account in decision-making, training must be extensive and ongoing.[84] Awareness of the legislation must be maintained across all arms of government, as well as amongst the legal profession and the broader community. Education should particularly be targeted at vulnerable members of the community who are most likely to experience an infringement of their human rights, and those who work with and support them.[85]

It is very difficult to 'measure' human rights awareness, although some reports and studies have attempted to do so.[86] In its 12-month review of the *ACT HRA*, the ACT Department of Justice and Community Safety attempted to determine

82 In the context of discrimination claims, which are comparable to human rights claims, see, eg, Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778 <https://doi.org/10.1080/10854664.2009.10854664>; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253 <https://dx.doi.org/10.2139/ssrn.3362157>.

83 Sean Mulcahy and Kate Seear, 'A Culture of Rights and Finding Its Feet: Parliamentary Human Rights Scrutiny in the Australian Capital Territory' (2023) *Journal of Legislative Studies*:1–23, 3 <https://doi.org/10.1080/13572334.2023.2185357>, citing Gabrielle McKinnon, 'Giving Meaning to a "Culture of Human Rights"' (Working Paper No 3, Australian National University, 2006) 4.

84 Watchirs and McKinnon (n 1) 167; Rice (n 14) 187; ACT Bill of Rights Consultative Committee (n 2) 37.

85 Public sector agencies are required to report annually on how they have implemented the *ACT HRA* (n 3) into their operations and so they report on the human rights education and training programs staff have completed: see, eg, 'Human Rights', *ACT Government Justice and Community Safety Directorate* (Web Page) <https://www.justice.act.gov.au/annual-report-2022-23/human-rights>.

86 Rice, Meyerson and Ogg (n 16). Their discussion on whether human rights sensibilities really can be measured: at 76–7.

whether members of the public service had adopted a 'human rights culture' by reviewing the extent to which information had been disseminated and training had been conducted.[87] In their 2014 study, Simon Rice, Denise Meyerson and Kate Ogg developed an online survey for lawyers and social service providers that was aimed at measuring the effectiveness of the *ACT HRA* and the *Victorian Charter* and the extent to which 'human rights norms' had been 'internalised'.[88] The findings were troubling: only a minority of the ACT lawyers and social service providers surveyed claimed to have good knowledge of the provisions of the *ACT HRA*, and few lawyers considered the *ACT HRA* to be particularly relevant or useful to their work.[89]

There does not appear to have been a substantial increase in the awareness of the *ACT HRA* in recent years, nor an uptake in its use in advocacy by the ACT legal community outside of the community legal sector. This suggests a need for ongoing education about human rights. The ACT HRC's functions include educating the community about human rights and the *ACT HRA*.[90] To do this, it is vital that the ACT HRC is adequately resourced,[91] and this will be even more important once it begins conciliating human rights complaints in 2024 because this can be a resource intensive function. The ACT HRC has suggested that other institutions could take some responsibility for human rights education in light of its 'very small team of staff' and the need for it to 'prioritise resources strategically'.[92] Watchirs has suggested that the bureaucracy should take responsibility for educating its own staff and that the ACT Government Solicitor should share its expertise more broadly.[93] Rice, Meyerson and Ogg report that the Human Rights Unit in the Victorian Department of Justice received more than six times the funding of ACT equivalent. They suggest that this could explain why the *Victorian Charter* has been 'more successful in achieving a human rights sensibility' than the *ACT HRA*.[94]

Prior to the passing of the *ACT HRA*, the Consultative Committee envisaged that schools would take some responsibility for educating children on human rights to build a human rights culture across the ACT.[95] The legal community also has a

87 ACT Department of Justice and Community Safety (n 15).
88 Rice, Meyerson and Ogg (n 16) 68.
89 Ibid 85–7.
90 *HRC Act* (n 45) s 27(2)(a).
91 Helen Watchirs said that over her 19 years in office, her resources were not increased despite regular requests: Watchirs (n 68) 36. See also Rice (n 14) 199–200. Rice (n 14) notes that in 2019, the human rights resources on the government's website had not been updated for many years and the 'toolkit' that was promised to public servants had not been developed: at 194.
92 Watchirs and McKinnon (n 1) 162.
93 ACT Human Rights and Discrimination Commission, Submission No 434 to Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Inquiry* (18 April 2016) 19.
94 Rice, Meyerson and Ogg (n 16) 91–2.
95 ACT Bill of Rights Consultative Committee (n 2). Although, it was the Chief Minister's expectation that the Human Rights Commissioner would work to ensure that everyone in the ACT community was aware of their human rights: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2003, 4030.

role to play in ensuring that the profession receives ongoing human rights training[96] and developing expertise within that community.[97]

C Parliamentary Scrutiny and Human Rights 'Dialogue'

The Five Year Review of the *ACT HRA* confirmed that the 'clearest effects' of the *ACT HRA* had been in the 'development of new laws by the executive'.[98] It concluded that the requirement to issue statements of compatibility for new Bills, and the 'robust dialogue' that ensued between the legislature, the Scrutiny of Bills Committee, and the Human Rights Commissioner had 'improv[ed] the quality of law-making in the Territory'.[99] Our participants did not discuss the parliamentary committee process,[100] but they did speak extensively about compatibility statements and the role of the ACT HRC in the parliamentary scrutiny process.

The ACT's parliamentary scrutiny process is distinct in that only government Bills require a compatibility statement.[101] By contrast, *all* Bills are required to be accompanied by a statement of compatibility in Victoria and Queensland.[102] This means that, in the ACT, only the government is officially required to turn its mind to the human rights implications of a Bill. This may be considered a shortcoming, particularly considering the ACT has a history of minority governments.[103] On the other hand, the fact that the ACT Attorney-General (rather than the relevant Minister) has responsibility for preparing compatibility statements may be considered a strength of the ACT process. At first glance, this could also be criticised, as the responsible Minister and their department would be most knowledgeable about the

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96 There is no requirement for the legal profession to complete training or be educated about human rights as part of their degree or training prior to being admitted to practice but it could be included as part of the profession's continuing development program.

97 'Human rights' is not listed as an area of practice when searching for a barrister in the ACT; 'Civil and human rights' is only listed as a search term as a subset of 'Public/Administrative Law'. At the time of writing, 33 barristers list themselves as practicing in the area, only 5 of which are based outside the ACT: see 'Find a Barrister', *ACT Bar Association* (Web Page) <https://www.actbar.com.au/barristers/find-a-barrister/>.

98 Australian National University, *The Human Rights Act 2004 (ACT): First Five Years of Operation* (Report, May 2009) 27.

99 Ibid 6. See also Watchirs and McKinnon (n 1) 144–5.

100 We note, however, the work of Sean Mulcahy and Kate Seear in this space. They remain unenthusiastic about the potential of parliamentary committees to foster a rights-based culture, reminding us that the committee inquiry process tends to focus on the evidence of 'experts' and is not particularly inclusive of broader community members. They conclude, based on interviews with staff involved in parliamentary scrutiny processes, that the level of human rights engagement in committee inquiries is 'limited': Sean Mulcahy and Kate Seear, 'On Tables, Doors and Listening Spaces: Parliamentary Human Rights Scrutiny Processes and Engagement of Others' (2022) 28(2–3) *Australian Journal of Human Rights* 286, 287, 297 <https://doi.org/10.1080/1323238X.2022.2135677>.

101 *ACT HRA* (n 3) s 37(1).

102 *Victorian Charter* (n 7) s 28; *Qld HRA* (n 5) s 38.

103 Although ACT Labor has been in power since 2001, it has not held a majority of seats since 2008 and has only been able to form government with the agreement of the Greens. Under ACT Labor's agreement with the Greens, a member of the Greens will be appointed as a Minister and be privy to Cabinet discussions: Australian Capital Territory Labor Party and Australian Capital Territory Greens, *Parliamentary Agreement for the 9th Legislative Assembly for the Australian Capital Territory* (11 February 2013) app 1 <http://www.cmd.act.gov.au/__data/assets/pdf_file/0005/1013792/Parliamentary-Agreement-for-the-9th-Legislative-Assembly.pdf>.

Bill in question. Yet, by requiring Ministers to obtain a statement of compatibility from the Attorney-General's Department, an additional layer of scrutiny is created. The Bill's human rights compatibility is tested internally and refined before the Attorney-General's 'sign off' can be obtained. Our participants confirmed that this process often results in changes to Bills to improve their human rights compliance.

The ACT HRC also plays an important role in this process of refinement. The functions of statutory human rights agencies are often overlooked in analyses of human rights frameworks. The human rights commissions in the ACT, Victoria and Queensland, as well as the Australian Human Rights Commission, perform myriad functions: some can conciliate human rights complaints;[104] they can all intervene in litigation relating to human rights;[105] they can all provide expert advice to the government about human rights;[106] and they are all responsible for educating the community about human rights.[107]

Human rights commissions are expected to be independent advocates for human rights.[108] However, the ACT HRC assumes special significance in the ACT human rights 'dialogue'. Several participants in our study discussed the Commission's access to draft cabinet submissions and its ability to comment on proposals as they are being developed.[109] The ACT HRC has a unique level of access to members of the executive. The trust and confidence that government places in the ACT HRC has meant it can influence policy early and in a positive way. Providing an insider perspective, Watchirs and McKinnon[110] maintain this arrangement has allowed the ACT to avoid 'the worst excesses' of laws that would otherwise have resulted in human rights breaches.[111] Watchirs opines that the relationship between government and the Commission has 'increased the public service dialogue and enhanced the understanding of human rights compatibility'.[112]

Of course, such a close relationship can also attract criticism, and, in our study, several lawyers (for both complainants and respondents) questioned the Commission's independence. On one hand, it is privy to sensitive cabinet information and invited to comment on it, but on the other hand, it can hold government agencies to account through early intervention and litigation. This,

104 *Qld HRA* (n 5) pt 4 div 2. The ACT HRC will be able to do so from 2024. The Australian Human Rights Commission can also conciliate some human rights complaints: *Australian Human Rights Commission Act 1986* (Cth) s 11(f)(ii) ('*AHRC Act*'). The Victorian Ombudsman can inquire into whether a public authority complied with the *Victorian Charter* (n 7) when performing administrative action: *Ombudsman Act 1973* (Vic) s 13(2). The Victorian Equal Opportunity and Human Rights Commission has no complaints-related functions.

105 *AHRC Act* (n 104) s 11(o); *Victorian Charter* (n 7) s 40; *Qld HRA* (n 5) s 51; *ACT HRA* (n 3) s 36.

106 *AHRC Act* (n 104) ss 11(e), (j); *Victorian Charter* (n 7) ss 41(b), (f); *Qld HRA* (n 5) ss 61(b), (g), (h); *HRC Act* (n 45) s 6(2)(c).

107 *AHRC Act* (n 104) s 11(h); *Victorian Charter* (n 7) s 41(d); *Qld HRA* (n 5) s 61(e)–(f); *HRC Act* (n 45) ss 6(2)(a), 27.

108 This is explicitly stated in the ACT HRC's establishing legislation: *HRC Act* (n 45) s 16.

109 Helen Watchirs said in 2022 that the ACT HRC had made submissions in relation to 28 cabinet submissions: Watchirs (n 68) 28.

110 Helen Watchirs was the inaugural ACT Human Rights Commissioner and served from 2004 until July 2023. Gabrielle McKinnon was then a legal adviser at the ACT HRC.

111 They cite the 'outlaw motorcycle gangs' legislation as an example: Watchirs and McKinnon (n 1) 143.

112 Watchirs (n 68) 33.

they said, creates a tension which could become more acute when the Commission assumes its additional complaints handling and conciliation functions. The Commission should be able to navigate this tension of being both an advocate for the *ACT HRA* and a dispute resolution provider, having already done so in a discrimination context.[113] What will be most important is that complainants and respondents alike perceive it to be neutral when it provides dispute resolution services.

VI CONCLUSION

Human rights apply to everyone, and the intention of human rights legislation is to protect the rights of the entire community. When introducing the Human Rights Bill into the ACT Legislative Assembly, Chief Minister Jon Stanhope said:

> The mark of our progress and our humanity is the extent to which we respect and protect fundamental human rights. This is not simply the concern of the few or the vulnerable. Human rights belong to everyone, and we are all diminished by breaches of human rights.[114]

The findings of this study support the assertion that as a society, we cannot become complacent about human rights once they are enshrined in legislation. There is an obligation on the government to maintain awareness of the Act and how it operates, long after its passage through the Parliament. Training public servants and parliamentarians is an important aspect but equally important is making sure that the community understands that human rights are protected and that they can enforce their rights if they are breached.

Human rights laws need to be accessible, particularly by vulnerable members of the community. In that sense, conciliation of human rights complaints in the ACT is to be welcomed. Conciliation will offer a non-adversarial, accessible process where complaints can be resolved early before they escalate, and it will be provided by an agency with an acute understanding of what human rights compliance requires.

Yet, accessibility is also about the law itself. Our participants insisted that, without a lawyer, bringing a human rights complaint was impossible because of the complexity of the laws and legal processes involved. Even lawyers described human rights law as complex. The body of jurisprudence is relatively small, and it appears that the number of lawyers who have developed expertise in using the legislation in the ACT is also relatively small.

It is hoped that over the next decade, human rights law, and its practice, will continue to mature. This may be reflected in a more steady 'stream' of cases, but it could also manifest in legislation, policies and processes that are more respectful of human rights, and in day-to-day decisions that routinely take human rights into account. None of these will be possible, however, unless members of the public are informed about their rights and empowered to enforce them.

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113 See generally *HRC Act* (n 45) ss 14, 23, 42.

114 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 18 November 2003, 4246.